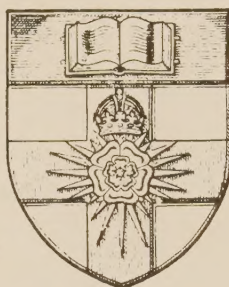


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CORRIGENDA

- [1948] 2
- P. 59. *SQUIRE v. SQUIRE*. Line D.6: for "(though not even able to sleep by day)" read "(though not infrequently able to sleep by day)."
- P. 933. *Re SHEPHERD*. Counsel: for "*J. A Wolfe*," read "*Jackson Wolfe*."
- P. 1108. *WILLIAM HILL (PARK LANE), LTD. v. ROSE*. Counsel: for "*Salmon, K.C., and Gallop, K.C.*" read "*Gallop, K.C., and S. W. Magnus*."
- [1949] 1
- P. 37. *CARDIFF RATING AUTHORITY v. GUEST KEEN BALDWIN'S IRON & STEEL CO., LTD.* Solicitors: for "*Church, Rendell & Co.*" read "*Simmonds, Church Rackham & Co.*"
- P. 456. *LINDOP v. QUAIFF*. Line C.3: for "rateable value" read "rent." P. 457, line 7: for "rateable value" read "rent."
- P. 596. *HOGAN v. BENTINCK WEST HARTLEY COLLIERIES, LTD.* Line E: for "*LORD MACDERMOTT*" read "*LORD NORMAND*."
- P. 801. *MCCARTHY v. DAILY MIRROR NEWSPAPERS, LTD.* Counsel: for "*Edgar Bradley*" read "*J. G. K. Sheldon*," and for "*J. G. K. Sheldon*" read "*Edgar Bradley*."
- P. 1046. *Re BIRKIN (deceased)*. Counsel: for "*Duffy*" read "*Duthie*."

THE
ALL ENGLAND
LAW REPORTS
INCORPORATING THE
LAW TIMES REPORTS

C MONARCH STEAMSHIP COMPANY, LTD. *v.*
A/B KARLSHAMNS OLJEFABRIKER AND OTHERS.

[HOUSE OF LORDS (Lord Porter, Lord Wright, Lord Uthwatt, Lord du Parc and Lord Morton of Henryton), May 31, June 1, 2, 3, 4, 7, 8, December 9, 1948.]

D *Charterparty—Bill of lading—Delay on voyage due to unseaworthiness—Outbreak of war—Diversion of ship by Admiralty—Transshipment of cargo to neutral ships for completion of voyage—Damages—Cost of transshipment.*

E On Apr. 4, 1939, the M. company chartered a steamship, belonging to the S. company, a British company, which sailed to Rashin in fulfilment of the charter and there loaded a cargo of soya beans, purchased from the M. company by the K. company of Sweden. On May 6, 1939, sixteen bills of lading were issued and on May 12 the ship sailed from Rashin. Under the terms of the charterparty the S. company contracted to supply a seaworthy ship; but, owing to bad bunker coal having been used in her and to other causes, the ship was unseaworthy on sailing from Rashin and considerable delay was caused owing to deviations from route for repairs. **F** On June 7, in conformity with the charterparty and bills of lading, the M. company nominated Karlshamn as the port of discharge, but the S. company was not told until the middle of August that delivery was intended to be made to the K. company. On the outbreak of war on Sept. 3, 1939, the voyage, which would have taken only 63 days but for the ship's unseaworthiness, was still not completed, and the ship was ordered by the Admiralty to proceed to Glasgow which she reached on Oct. 21. On her arrival the M. company paid the freight and took delivery of the cargo, and on Oct. 23 transferred the bills of lading to the K. company, who had chartered three neutral ships to carry on the cargo to Karlshamn. **G** The cost of transshipment was £21,634 7s. 4d. which the K. company now claimed from the S. company as damages for breach of contract. It was found as a fact that the S. company was unaware of the unseaworthiness of the ship. The charterparty contained a war risks clause, relied on by the S. company, under which the ship was to have liberty to comply with orders of (*inter alia*) the British government and delivery under such orders was to be fulfilment of the contract. **H**

HELD : (i) the diversion to Glasgow, brought about through the delay in carrying out the contract of carriage, was attributable to the default of the S. company, because in the conditions existing in April, 1939, it

ought to have foreseen that war might shortly break out and that any prolongation of the voyage might cause the loss of or diversion of the ship.

The Malcolm Baxter, Jr., (1928) (31 Ll. L.Rep. 200), *distinguished*.

The Wilhelm (1865) (14 L.T. 636) and *Associated Portland Cement Manufacturers* (1900), *Ltd. v. Houlder Bros. & Co., Ltd.* (1917) (118 L.T. 94), *explained*.

(ii) the cost of transhipment was due to the S. company's failure to carry out its bargain and was damage arising as a direct and natural consequence of the breach of contract, for which the S. company was liable.

[AS TO REMOTENESS OF DAMAGE, see HALSBURY, Hailsham Edn., Vol. 10, pp. 103-109, paras. 130-136; and FOR CASES, see DIGEST, Vol. 17, pp. 93-99, Nos. 108-141.]

Cases referred to :

- (1) *The Europa*, [1908] P. 84; 77 L.J.P. 26; 98 L.T. 246; 41 Digest 480, 3129.
- (2) *Kish v. Taylor*, [1912] A.C. 604; 81 L.J.K.B. 1027; 106 L.T. 900; 41 Digest 485, 3170.
- (3) *The Malcolm Baxter, Jr.*, (1928), 31 Ll. L.Rep. 200.
- (4) *Smith, Hogg & Co., Ltd. v. Black Sea and Baltic General Insurance Co., Ltd.*, [1940] 3 All E.R. 405; [1940] A.C. 997; 109 L.J.K.B. 848; 163 L.T. 261; 2nd Digest Supp.
- (5) *The Wilhelm*, (1865), 14 L.T. 636; 41 Digest 490, 3196.
- (6) *Associated Portland Cement Manufacturers* (1900), *Ltd. v. Houlder Brothers & Co., Ltd.*, (1917), 86 L.J.K.B. 1495; 118 L.T. 94; 22 Com. Cas. 279; 41 Digest 443, 2780.
- (7) *Hadley v. Baxendale*, (1854), 9 Exch. 341; 23 L.J.Ex. 179; 23 L.T.O.S. 69; 8 Digest 138, 910.
- (8) *Horne v. Midland Ry. Co.*, (1873), L.R. 8 C.P. 131; 42 L.J.C.P. 59; 28 L.T. 312; 8 Digest 140, 918.
- (9) *British Columbia, etc., Saw Mill Co. v. Nettleship*, (1868), L.R. 3 C.P. 499; 37 L.J.C.P. 235; 18 L.T. 604; 8 Digest 138, 905.
- (10) *Connal, Cotton & Co. v. Fisher, Renwick & Co.*, (1883), 10 R. (Ct. of Sess.) 824; 19 Sc. L.R. 698; 41 Digest 451, 2827 i.
- (11) *Banco de Portugal v. Waterlow & Sons, Ltd., Waterlow & Sons, Ltd. v. Banco de Portugal*, [1932] A.C. 452; 101 L.J.K.B. 417; 147 L.T. 101; Digest Supp.
- (12) *Livingstone v. Rawyards Coal Co.*, (1880), 5 App. Cas. 25; 42 L.T. 334; 44 J.P. 392; 17 Digest 83, 29.
- (13) *British Westinghouse Electric & Manufacturing Co., Ltd. v. Underground Electric Rys. Co. of London, Ltd.*, [1912] A.C. 673; 81 L.J.K.B. 1132; 107 L.T. 325; 17 Digest 126, 343.
- (14) *Admiralty Comrs. v. Susquehanna (Owners), The Susquehanna*, [1925] P. 196; *affmd.*, [1926] A.C. 655; 95 L.J.P. 128; 135 L.T. 456; 41 Digest 802, 6624.
- (15) *Liesbosch, Dredger v. Edison S.S.*, [1933] A.C. 449; 102 L.J.P. 73; *sub nom. The Edison*, 149 L.T. 49; Digest Supp.
- (16) *Muhammad Issa el Sheikh Ahmad v. Ali*, [1947] A.C. 414; 2nd Digest Supp.
- (17) *Standard Oil Co. of New York v. Clan Line Steamers, Ltd.*, [1924] A.C. 100; 93 L.J.P.C. 49; 130 L.T. 481; 41 Digest 920, 8103.
- (18) *Leyland Shipping Co. v. Norwich Union Fire Insurance Society*, [1918] A.C. 350; 87 L.J.K.B. 395; 118 L.T. 120; 29 Digest 229, 1858.
- (19) *Paterson Steamships, Ltd. v. Canadian Co-operative Wheat Producers, Ltd.*, [1934] A.C. 538; 103 L.J.P.C. 166; 151 L.T. 549; Digest Supp.

- (20) *Dunn v. Bucknall Brothers, Dunn v. Currie (Donald) & Co.*, [1902] 2 K.B. 614; 71 L.J.K.B. 963; 87 L.T. 497; 41 Digest 410, 2552.
- (21) *Bank Line, Ltd. v. Capel (Arthur) & Co.*, [1919] A.C. 435; 88 L.J.K.B. 211; 120 L.T. 129; 41 Digest 366, 2136.
- (22) *Maritime National Fish, Ltd. v. Ocean Trawlers, Ltd.*, [1935] A.C. 524; 104 L.J.P.C. 88; 153 L.T. 425; Digest Supp.
- (23) *Gee v. Lancashire & Yorkshire Ry. Co.*, (1860), 6 H. & N. 211; 30 L.J.Ex. 11; 3 L.T. 328; 17 Digest 96, 118.
- (24) *Cory v. Thames Ironworks Co.*, (1868), L.R. 3 Q.B. 181; 37 L.J.Q.B. 68; 17 L.T. 495; 17 Digest 96, 115.

APPEAL by shipowners from an interlocutor of the First Division of the Court of Session, pronounced on Dec. 6, 1946, affirming two interlocutors of the Lord Ordinary, dated respectively May 6 and 14, 1946, whereby he decerned against the shipowners for payment of £21,634 7s. 4d. for breach of contract contained in certain bills of lading issued by the shipowners of which the respondent company was indorsee. The House of Lords dismissed the appeal. The facts are set out in the opinions of LORD PORTER and LORD WRIGHT.

Sir William McNair, K.C., and *E. W. Roskill* for the appellant shipowning company.

L. Hill Watson, K.C., and *George S. Reid* (both of the Scottish Bar) for the respondent company.

The House took time for consideration.

Dec. 9. The following opinions were read.

LORD PORTER: My Lords, this is an appeal from an interlocutor pronounced by the First Division of the Court of Session on Dec. 6, 1946, affirming two interlocutors of the Lord Ordinary dated respectively May 6 and 14, 1946, whereby he decerned against the appellant for payment of £21,634 7s. 4d. for breach of a contract contained in 16 bills of lading issued by the appellant of which the respondent was indorsee and for expenses.

The pursuer is a Swedish manufacturing firm which, on Apr. 21, 1939, purchased through their London agents a cargo of Manchurian soya beans from the Japanese firm, Mitsui and Co. The amount purchased was 8,200 tons at the price of £8 6s. 3d. a ton or something over £68,000 in all, and the goods were to be shipped on board the appellant's vessel, the *British Monarch*. Presumably in anticipation of this contract Mitsui and Co., on Apr. 4, had chartered that vessel which sailed to Rashin in fulfilment of the charter, there loaded the beans, and issued 16 bills of lading on May 6. After loading her cargo she sailed from that port on May 12. Before proceeding to Rashin the vessel had been on time charter to Yamashita Kisen Kaisha of Kobe under a charterparty dated Oct. 11, 1938. By the terms of this document the charterers had to supply the bunker coal required and that which they furnished appears to have been of bad quality and to have affected the tubes of the vessel's boilers. Moreover, the coal supplied for the voyage from Rashin was itself of poor quality, though it may be that nothing better was procurable. However this may be, undoubtedly the combination of these two factors caused great delay in the homeward voyage. Furthermore, though the appellant did not know it, the evaporator and main condenser were out of order.

Under the terms of the charterparty the appellant was under contract to supply a seaworthy ship and this by reason of the defects stated above it failed to do. According to the finding of the Lord Ordinary she was unseaworthy on sailing from Rashin and the appellant has accepted this finding and argued its case on that footing. It was suggested to your Lordships that not only was the vessel unseaworthy on sailing, but that the owners knew of that unseaworthiness. I doubt whether this contention was open to the pursuer on the pleadings, and there is no sign of its consideration in the opinion of the Lord Ordinary

or the Inner House, but, even if it were open, I do not think it has been established. It is true that the appellant knew that there had been trouble with the boiler tubes and that its time charterers had been using bad coal, but it had been informed that the vessel had been surveyed and nothing found wrong, and it always hoped that a fresh supply of coal would prove efficient, or, anyhow, efficient enough. Moreover, actual knowledge of unseaworthiness must be shown, and mere imprudence or carelessness is not knowledge. The owners must, therefore, be absolved from the guilt of sending their ship to sea in an unseaworthy state with knowledge of that unseaworthiness. Nevertheless, the defects were there and entailed a considerable prolongation of the voyage. Her speed was slow and boiler trouble occurred more than once, so that for the ship's safety she had to be diverted to Colombo and repaired there, with the result that she did not reach Port Said until Aug. 31 and then spent twenty-three days at that port effecting further repairs. She ought, as the appellant admits, to have completed the voyage to Karlshamn in about 60 days, which would have brought her to her destination before the end of July, whereas she was still at Aden when war broke out on Sept. 3.

Under the charterparty and bills of lading, Messrs. Mitsui had a range of ports in the North Sea and Baltic to which they were entitled to direct the vessel and on June 7 they nominated Karlshamn as the port of discharge. The owners, however, did not know at that time for whom the cargo was intended. Their contract was still with Mitsui and with them alone, and it so remained until Oct. 23. They were not even informed that Mitsui intended to deliver to the pursuers until the middle of August. As a result of the outbreak of war the British Monarch was, by Admiralty orders, diverted to Glasgow. On this last lap of the voyage her speed was not unreasonably slow and she reached Glasgow on Oct. 21. On her arrival, Mitsui paid the freight and took delivery of the cargo. Two days later they transferred the bills of lading to the respondent, who meantime had chartered three ships to carry on the beans to Karlshamn, where the respondent intended to use them directly or indirectly for the purposes of its factory. It had expected the beans to arrive at Karlshamn before the end of July, and, being short of supplies owing to their late arrival, had for lack of them to borrow some soya beans from the Swedish government under promise to replace them on the arrival of the vessel and needed the rest to keep its factory at work. The cost of transhipment was £21,634 7s. 4d., the sum sued for in the action, and, whatever the rights of the parties may be, it is not contended that this sum was an unreasonable amount to pay for the carriage on to Sweden at that time and in war conditions. This sum the pursuer says it was entitled to recover as damages for the appellant's breach of contract.

The argument runs as follows. The undertaking was to carry the beans to one of a range of ports at the option of Mitsui or of those to whom they transferred the bills of lading; the option was exercised in favour of Karlshamn; the appellant failed to carry out its obligation, and, accordingly, the respondent had the right to fulfil the contract itself, and to charge the appellant with the cost of doing so; the appellant should have delivered the beans at Karlshamn within a reasonable time; it failed to do so because of its breach of contract to provide a seaworthy ship; and the additional expense of carrying out the contract must, therefore, fall on it. If it had not taken so unduly long a time, the British Monarch would have arrived at Karlshamn long before the outbreak of war and the hire of the three additional ships would have been unnecessary. In opposition to this argument the appellant maintains that the respondent is not entitled to recover this or any sum. It relies, in the first place, on the provisions of the charterparty and bills of lading which incorporate its terms, and, in particular, on the war clause attached to it, which is in the following terms :

" War Risks Clause. (1) No bills of lading to be signed for any blockaded

port and if the port of discharge be declared blockaded after bills of lading have been signed, or if the port to which the ship has been ordered to discharge either on signing bills of lading or thereafter be one to which the ship is or shall be prohibited from going by the government of the nation under whose flag the ship sails or by any other government, the owner shall discharge the cargo at any other port covered by this charterparty as ordered by the charterers (provided such other port is not a blockaded or prohibited port as above mentioned) and shall be entitled to freight as if the ship had discharged at the port or ports of discharge to which she was originally ordered. (2) The ship shall have liberty to comply with any orders or directions as to departure, arrival, routes, ports of call, stoppages, destination, delivery or otherwise howsoever given by the government of the nation under whose flag the vessel sails or any department thereof, or any person acting or purporting to act with the authority of such government or of any department thereof, or by any committee or person having, under the terms of the war risks insurance on the ship, the right to give such orders or directions and if by reason of and in compliance with any such orders or directions anything is done or is not done, the same shall not be deemed a deviation, and delivery in accordance with such orders or directions shall be a fulfilment of the contract voyage and the freight shall be payable accordingly."

Indeed, without the war clause the owners contend that they fulfilled their obligations since after the outbreak of war the ship was under a duty to obey the orders of the British Admiralty and it became illegal for the owners to proceed to or to discharge at any port other than Glasgow. They accept the finding that the vessel was unseaworthy and deviated to Colombo, but say that the reason for the deviation was the initial unseaworthiness and that deviation to remedy unseaworthiness is not unjustifiable unless the state of the vessel was known to her owners before she sailed. Such knowledge, they contend, has not been established, and the mere existence of unseaworthiness does not prevent a shipowner from relying on the terms of the charterparty or bill of lading unless physical loss is caused by the unseaworthiness itself. It is claimed that in the present case loss was not so occasioned, and, consequently, the terms and exceptions contained in the documents remained in force until the termination of the voyage at Glasgow which, in the events which happened and in accordance with the terms of the war clause, became her contractual port of discharge, and, indeed, the only port to which she could legally go. For this proposition reliance is placed on *The Europa* (1) and *Kish v. Taylor* (2)

Undoubtedly, deviation necessarily made to remedy unseaworthiness does not amount to unjustifiable deviation or destroy the right to rely on the terms of the contract of carriage unless it is established that the owners knew of the vessel's state on sailing. As indicated above, no such knowledge has been brought home to the appellant, and, therefore, it continues to be entitled to rely on the war clause. Nevertheless, it has to be considered whether the delay due to initial unseaworthiness was not the factor which brought that clause into operation and so caused the diversion of the ship to Glasgow and her failure to reach Karlshamn. On behalf of the appellant it is said that the unseaworthiness was not the cause of the change of destination. The immediate cause was the order of the British Admiralty. After repairs had been effected at Port Said there was nothing in the physical condition of the ship to prevent her from proceeding to or reaching Karlshamn. Admiralty orders, on this argument, were an independent executive act applying to all ships whether seaworthy or not, and this vessel was never under an absolute obligation to go to Karlshamn. She need only go there provided the British government permitted. As they did not, she must obey and go to Glasgow.

It cannot, of course, be denied that those orders were binding on her, but that concession does not end the matter. It has still to be determined whether the effective cause which necessitated those orders and made obedience compulsory was not the delay in the voyage which was brought about by her unseaworthiness on sailing from Rashin. The appellant says that this was only an indirect cause, and, therefore, historically true but causally irrelevant, and in support of this part of its argument relies on the principles enunciated in the American case, *The Malcolm Baxter* (3). The unseaworthiness, they say, had come to an end, or, at any rate, was not, after Port Said, an active element in preventing the ship reaching Karlshamn. The case was not like *Smith, Hogg & Co., Ltd. v. Black Sea and Baltic General Insurance Co., Ltd.* (4), where there were two concurrent physical causes of the loss. Here the unseaworthiness had ceased to operate and the sole reason preventing the continuance of the voyage to Sweden was the control of the British government. Speaking for myself, I am unable to distinguish the principles adopted in the American case from those which must be applied in this, save, on one matter, *viz.*, whether before the ship sailed her diversion by government orders could reasonably have been foreseen. If the American case is applicable and rightly decided the appellant should, I think, succeed. It is, therefore, necessary to analyse that decision and consider whether it is right and whether it correctly represents the law of England.

The facts are, indeed, very much like those existing in the present case. The *Malcolm Baxter*, which was a sailing vessel, was unseaworthy on sailing but not unseaworthy to the knowledge of her owners. The result of her unseaworthiness was, however, that she had to deviate in order to effect repairs at Havana and while those repairs were being effected the United States government levied an embargo which prevented any sailing vessel from clearing for a voyage to Bordeaux, which was her port of destination, or for any port within the war zone. The vessel thereupon sailed for New York and delivered her cargo there, relying on the exception of the "restraint of princes, rulers, and people" contained in the bills of lading and also on the illegality of proceeding on her original voyage. It was argued in that, as in this, case that the unseaworthiness was known to the owners, or, at any rate, that they were negligent in failing to discover it before she sailed. Knowledge by the owners was negatived by the court, and negligence without knowledge was held, as it would be held in this country, not to be material as an element in depriving the owners of the protection of the terms of the bills of lading. As to the delay caused by the embargo, it was held that the bills of lading holders could not recover because the change of destination was within the exceptions of the bills of lading and because, exception or no exception, while the embargo continued it would have been illegal to proceed with the voyage. It was urged, however, that it was the delay caused by her unseaworthiness which brought the vessel within the excepted peril. This argument was rejected on the ground that the delay was the occasion and not the cause of the operation of the embargo. It was, so the court held, no more its cause than delay which caused goods to be brought within the path of a flood would be the cause of their destruction. To one other circumstance existing in that case attention must be called, *viz.*, the statement in the judgment of *STONE, J.*, where he says (31 Ll. L.R. 202):

"There is no finding, nor is it suggested, that at the time when the contract of affreightment was entered into, or when the vessel broke ground, the embargo could reasonably have been foreseen, or that there were any special circumstances charging petitioners with the knowledge or expectation that the unseaworthiness or consequent delay would bring the vessel within its operation."

My Lords, in my view, the overriding fact which led to the decision in that case is to be found in the words just quoted. Whether the same result would

have been arrived at if there had been reason for the owners to apprehend a state of affairs in which delay would bring the war clause into operation is left undetermined.

It was on this differentiation of fact that the Lord President founded his decision in the present case. In his view, the appellant should reasonably have foreseen the likelihood of the imposition of an embargo. In forming this opinion he relied on the insertion of the war clause in the charterparty coupled with the evidence of Mr. George Sheriff, assistant manager to the appellant's chartering agents, who stated that, at the date of the charter, the international situation was considerably overclouded and the possibility of war was in the minds of his company. My Lords, both these facts are true, but it still has to be determined whether they are enough to establish that at that time the embargo could reasonably have been foreseen. It is true that when the bills of lading were issued Czechoslovakia had been seized and an undertaking given to protect Poland, but no treaty had yet been made between Germany and Russia. These circumstances have to be balanced one against the other and I am not sure that, without the advantage of your Lordships' opinions, I should have come to the conclusion that a shipowner ought to have foreseen that within the course of the contemplated voyage, even if protracted, a war would be likely to occur, or, if it did, that the carriage of goods to the stipulated range of ports, and, in particular, to Karlshamn, would be prohibited. But your Lordships think that such an event should have been anticipated and I am not prepared to differ.

On this finding, while, in my opinion, *The Malcolm Baxter* (3) was rightly decided according to the law of this country, it can be distinguished and its principles do not govern the case which your Lordships are considering. In reaching this conclusion I take into account the distinction drawn by the Lord President between such a case and that of a vessel struck by lightning or running into a typhoon which she would have avoided had she sailed with reasonable despatch. Either may happen as much at one place or time as another whereas delay at a time when war is likely to occur gives more opportunity for its incidence than a speedy and proper despatch would give. Where, however, the basis of liability is delay, it is, as I think, the reasonable anticipation which matters, and but for the finding that the appellant ought to have foreseen the likelihood of war breaking out I should have thought your Lordships' decision would rightly have been given in favour of the appellant.

It was contended, indeed, on behalf of the respondent that the delay was the result of the appellant's breach of contract in providing an unseaworthy ship, and that for the consequences of that breach of contract it is liable whether it could have anticipated them or not, and in support of this argument *The Wilhelm* (5) was cited. In that case a ship was chartered to proceed to Archangel and there load a part cargo of tar. After she was loaded and ought to have had her provisions on board she had an opportunity of sailing, but, owing to the negligence of the master in not having provisions on board, she missed that opportunity and then was frozen in. In these circumstances DR. LUSHINGTON, sitting in the Court of Admiralty, held the shipowners liable for their breach of contract in failing to convey the cargo to its port of delivery with all expedition and to make good to the owners of the cargo the damage which accrued. If this decision is to be given its fullest significance, the respondent's contention would be established, but I think it must be qualified to some extent and is only justified on the ground that the shipowner ought reasonably to have contemplated that at the relevant time, *viz.*, Oct. 8, the vessel was in danger of being frozen in unless she sailed promptly. On the other hand, in *Associated Portland Cement Manufacturers* (1900), *Ltd. v. Houlder Brothers* (6), where a ship was to be at Northfleet on May 25, but was still on

a voyage from Hull on May 26 and on that date was torpedoed, ATKIN, J., held the charterers entitled to recover any expenses resulting from her non-arrival on May 25 and 26, but that thereafter the loss of the ship rendered performance of the contract impossible and the shipowners liable for no further loss. These two cases can, I think, only be made consistent on the ground that in the first the shipowners ought reasonably to have foreseen the likelihood of the ship being frozen in if she delayed, whereas in the second there was no more reason to anticipate her loss by torpedo at one moment rather than at another, and the same principle seems to me to lie at the back of that class of decision which says that delay does not expose goods to any greater risk of being carried away by a flood or struck by lightning than if they had been carried with despatch. I conclude, therefore, that the diversion to Glasgow, brought about through the delay in carrying out the contract of carriage in the present case is attributable to the default of the owners of the ship because, in the conditions existing in April, 1939, they ought to have foreseen that war might shortly break out and that any prolongation of the voyage might cause the loss or diversion of the ship.

Even, however, if the present case is distinguishable on its facts from *The Malcolm Baxter* (3) and the appellant is liable for such loss as is legally recoverable, it yet has to be determined whether the respondent is entitled to recover the damages claimed, or, indeed, any damages as a result of the appellant's breach of contract. In other words, did the transshipment costs naturally and directly flow from the initial unseaworthiness? The appellant contends that those costs were neither directly nor naturally caused by the unseaworthiness of the vessel, but were the result of circumstances peculiar to the pursuers and not communicated to the appellant who never undertook the contract on the terms that it should be liable for damages of that kind. If the claim had been for loss of profit in the respondent's business, I should think the appellant's contention sound. *Hadley v. Baxendale* (7), *Horne v. Midland Railway* (8), and *British Columbia Saw Mill Co. v. Nettleship* (9), would apply, and the damages would be too remote, but the claim is not for such damages but for transshipment costs, and the argument turned on the right of a shipper to recover such costs in a case where he was left to complete the contract of carriage at his own expense.

On behalf of the appellant it was said that the contract was made with Mitsui and continued to be with them, on the terms of the contract contained in the charterparty, until the bills of lading were transferred to the pursuers two days after the ship's arrival at Glasgow. The appellant, when it entered into the contract of carriage, knew only Mitsui who were Japanese merchants buying for re-sale and delivery at one of a range of ports. If the carrying ship failed to deliver at the nominated port, the only damages sustained by the merchants were such sum as they lost which would normally be measured by the difference between the price obtainable for the goods at the named port and that receivable at the place where they were actually delivered. In the present case there was no loss since the price at which the British government would have requisitioned at Glasgow was £8 17s. 6d. a ton, i.e., 11s. 3d. more than the sale price, and it had not been proved that more could have been obtained in the open market at Karlshamn. Mitsui, it was said, could not increase those damages by transferring the bills of lading to the pursuer after the ship's arrival at Glasgow. It was pointed out further that before the Bills of Lading Act, 1855, Mitsui could have transferred the property in the goods but not the benefit of the contract of carriage. After the passing of that Act, it was said, they could transfer any right which they themselves possessed under it but nothing more, and, as they could recover no damages, no more could their assignees. Moreover, the assignees themselves could not even obtain damages against Mitsui who had fulfilled their c.i.f. contract by

furnishing valid bills of lading, the contractual insurance policies, and the appropriate invoices.

For the purpose of testing this argument it must, of course, be assumed that the appellant had broken its contract by failing to deliver the goods at Karlshamn, and it must then be asked whether Mitsui or the respondent was obliged to accept the beans in some other quarter of the globe, where it did not want them, without any right to recover damages provided it could sell them there at a price as high as it could obtain at the contractual port. I cannot think that it was obliged to accept any such substituted performance. It appears to me to have had the right to require the goods to be delivered at the place stipulated, and, if the shipowner failed to carry out his bargain to deliver there, the direct and natural consequence is that the merchant should arrange for the carriage forward and charge the shipowner with the reasonable cost of doing so. Nor do I think it improves the appellant's position to say that it is the respondent's duty to minimize or nullify his damages by selling elsewhere. He is entitled to have his contract fulfilled in the manner stipulated and is under no obligation to accept some undesired method of performance. Some support is given to this view by the decision in *Connal, Cotton & Co. v. Fisher, Renwick* (10), though in that case the extra cost of purchasing at the port of delivery in fact exceeded the expense of transshipment. If this view be right, the respondent was entitled to recover the expense of forwarding the goods in fulfilment of his contract, whether that contract was contained in the charterparty or in the bills of lading, and, under the Bills of Lading Act, 1855, could transfer that right to the assignee of the latter documents.

Having regard to this view, it is unnecessary to discuss the other consideration put forward in the course of argument that, whatever the exact legal position between Mitsui and the pursuer, the latter was under no obligation to stand on its exact legal rights, but as an honourable merchant was entitled to fulfil its contract and to be indemnified by shipowners who had not fulfilled theirs. It will be observed that in this conclusion I am accepting the position maintained by the appellant that the indorser of a bill of lading cannot give his indorsee more rights than he himself possesses, and treating the matter as if Mitsui, by assigning the bills of lading to the respondent, had only transferred such rights as they themselves possessed to the Swedish company. To some extent this attitude involves acceptance of the view that the taking of a bill of lading by the charterer of a ship confers no immediate rights on him under the bill of lading, but gives him an inchoate right by endorsing the bill of lading to a third party to make it an effective document from the beginning of the voyage so as to enable the indorser to sue on it for any breaches of contract committed during the voyage but before its transfer to him: "As if," it was put in the course of argument, "a contract in the terms of the bill of lading had at the time of shipment been made with himself." If this be the true view, it does not matter that at the time the bill of lading was transferred to the respondent carriage to and delivery at Karlshamn by the chartered ship had become illegal. If it took over the contract of carriage as from the date of shipment it had a right to have the goods shipped to Karlshamn and it was immaterial that at a later date delivery there became impossible, provided, of course, that that inability was caused by the appellant's breach of contract.

But, it is said, to give such damages either to Mitsui or to the respondent is to give damages for delay in delivery—a remedy which is not given in the case of carriage of goods by sea. No doubt, expressions of opinion to that effect are to be found, perhaps more frequently in the days of sailing ships when prolonged delay was to be expected, but it never was a rule of law—merely a working practice answering to the circumstances of the time and subject to the consideration that the contract must be reasonably performed. In the present case the result of the delay was to deprive the shipper and his

indorsee of the goods at Karlshamn. Of course, if they could replace them by buying other goods there, it was their duty to diminish the damages by doing so, but they could not do so since no soya beans were procurable at Karlshamn and, in default, the only way of placing themselves in the same position as if the contract had been performed was to engage transport to carry the beans to that port. Accepting, then, the view that the appellant ought to have foreseen the likelihood of war occurring and of an embargo being imposed, I should find it liable to pay the damages claimed and would dismiss the appeal.

LORD WRIGHT : My Lords, the appellant is a limited company having its registered office at Glasgow, and is the owner of the British steamship, *British Monarch*, herein called "the vessel". The respondent is a Swedish company carrying on a manufacturing business at Norrköping, Sweden. The respondent has been awarded the sum of £21,634 as damages due from the appellant to the respondent as indorsee of bills of lading to which the property had passed by the indorsement, in respect of a cargo of soya beans shipped at Rashin, Manchuria, for Karlshamn. The award was for damages caused by the unseaworthiness of the vessel resulting in such delay on the voyage that the vessel did not deliver the cargo as she ought to have done before the outbreak of war in September, 1939, but, being still on the voyage when war broke out, was diverted to Glasgow under the war clause. The amount claimed was the cost which was incurred by the respondent in transhipping the cargo from Glasgow to the port of destination contracted for. The appellant now admits, as it did before the Inner House, that the vessel was unseaworthy, but claims that only nominal damages are recoverable. Both the Lord Ordinary and the Inner House have decided against the appellant.

The contract of carriage founded on was contained in the bills of lading dated at Rashin, May 6, 1939, and was for a total quantity in the aggregate under the bills of lading of about 8,200 tons of Manchurian soya beans to one of a range of ports in Europe, including Karlshamn, which was in due course nominated as the port of discharge. The shippers were the Japanese company, Mitsui Bussan Kaisha. The beans were to be delivered unto order, freight and all other conditions to be as per charterparty dated London, Apr. 4, 1939. The bills of lading contained the usual exceptions with a full negligence clause. In particular, the bills provided that all the exceptions were conditional on the ship being seaworthy when she sailed on the voyage, but any latent defects in the hull and/or machinery were not to be considered unseaworthiness provided the same did not result from want of due diligence of the owners or any of them or of the ship's husband or manager. The charterparty under which the bills of lading were issued was between the appellant as owner and Mitsui as charterer, and provided that the *British Monarch* should proceed to Rashin, and, being tight, staunch and strong and in every way fitted for the voyage, should load a full and complete cargo not exceeding 8,610 tons and proceed with all possible speed under steam *via* Suez Canal to one or two ports at charterers' option as ordered and there deliver the cargo. The charterparty contained an exception clause to the same effect as that contained in the bills of lading. The only one of the other clauses which it is here necessary to refer to is the war risks clause of which para. (1) is not here material, but para. (2) is in the following terms :

"The ship shall have liberty to comply with any orders or directions as to departure, arrival, routes, ports of call, stoppages, destination, delivery or otherwise howsoever given by the government of the nation under whose flag the vessel sails or any department thereof, or any person acting or purporting to act with the authority of such government . . . and if by reason of or in compliance with any such orders or directions anything is done or is not done, the same shall not be deemed a deviation

and delivery in accordance with such orders or directions shall be a fulfilment of the contract voyage and the freight shall be payable accordingly."

I have quoted the clause practically in full because it became important in the events which ensued.

The cargo shipped at Rashin consisted of 8,200 tons. The shippers, Mitsui, sold these beans under a c.i.f. contract dated London, Apr. 21, 1939, the buyer being the Scandinavian Co-operative Wholesale Society who acted as agent for the respondent. The bills of lading were not indorsed to it until Oct. 23, 1939, when it took up the bills of lading and paid the price. Thereupon the respondent acquired the property in the goods and the rights under the contract contained in the bills of lading in virtue of the Bills of Lading Act, 1855. It brings this action accordingly.

The voyage was extraordinarily protracted owing to the unseaworthiness of the vessel. This fact of unseaworthiness was established after an elaborate and prolonged trial before LORD SORN, the Lord Ordinary, and was, as already stated, admitted before the Inner House and is now admitted before your Lordships. It was not suggested that the unseaworthiness was latent or excused by any term of the contract. LORD SORN found (79 Ll. L.Rep. 388) that

"Considering the whole evidence, it is impossible to my mind to resist the inference that by the time the British Monarch had got to Rashin her boiler tubes were so worn and deteriorated that she was in no fit state to enter on the contemplated voyage."

Later in his judgment he said (*ibid.*, 390):

"... I am satisfied that by the time the vessel reached Rashin her tubes as a whole were in a defective condition and that, in addition, the flaw which permitted sea water to find its way into the boilers was then in existence and that, in consequence of these defects, the ship was unseaworthy."

There were also questions about the Japanese coal with which the vessel was mainly bunkered when she left Rashin. The appellant was fully aware of the risk connected with the boilers because there had been a great deal of trouble under the previous charter. No doubt, the risk was appreciated, but it was hoped by the appellant that it would not materialise.

The result of the unseaworthiness was that the vessel did not reach Glasgow until Oct. 21, 1939. The appellant accepts that the vessel would normally have taken about 60 days so that she should have reached European waters about the middle of July, 1939, by which date she had only reached Colombo. She had so much trouble that she was forced to put in to Colombo for repairs, in particular to the choked and leaking tubes. This detained her there from June 30 to July 15, 1939. On her next stage, which was to Suez, she had to put in to Aden. At Port Said she was again detained for repairs from Aug. 31 until Sept. 23. On arrival at Glasgow the boilers were surveyed, and renewal throughout was found necessary, and was, in fact, carried out. The deviations were necessitated by the unseaworthiness and are not separately founded on. War broke out between Great Britain and Germany on Sept. 3, 1939. But for the delay on the voyage, the vessel should, therefore, have reached Karlshamn some weeks before it commenced. In consequence of the war, the Admiralty prohibited the vessel from proceeding to Karlshamn and ordered her to proceed to and discharge at Glasgow, where she arrived on Oct. 21, 1939 and discharged her cargo. The respondent wanted the soya beans for its business, and was relying on the cargo in question. The Swedish government, in order to help it, gave it some soya beans on loan on the terms of being repaid by an equivalent quantity when these beans arrived. The respondent succeeded in chartering three smaller neutral vessels to proceed with the beans to Karlshamn, where they were eventually delivered. The cost of transhipment was

£21,634 7s. 4d. The appellant admits that the transshipment could not have been arranged more economically. The beans could have been sold at Glasgow for not less than £8 6s. 3d. per ton, the purchase price under the contract with Mitsui.

At the conclusion of the arguments, counsel for the appellant admitted that the appellant had broken its contract, but claimed that the damages were only nominal. I agree, however, with the unanimous decision of all the judges below that the claim for the damages is justified. It, in truth, gives effect to the broad general rule of the law of damages that a party injured by the other party's breach of contract is entitled to such money compensation as will put him in the position in which he would have been but for the breach. In that respect this case is singularly clear, because the contract entitled the respondent to have the beans delivered at Karlshamn and the damages claimed and awarded represent simply the sum necessary to effect that result, namely, the cost of transshipment from Glasgow to Karlshamn. The respondent was fortunate in being a neutral and in being able to charter neutral tonnage and obtaining from the British government permits to carry the beans from this country to Sweden. What the respondent wanted was the consignment of beans. Their value either in Glasgow or Sweden, where no beans were on the market, would have been a poor consolation, but, as transshipment could be effected, the extra cost incurred for transshipment was the proper subject of monetary compensation. The respondent has made no claim for interference with its business. The damages awarded are not special or remote, but are the damages naturally and directly resulting from the appellant's breach of contract within the rules of *Hadley v. Baxendale* (7) where ALDERSON, B., giving the judgment of the court said (9 Exch. 354):

"... we think the proper rule in such a case as the present is this: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally—i.e., according to the usual course of things, for such breach of contract itself—or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."

ALDERSON, B., then points out that, if the special circumstances of the particular case were wholly unknown to the other party, he could at most be only supposed to contemplate the amount of injury which would arise generally and in the great number of cases not affected by any special circumstances. This passage is quoted in full by LORD SANKEY, L.C., in *Banco de Portugal v. Waterlow* (11) ([1932] A.C. 474). LORD SANKEY adds a clear and useful statement by LORD BLACKBURN in *Livingstone v. Rawyards Coal Co.* (12) (5 App. Cas. 39):

"Where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."

The ruling of ALDERSON, B., has consistently been followed. The only difficulty, as LORD SANKEY observes, has been in applying it. The distinction there drawn is between damages arising naturally (which means in the normal course of things) and cases where there were special and extraordinary circumstances beyond the reasonable prevision of the parties. In the latter event it is laid down that the special facts must be communicated by and between the parties. The distinction between these types is usually described in English law as

A that between general and special damages. The latter are such that, if they are not communicated, it would not be fair or reasonable to hold the defendant responsible for losses which he could not be taken to contemplate as likely to result from his breach of contract. I am not here concerned to examine the differences or similarities between this rule and the corresponding rules which are adopted in claims in tort. To apply this rule to the facts of the present case, it appears that, if the respondent had been claiming special and peculiar loss due to interference with its business, such damages might *prima facie* be too remote and not proper to be recovered in the absence of notice when the contract was entered into. The court will, however, assume that the parties, as business men, have all reasonable acquaintance with the ordinary course of business. As, however, the respondent is claiming only for its loss directly due to the failure of the appellant to fulfil his promise to deliver the beans at Karls-
B hamn, its claim is not based on any extraordinary or peculiar matter, but is only what might be claimed by any party which suffered a similar injury in the general circumstances of that business and at that time and place. There was, indeed, in 1939 the general fear that there might be war. Munich, the Sudetenland, the invasion by Germany of Czechoslovakia, the difficulty
C about the Polish Corridor were matters of common knowledge. Indeed, Mr. Sheriff, the appellant's responsible assistant manager concerned with chartering, in his evidence said that in April, 1939 (that is, when the charter was negotiated) the possibility of war was in the mind of the appellant, and he adds that there was a special war risks clause added to the charter in a slip attached. If the possibility of war was in the thoughts of the appellant, as it must have been
D because shipowners have to keep in mind the international situation, the same must be true of the respondent, a concern dealing in large international purchases of raw material. The possibility must have been in the minds of both parties even apart from the war clause, which is a printed form in frequent use during unsettled times. There was no need for one party to say to the other: "Be
E careful to hurry on the voyage as much as possible because, if war breaks out before the vessel gets to Karlshamn, the British government will almost certainly direct her under the war clause. The Channel, the North Sea, or the Baltic will, of course, not be healthy places for a British vessel." Business is not conducted in that way. Experienced business men would know what the contract provided and what the actual risks were. It was not likely that the appellant's representatives would say: "We have been having trouble
F with her boilers, but we will hope for the best and in any case there is an ample margin of time."

But all I am at the moment emphasising is that risks consequent on the prolongation of the voyage must have been in contemplation both by the shipowners and the shippers. The question whether damage is remote or "circumstances of each special case. Remoteness of damage is, in truth, a question
G of fact, as LORD HALDANE, L.C., describes it in the *British Westinghouse* case (13). He said ([1912] A.C. 688) with reference to questions as to damages:

"In some of the cases there are expressions as to the principles governing the measure of general damages which at first sight seem difficult to harmonise. The apparent discrepancies are, however, mainly due to the
H varying nature of the particular questions submitted for decision. The *quantum* of damage is a question of fact, and the only guidance the law can give is to lay down general principles which afford at times but scanty assistance in dealing with particular cases. The judges who give guidance to juries in these cases have necessarily to look at their special character, and to mould, for the purposes of different kinds of claim, the expression of the general principles which apply to them, and this is apt to give rise to an appearance of ambiguity."

He then states the broad principle of compensation to which I have already referred and adds a reference to the ancillary duty of minimising damage. It is, I imagine, with language like that of LORD HALDANE, L.C., in his view that ATKIN, L.J., in *The Susquehanna* (14) said ([1925] P. 210):

"This is one of those cases dealing with damages which in my experience I have found to be a branch of the law on which one is less guided by authority laying down definite principles than on almost any other matter that one can consider."

LORD HALDANE, in the passage just cited, had to deal with a case where, as he said, it was necessary to balance loss and gain and no simple solution was possible. Again, in *Liesbosch, Dredger v. Edison S.S.* (15) this House made some observations on the measure of damages, which are of general import. The case was one of tort. The question there was what was the proper sum to award by way of compensation for the loss of a dredger. LORD WRIGHT said ([1933] A.C. 464):

"Many, varied and complex are the types of vessels and the modes of employment in which their owners may use them. Hence the difficulties constantly felt in defining rules as to the measure of damages. I think it impossible to lay down any universal formula."

Earlier in his speech LORD WRIGHT said (*ibid.*, 463):

"... the dominant rule of law is the principle of *restitutio in integrum*, and subsidiary rules can only be justified if they give effect to that rule."

In the *Liesbosch* (15) it was held that loss due to the party's impecuniosity was too remote, and, therefore, to be neglected in the calculation of damages. It was special loss due to his financial position. A different conclusion was arrived at in *Muhammad Issa el Sheikh Ahmad v. Ali* (16) where damages consequent on impecuniosity were held not too remote, because, as I understand, the loss was such as might reasonably be expected to be in the contemplation of the parties as likely to flow from breach of the obligation undertaken: see the judgment of the Judicial Committee delivered by LORD UTHWATT ([1947] A.C. 427). The difference in result did not depend on the differences (if any) between contract and tort in this connection. The "reasonable contemplation" as to damages is what the court attributes to the parties. The breach itself is, of course, objective. The constant necessity of picking out from a plurality of items that which is material is also remarked on in the judgment in *Liesbosch, Dredger v. Edison S.S.* (15).

These general statements could be multiplied, but the question in a case like the present must always be what reasonable business men must be taken to have contemplated as the natural or probable result if the contract was broken. As reasonable business men each must be taken to understand the ordinary practices and exigencies of the other's trade or business. That need not generally be the subject of special discussion or communication. The future possibility of a breach must be both contingent and hypothetical and may take unexpected forms. Thus, in the *Banco de Portugal* case (11) the breach of contract was of a type not reasonably to be anticipated and the consequences were complex and indirect at least in the sense that they naturally involved action by other parties, but they were unanimously held by the House to be subjects of monetary compensation to make good the loss. I cannot find that any point was raised as to the necessity of communicating any special circumstances. Both parties were tacitly taken to be acquainted sufficiently with the general business position. The same is true in many cases of complicated consequences flowing from an unanticipated breach of contract, but the damages are not treated either as special or remote if they flow from the normal business position of the parties which the court assumes must be reasonably known to them. It would not be helpful to cite the familiar authorities which are numerous but

A depend primarily on the facts of each case. Even in the very simple case of breach by a buyer of his contract to accept and pay for goods, the Sale of Goods Act, 1893, s. 30 (2), is content to enact that the measure of damages is the estimated loss resulting in the ordinary course of events on the buyer's breach of contract. When in sub-s. (3) it gives a more specific rule, it qualifies it by the words *prima facie*. But in the present case the compensation claimed is what is the most obvious and natural. The cost of transshipment is the most natural form of reparation. It cannot be said to involve extraordinary or un contemplated hardship as the damages claimed were said to do in cases like *British Columbia Saw Mills Co. v. Nettleship* (9) and *Horne v. Midland Railway Co.* (8) which were relied on by counsel for the appellant. I may refer to the authority of the Scottish case of *Connal, Cotton & Co. v. Fisher, Renwick & Co.* (10) where the cost of transshipment was allowed as the proper measure of damages for failure to deliver under a contract of sea carriage at the agreed destination.

B But a question of remoteness in another connection and in another sense has been raised. That is in reference to remoteness in the sense of causal connection. The claim here is for damages for unseaworthiness, which, it is said, caused delay on the voyage and the delay exposed the vessel to being diverted by order of the Admiralty. This, it was said, may properly be regarded
C as coming within the exception of restraints of princes, though, indeed, it was for the benefit of the appellant because, if it could be invoked by the appellant, it gave it a right to the bill of lading freight in full as on performance of the contract by a delivery short of the bill of lading destination. In my opinion, this objection, which would treat restraints of princes as the immediate or dominant cause of the delay, fails. The Lord President relied on the decision
D of this House in *Smith, Hogg & Co. v. Black Sea, etc., Insurance Co.* (4) in which case the loss of a vessel which occurred through the negligence of the master operating on conditions of unseaworthiness existing since the commencement of the voyage was held to be caused by breach of the warranty of seaworthiness and recoverable accordingly. There was an exception of negligence. Negligence could be regarded as a co-operating cause, no different
E in principle from any physical and tangible cause. As this House, however, said ([1940] A.C. 1005) no distinction can be drawn between cases where the negligent conduct of the master is a cause and cases where any other cause, such as perils of the sea, is a co-operating cause. "A negligent act is as much a co-operating cause, if it is a cause at all, as an act which is not negligent." What was being there emphasised was that a voluntary act
F (negligent or not) of a human agent is not generally an independent or new cause for this purpose which breaks the chain of causation, as it is called, so as to exclude from consideration the causal effect of the unseaworthiness. It is well established that unseaworthiness, if it is to be a relevant factor of liability, must be "a cause" of the damage or loss. That is necessary because
G unseaworthiness might take many different forms in the same vessel, so that before any one form can be relied on, it must be a cause of damage—for instance, the failure to carry a proper medical chest, if it is a breach of the warranty, might have no relevance to the loss of a vessel by perils of the seas. But a different result follows if the breach is a cause of the loss. Thus, in *Smith, Hogg & Co.'s* case (4) the unseaworthiness created in the vessel instability which, combined with negligence of the master, caused the loss. There was
H no new law laid down in that case. From one point of view unseaworthiness must generally, perhaps always in a sense, be a "remote" cause. To satisfy the definition of unseaworthiness it must exist at the commencement of the voyage. It must, however, still be in effective operation at the time of the casualty if it is to be a cause of the casualty, and from its very nature it must always, or almost always, operate by means of and along with the specific immediate peril. That is because the essence of unseaworthiness as a cause of loss or damage is that the unseaworthy ship is unfit to meet the peril.

In other words, the vessel would not have suffered the loss or injury if she had been seaworthy. A ship may be lost, not simply by a peril of the sea, but also by and because of the failure to fulfil the warranty. Thus, for instance, in the *Standard Oil Company of New York v. The Clan Line* (17) the vessel capsized because the master, not being instructed by his owners as to the peculiarities of a turret ship, so handled her that she capsized. That loss was immediately due to perils of the sea which overwhelmed her when she capsized, liability for which was excepted, but the dominant cause was her unseaworthiness in that her master, though otherwise efficient, was inefficient in not being aware of the special danger. In general, all the authorities are in agreement in this respect and embody the same rule. The shipowner, of course, under the familiar general rule is debarred by his breach of duty from relying on the specific exception. Though he would not be liable for the consequences caused by the specific excepted peril or the accident alone if he were not in default, and though the unseaworthiness existing at the commencement of the voyage might not be operative or known until the time when the accident occurs, yet then the breach of the warranty operates directly as a cause, and, indeed, a dominant cause. Causation in law does not depend on remoteness or immediacy in time. So it was held in *Leyland v. Norwich Union* (18), but unseaworthiness as a cause operates immediately whenever it comes into effect. It has until then only been dormant. The maxim *causa proxima non remota spectatur* is either meaningless or misleading until "remota" and "proxima" are defined. Thus, unseaworthiness as a cause cannot from its very nature operate by itself. It needs the "peril" in order to evince that the vessel or some part or quality of it is less fit than it should have been and would have been if it had been seaworthy, and hence the casualty ensues. A fitter ship would have passed through the peril unscathed. In this way unseaworthiness is a decisive cause, or, as it is called, a dominant cause. If it is not expressly excepted, the shipowner cannot excuse himself by any specific exception for a loss for which he is himself responsible because he is responsible for unseaworthiness.

There is, however, in this case a contention of a more general nature, which is that the delay which resulted from the defective boilers did not in any legal sense cause the diversion of the vessel. It is said that the relation of cause and effect cannot be postulated here between the unseaworthiness and the restraints of princes or the delay. As to such a contention it may be said at once that all the judges below have rejected it. As I have pointed out, if the vessel had arrived at Karlshamn in July she could not have been exposed to the risk of the restraint of princes, but she did not arrive until October, and thereby (in the historic phrase) "missed the bus." If a man is too late to catch a train because his car broke down on the way to the station, we should all naturally say that he lost the train because of the car breaking down. We recognise that the two things or events are causally connected. Causation is a mental concept, generally based on inference or induction from uniformity of sequence as between two events that there is a causal connection between them. This is the customary result of an education which starts with our earliest experience. The burnt child dreads the fire. I am not entering on or discussing any theory of causation. Those interested in philosophy will find modern philosophic views on causation explained in RUSSELL'S HISTORY OF WESTERN PHILOSOPHY in the chapter on Hume, Book 3, c. XVII. The common law, however, is not concerned with philosophic speculation, but is only concerned with ordinary everyday life and thoughts and expressions and would not hesitate to think and say that because it caused the delay unseaworthiness caused the Admiralty order diverting the vessel. I think the common law would be right in picking out unseaworthiness from the whole complex of circumstances as the dominant cause. I have assumed that the bills of lading and charterparty exceptions which are expressed to be conditional on the vessel being seaworthy use "seaworthy" in the sense that the breach of warranty

was a breach which caused the loss. This is assumed in *Paterson v. Canadian Co-operative Wheat Producers* (19) in respect of a similar provision in the Water-Carriage of Goods Act (R.S. Can., 1927, c. 207), and in other cases.

Before I leave the various problems or difficulties argued or suggested in the appeal, I should notice some others. (i) It is suggested that the *Smith, Hogg* case (4) only refers to physical causes and physical defects and physical damage. I can see no ground for this in principle or authority or in the facts of this case. The bad state of the boilers was a physical cause which reduced the vessel's speed from 9 to 5 knots and necessitated the deviations, and I think as a matter of law that a vessel may be unseaworthy in particular circumstances without any structural or mechanical defect, for instance, if she is carrying contraband or false papers without the consent of the shippers and may, *quoad hoc*, be subject to delay or even condemnation without any physical interference except such as the restraint implies. The principle of *Smith, Hogg & Co.* (4) is wide enough to cover such a case. *Dunn v. Bucknall Bros.* (20) was an illustration of that character and in principle supports this view. (ii) It is said that the respondent, when it became assignee of the bills of lading, got only such rights as were then alive, and the only rights then alive were for delivery at Glasgow. I think it enough to refer to the Bills of Lading Act, 1855, and the long established practice of dealing with the bills of lading of seaborne cargoes. The rights transferred under the bills of lading were all such as might flow from the contract *ab initio* and the various supervening events. (iii) There is also the contention that the action must fail because the contract was frustrated and that the claim for damages must, therefore, fail. There are, in my judgment, many fatal objections to this contention. I think it is enough to point out that the Admiralty order (which is the frustrating event) is a restraint of princes expressly dealt with by the contractual exception which sufficiently provides for the peril, and, further, does not help the appellant because it is excluded by the breach of warranty which brings it into operation. Thus, the frustration was caused by matters for which the appellant was responsible. In *Bank Line v. Capel* (21) LORD SUMNER stated the principle thus ([1919] A.C. 452): "... the principle of frustration of an adventure assumes that the frustration arises without blame or fault on either side. Reliance cannot be placed on a self-induced frustration." The principle was applied in *Maritime National Fish Co. v. Ocean Trawlers* (22). I think it is enough to say that it applies here. (iv) I think a similar course of reasoning disposes of the contention that the appellant can escape the consequences of its breach of contract by saying that it would have been illegal for it to proceed to Karlshamn after the Admiralty order. It would certainly not have been possible, and it would certainly not have been allowed by the Admiralty. The appellant would rather have welcomed than resisted the order, but I think the same answer applies here according to English law as in regard to the contention of frustration. I mean, that the illegality was due to the appellant's own act and is not available as a defence to the injured party's claim. (v) I agree with the court below that nothing done at Glasgow by the respondent constituted a waiver of his right for breaking the contract.

I might, however, notice before I conclude the arguments based on the authority in the United States Supreme Court cited by the appellant, *The Malcolm Baxter* (3), entitled in the Supreme Court the *Republic of France v. French Overseas Corporation*. The Lord President, in his outstanding judgment, has put his finger on one decisive difference from the present case, namely, that there the law forbidding United States sailing ships from sailing across the Atlantic was something new, unprecedented, and not capable of prevision as a possible consequence of the delay consequent on the breach of warranty. That is certainly a sufficient distinction, but the complex of facts in that case was so completely dissimilar from those in the present case as to prevent the authority from being any guide to me. The United States case is noted by

WILLISTON in his encyclopaedic work on *CONTRACTS*, revised ed., ss. 1096, 1938 and 1951, but the learned author does not comment on it in any detail. He cites it in his sections on illegality and also in connection with the liabilities of carriers by land where their delay has brought the goods into the scope of an Act of God, such as floods, tempests and the like, which could not be foreseen as likely to operate on the adventure, as a consequence of delay. The Lord President has dealt with this aspect and I do not wish to add to what he has said. The other peculiarity of the decision is that, as I understand, the court held that when eventually at Havana the vessel was made seaworthy and the general law prohibited her from crossing the Atlantic the whole position could be considered without reference to what happened before that stage and it could be said that the only cause why she could not then proceed was the United States law and not the unseaworthiness. I can only regard that as a particular conclusion based on all the special facts of the case. I cannot, therefore, find any guidance for the decision in this appeal. Decisions of the United States Courts, even the Supreme Court, are not of coercive, but only of persuasive, force on the courts of this country. It is certainly desirable that, so far as possible, there should be uniformity between the law merchant as administered in the United States and in Britain. The origin and foundation of the law in both countries are the same, but as time goes on and cases arise individual differences emerge and accumulate. Even the general principles of the law of carriage by sea do not receive identical expression or development in the courts of the two countries. That same phenomenon may be observed even in comparing the laws of the different states and the federal courts. Instances must be familiar to lawyers. There is a further difficulty in that the British lawyer cannot be familiar with the American decisions. He has not access to the reports, and, indeed, the American reports have reached such dimensions that they are quite beyond the capacity of a British lawyer. Even the American lawyer has to avail himself of the extraordinarily efficient and comprehensive system of indexing and reference which has been developed. This is quite beyond the reach of the British lawyer. It is the great development of case law on the other side of the Atlantic, coupled with a similar though lesser development on this side, which has discouraged the practice, at best rare, followed up to the middle decades of last century by British judges to cite American cases. I am not disparaging or discouraging the fullest possible interchange and reciprocity between American and British lawyers, but I cannot help recognising how difficult, and, perhaps, dangerous, it may be to ask a British judge to rely on a particular United States decision torn from its setting in the totality of United States case law and statutes, simply because of some partial similarity in the facts. I should dismiss the appeal.

LORD UTHWATT: My Lords, I have had the advantage of reading in print and considering the opinions of the noble and learned Lord on the Woolsack and of my noble and learned friend, LORD WRIGHT. I agree with their conclusion, and I intervene only to say that I do not share the doubt expressed by the noble and learned Lord on the Woolsack on the question whether the appellants, on Apr. 4, 1939, should reasonably have foreseen the likelihood of the imposition of an embargo affecting the carriage of goods to the range of ports specified in the charterparty. To my mind, the situation in Europe at that date was such that a reasonable shipowner contemplating a voyage from Rashin to that range of ports would regard the chance of war, not as a possibility of academic interest to the venture, but as furnishing matter which commercially ought to be taken into account. If war happened, the embargo to which I have referred would, in his view, be an almost inevitable consequence. I would dismiss the appeal.

LORD DU PARCQ: My Lords, it is unnecessary for me to address your Lordships on all the points which were argued at the Bar, and I will confine

myself to the question of damages. I may be taken to concur in the opinion of my noble and learned friend on the Woolsack on all those matters with which I do not specifically deal.

I do not doubt the wisdom of the judges who, in *Hadley v. Baxendale* (7) and the many later cases which interpreted or explained that classic decision, have laid down rules or principles for the guidance of those whose duty it is, as judges or jurymen, to assess damages. When those rules or principles are applied, however, it is essential to remember what my noble and learned friend, LORD WRIGHT, and LORD HALDANE in the passage cited by him have emphasised—that in the end what has to be decided is a question of fact, and, therefore, a question proper for a jury. Circumstances are so infinitely various that, however carefully general rules are framed, they must be construed with some liberality and not too rigidly applied. It was necessary to lay down principles lest juries should be persuaded to do injustice by imposing an undue, or, perhaps, an inadequate, liability on a defendant. The court must be careful, however, to see that the principles laid down are never so narrowly interpreted as to prevent a jury, or judge of fact, from doing justice between the parties. So to use them would be to misuse them. It is interesting to find a judge of the experience of WILDE, B., six years after *Hadley v. Baxendale* (7) was decided, expressing a doubt which may well have been widely shared. He said in *Gee v. Lancashire and Yorkshire Railway Co.* (23) (6 H. & N. 221) :

“For my own part I think that, although an excellent attempt was made in *Hadley v. Baxendale* (7) to lay down a rule on the subject, it will be found that the rule is not capable of meeting all cases ; and when the matter comes to be further considered, it will probably turn out that there is no such thing as a rule, as to the legal measure of damages, applicable to all cases.”

The observations of LORD HALDANE to which reference has been made show the wisdom of this forecast.

My Lords, what I have said is not, I think, without relevance to the matter in hand. If the argument of counsel for the appellant were right, a judge would have had to direct a jury in the present case that they must award no more than nominal damages. Any jury of business men would, I believe, have received such a direction with dismay, and acted on it with reluctance. It would, indeed, as it seems to me, result in manifest injustice. I may express my own opinion by saying that, if a jury, directed in the terms in which the Lord President's opinion shows us that he would have directed them, had awarded the respondent the sum of £21,634 as damages, there would have been no ground for setting aside or varying the verdict. It was pointed out by BLACKBURN, J., in *Cory v. Thames Ironworks Co.* (24) (L.R. 3 Q.B. 188) that the rule which ALDERSON, B., stated to be “the proper rule in such a case as the present” in *Hadley v. Baxendale* (7) (9 Ex. 354), consists of two alternatives. In my opinion, the damages which have been awarded to the respondent come within the former of these alternatives inasmuch as they are “such as may fairly and reasonably be considered as arising . . . according to the usual course of things, from the breach of the contract itself.” Damage arises “according to the usual course of things” if, in the circumstances existing at the date of the contract, both parties to it, supposing them to have considered the probable effects of a breach of the contract with due regard to events which might reasonably be expected to occur, must be assumed as reasonable men to have foreseen such damage as at least a serious possibility. Unseaworthiness in itself may, if fortune is kind, occasion no damage to anybody, but, apart from other obvious dangers, it is very likely to cause delay. Delay may produce damage of many kinds, some of it predictable. If it be once granted that there was a real, and known, danger of war at the date of the contract, I understand that all your Lordships who heard the argument are agreed that the diversion

of the ship which caused such grave loss to the respondent followed in the usual course of things from the delay and the unseaworthiness which caused it.

In order that the respondent might succeed in establishing its case, it was not necessary, in my opinion, that the parties to the contract should be shown to have contemplated the outbreak of war as something certain and unavoidable. They are not to be supposed to have had the gift of prophecy. It is enough if they may reasonably be assumed to have contemplated a war, and the likelihood that it would lead to such an embargo as was, in fact, imposed, as a real danger which must be taken into account. I agree with my noble and learned friend, LORD WRIGHT, that Mr. Sheriff's evidence and the addition to the charter of the war risks clause support the view that this assumption may fairly be made. I also agree that there was at the material date a general fear of war. Your Lordships are entitled, as were the Scottish courts, to take judicial notice of the facts of history, whether past or contemporaneous with ourselves. The Prime Minister's announcement on Mar. 31, 1939, of the guarantee given to Poland was a definite landmark in the history of the world. It had been preceded on Mar. 17 by the speech at Birmingham in which the Prime Minister had asked rhetorically whether the attack on Czechoslovakia was to be followed by another. It was natural to see in this question a reference to Poland, and the assurance which so swiftly followed that His Majesty's government would "lend the Polish government all support in their power" in the event of any action which clearly threatened Polish independence justified, and, I think, aroused, a general apprehension of war. Certainly men engaged in commerce, who are rightly sensitive even to hints of danger when their business interests are affected, can hardly have failed to be alive to the risk of war. Speaking of the guarantee to Poland, MR. WINSTON CHURCHILL has written: "No one who understood the situation could doubt that it meant in all human probability a major war in which we should be involved": *THE SECOND WORLD WAR*, vol. I, p. 270. I am not entitled to ask your Lordships to rely on this statement for its evidential value. I quote it as a comment which, speaking for myself, I would endorse, though with the qualification that those who had to rely for their information on sources available to the general public at least had reasonable grounds for the belief that such a war was a serious possibility. In my opinion, the Lord Ordinary and the Inner House arrived at a proper conclusion, and this appeal ought to be dismissed.

LORD MORTON OF HENRYTON: My Lords, I agree with the reasoning of the noble and learned Lord on the Woolsack, and I only desire to say a few words on the matter as to which he expressed some doubt. Before the date of the charterparty, Apr. 4, 1939, Germany had overrun Czechoslovakia. It was apparent then, if not before, that Hitler's pledged word was worthless and that he did not shrink from violence to achieve his ends. I think that any shipowner who was then contemplating a voyage from Rashin to one of a range of ports in Europe would feel that there was a grave risk of war breaking out in Europe and an embargo being imposed before the vessel reached her destination. In my view, the damage which was, in fact, suffered by the respondents was within the reasonable contemplation of the parties, and the appellant is liable to pay the damages claimed. I should dismiss the appeal.

Appeal dismissed. Appellant to pay the costs of this appeal other than the costs of the inclusion of oral evidence, or documents relating solely to unseaworthiness or knowledge thereof. Respondent to pay to the appellant the costs so excepted.

Solicitors: *Botterell & Roche*, agents for *Montgomerie, Flemings, Fyfe, Maclean & Co.*, Glasgow, and *Beveridge, Sutherland & Smith*, Leith (for the appellant); *Thomas Cooper & Co.*, agents for *Boyd, Jameson & Young*, Leith (for the respondent).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

BRITISH LAUNDERERS' RESEARCH ASSOCIATION v.
CENTRAL MIDDLESEX ASSESSMENT COMMITTEE AND
HENDON RATING AUTHORITY.

[COURT OF APPEAL (Bucknill and Denning, L.JJ., and Jenkins, J.), November 16, 17, December 3, 1948.]

A Rating—Exemption—Scientific society—“Purposes of science exclusively”—
“Voluntary contributions”—Laundries research association—Company
limited by guarantee—Advice to members and courses for students—Govern-
ment grant—Scientific Societies Act, 1843 (c. 36), s. 1.

The Scientific Societies Act, 1843, s. 1, provides: “No person or persons shall be assessed or rated, or liable to be assessed or rated, or liable to pay, to any county, borough, parochial, or other local rates or cesses, in respect of any land, houses, or buildings, or parts of houses or buildings, belonging to any society instituted for purposes of science, literature, or the fine arts exclusively, either as tenant or as owner, and occupied by it for the transaction of its business, and for carrying into effect its purposes, provided that such society shall be supported wholly or in part by annual voluntary contributions, and shall not, and by its laws may not, make any dividend, gift, division, or bonus in money unto or between any of its members, and provided also that such society shall obtain the certificate of the barrister-at-law or lord advocate, as hereinafter mentioned.”

An association, according to its memorandum and articles, was instituted *inter alia* for the purposes of encouraging and improving the education of persons who were engaged in the laundry industry, of disseminating information by the giving of advice, and of making known the nature and merits of processes. It carried on research into matters connected with the laundry industry and to that end was in receipt of a government grant. The association was a company limited by guarantee, and its members, who paid subscriptions according to the size of their businesses, were entitled to, and did, put the results of the association's researches to practical advantage in their business. Lectures and demonstrations to students intending to enter the laundry industry were given, and on request experts were sent to advise launderers in their businesses in return for fees. The association claimed to be exempt from the payment of rates by virtue of s. 1 of the Act of 1843.

HELD: (i) according to its memorandum and articles, which was the best evidence of its purposes, the association was instituted for purposes other than those incidental to the purposes of science; even if there were any doubt as to the construction of the stated objects, the purposes which it, in fact, pursued, in particular, the purposes of its members, were not so incidental; and, therefore, it was not a “society instituted for the purposes of science exclusively” within s. 1.

Inland Revenue Comrs. v. Forrest, (1890), (15 A.C. 334; 63 L.T. 36), applied.

R. v. Institution of Civil Engineers, (1879), (5 Q.B.D. 48; 42 L.T. 145), explained.

Institution of Civil Engineers v. Inland Revenue Comrs., ([1932] 1 K.B. 149; 145 L.T. 553), considered.

R. v. British Non-Ferrous Metals Association, (1932), (16 Rating and Income Tax Cas. 149), overruled.

(ii) “voluntary contributions” were payments made by private citizens without compulsion and without any view to recompense save the gratitude of one's fellow men, and did not include a government grant.

Dicta of LORD HALSBURY, L.C., in *Savoy Overseers v. Art Union of London* ([1896] A.C. 305; 74 L.T. 498), applied.

Liverpool Corpn. v. West Derby Union, (1905) (92 L.T. 467), approved.
Hornsey School of Art v. Edmonton Union, (1905) (94 L.T. 203), *R. v. British Non-Ferrous Metals Association* (1932) (16 Rating and Income Tax Cas. 136), *Westminster City Council v. Royal United Service Institution*, ([1938] 2 All E.R. 545), overruled.

Decision of the DIVISIONAL COURT OF THE KING'S BENCH DIVISION
 ([1948] 1 All E.R. 277), affirmed.

[AS TO THE EXEMPTION OF SCIENTIFIC SOCIETIES FROM RATES, see HALSBURY, Hailsham Edn., Vol. 21, pp. 11-15, paras. 25-30; and FOR CASES, see DIGEST, Vol. 38, pp. 493-499, Nos. 485-540.]

Cases referred to :

- (1) *Inland Revenue Comrs. v. Forrest*, (1890), 15 A.C. 334; 60 L.J.Q.B. 281; 63 L.T. 36; 54 J.P. 772; 38 Digest 496, 503. B
- (2) *Royal College of Music v. Westminster Vestry*, [1898] 1 Q.B. 809; 67 L.J.Q.B. 540; 78 L.T. 441; 62 J.P. 357; 38 Digest 499, 540.
- (3) *Jenner Institute of Preventive Medicine v. St. George's Hanover Square Assessment Committee and Surveyor of Taxes*, (1900), 69 L.J.Q.B. 814; 83 L.T. 344; 38 Digest 497, 513.
- (4) *School of Oriental and African Studies v. Westminster City Rating Authority*, [1940] 2 All E.R. 537; Digest Supp. C
- (5) *R. v. Institution of Civil Engineers*, (1879), 5 Q.B.D. 48; 49 L.J.M.C. 34; 42 L.T. 145; 44 J.P. 265; 38 Digest 497, 508.
- (6) *Institution of Civil Engineers v. Inland Revenue Comrs.*, [1932] 1 K.B. 149; 100 L.J.K.B. 705; 145 L.T. 553; 16 Tax Cas. 158; Digest Supp. D
- (7) *R. v. British Non-Ferrous Metals Association*, (1932), 16 Rating and Income Tax Cases 136.
- (8) *R. v. Cockburn*, (1852), 16 Q.B. 480; 18 L.T.O.S. 302; *sub nom. R. v. St. Martin-in-the-Fields (Churchwardens and Overseers)*, 21 L.J.M.C. 53; 16 J.P. 198; 38 Digest 495, 495.
- (9) *Purvis v. Traill*, (1849), 3 Exch. 344; 3 New Mag. Cas. 88; 3 New Sess. Cas. 459; 18 L.J.M.C. 57; 12 L.T.O.S. 379; 13 J.P. 219; 38 Digest 497, 509. E
- (10) *Bracegirdle v. Oxley*, *Bracegirdle v. Cobley*, [1947] 1 All E.R. 126; [1947] K.B. 349; [1947] L.J.R. 815; 176 L.T. 187; 111 J.P. 131; 2nd Digest Supp.
- (11) *Savoy Overseers v. Art Union of London*, [1896] A.C. 296; 65 L.J.M.C. 161; 74 L.T. 497; 60 J.P. 660; 38 Digest 498, 525. F
- (12) *Hornsey School of Art v. Edmonton Union*, (1905), 94 L.T. 203; 70 J.P. 121; 38 Digest 498, 524.
- (13) *Westminster City Council v. Royal United Service Institution*, [1938] 2 All E.R. 545; Digest Supp.
- (14) *Liverpool Corpn. v. West Derby Union*, (1905), 92 L.T. 467; 69 J.P. 277; 38 Digest 494, 494. G

APPEAL of the British Launderers' Research Association from an order of the Divisional Court of the King's Bench Division, dated Jan. 29, 1948, reported [1948] 1 All E.R. 277, on a Case stated by the Middlesex Quarter Sessions.

The association was the owner and occupier of certain laundry premises which were entered in the valuation list with no figure for gross value and a rateable value of £360. Despite this entry, the association had for 20 years before 1946 been treated as exempt from rates in respect of the premises, but, in November, 1946, the rating authority served on it a demand for rates for the year 1946-47. The association, as a result of this demand, made a proposal for the amendment of the list on the ground that it was an association entitled to the benefit of the Scientific Societies Act, 1843, as certified by the Registrar of Friendly Societies in August, 1923, and was exempt from the payment of H

rates. The rating authority objected to this proposal. The laundry premises comprised a laboratory block containing analytical chemical, textile, bacteriological, and two physical chemical laboratories, an instrument laboratory, and a micro-photograph and ultra-violet light laboratory. There were also an engineer's drawing office, machine shop, library and various offices. In a separate block there was an experimental laundry, and the remaining buildings were used for demonstrations and lectures. The association was registered in 1920 as a company limited by guarantee, and received a grant from the Committee of the Privy Council for Scientific and Industrial Research, which, in 1946, was £8,500. The members of the association were persons and companies engaged in the laundry business, and they paid annual subscriptions according to the size of their businesses. In return for their subscriptions the members were enabled to apply the results of the researches of the association to practical advantage in their businesses. Special visits to give advice in return for fees were made to laundries by experts employed by the association. The association also conducted courses of instruction for students. The whole of the activities of the association were directed towards increasing scientific knowledge in relation to laundering. The association had not paid, and was not able to pay, any dividend, gift, division, or bonus money to its members. Middlesex Quarter Sessions was of the opinion that the association was instituted for the purposes of science exclusively, and that it was supported wholly or in part by voluntary contributions, but stated a Case for the opinion of the Divisional Court. The Divisional Court reversed the decision of quarter sessions, and the Court of Appeal now affirmed the decision of the Divisional Court. Only the rating authority appeared as a respondent to the appeal at quarter sessions, and the assessment committee were not thereafter a party.

Rowe, K.C., and W. L. Roots for the association.

Fitzgerald, K.C., and Ramsay Willis for the Hendon Rating Authority.

Cur. adv. vult.

Dec. 3. **BUCKNILL, L.J.:** I will ask DENNING, L.J., to give the first judgment.

DENNING, L.J., read the following judgment. The first question is what is the true interpretation of the words "for the purposes of science, literature, or the fine arts exclusively." There is one thing which is clear both on the wording of the statute and on the cases. The word "exclusively" must be given its full effect. It is not sufficient that the society should be instituted "mainly" or "primarily" or "chiefly" for the purposes of science, literature, or the fine arts. It must be instituted "exclusively" for those purposes. The only qualification—which, indeed, is not really a qualification at all—is that other purposes which are merely incidental to the purposes of science or literature or the fine arts, that is, merely a means to the fulfilment of those purposes, do not deprive a society of the exemption. Once, however, the other purposes cease to be merely incidental but become collateral—that is, cease to be a means to an end but become an end in themselves; that is, become additional purposes of the society—then, whether they be main or subsidiary, whether they exist jointly with or separately from the purposes of science, literature, or the fine arts, the society cannot claim the exemption. That is, I think, made clear by the opinions of LORD WATSON and LORD MACNAGHTEN in *Inland Revenue Comrs. v. Forrest* (1). More difficulty arises, however, in saying what are "the purposes of science." Science includes, of course, not only pure or abstract science, such as pure mathematics, but also the applied sciences, such as electricity or engineering, and the purposes of science include not only the advancement of knowledge by research work, but also the dissemination of it by lectures or teaching or writing. Take the department of engineering at Cambridge. It is, undoubtedly, instituted for the purposes

of science exclusively, and, although it undertakes the training of students, that is merely incidental to the purposes of science : see *Royal College of Music v. Westminster Vestry* (2). The purposes of science, however, do not include the purposes of the firms or persons who make use of science. Many of our great industrial concerns make use of science and, indeed, institute research laboratories for the purposes of science, but only as incidental to their industrial purposes. So, also, our technical schools make use of science and institute laboratories for the purposes of science, but only as incidental to the training of craftsmen. In such cases the laboratories are instituted for the purposes of individuals, not for the purposes of science except as incidental to the purposes of individuals. Trade research associations stand mid-way. They are instituted for the purposes of science and also for the purposes of the members who make use of science. Neither purpose is merely incidental to the other. Each is collateral to the other. The associations are instituted for the two purposes jointly, and are, therefore, not instituted for the purposes of science exclusively : see *Jenner Institute v. St. George's Assessment Committee* (3) and *School of Oriental and African Studies v. Westminster City Rating Authority* (4).

There are two cases, however, to which I must specifically refer. The first is *R. v. Institution of Civil Engineers* (5). In that case the Institution of Civil Engineers was held not to be exempted by the Act of 1843 from being rated. The decision was clearly right, but the court took the wrong test. The court there asked itself : What was the main and substantial object of the association ? Was it the purposes of science, or was it the purposes of its members ? That would have been a proper test under the Inland Revenue Acts, but it was a wrong test under the Scientific Societies Act, 1843, because it gave no effect to the word "exclusively." Applying that wrong test, the court thought that the main and substantial object of the institution was for the purposes of its members. That finding was, in effect, overruled by the decision of the House of Lords in *Inland Revenue Comrs. v. Forrest* (1). The House of Lords found that the main object of the institution was the promotion of science and it was on that account exempt from duty under the Customs and Inland Revenue Act, 1885, s. 11, but the House of Lords evidently thought that the institution had, as a subsidiary object, the purposes of its members, and that, therefore, the actual conclusion of the court in the rating case was right because the association was not instituted for the purposes of science exclusively, but also for the purposes of its members. This is, I think, what both LORD WATSON and LORD MACNAGHTEN had in mind in *Inland Revenue Comrs. v. Forrest* (1) (15 A.C. 348, 353, 354).

In a yet later revenue case—*Institution of Civil Engineers v. Inland Revenue Comrs.* (6) in the Court of Appeal—the judges thought that the actual conclusion in the rating case was virtually overruled by the House of Lords in the revenue case and that the rating case could only be supported on the ground that the institution was not supported by voluntary contributions. There is nothing in the report of the rating case, however, to suggest that the institution was not supported by voluntary contributions. It was assumed by everybody that it was, and it is obvious that, even if the members' subscriptions were not voluntary contributions, there may have been other contributions which were voluntary contributions. When LORD MACNAGHTEN said that he entirely agreed in the conclusion of that case, he meant that he agreed with the actual conclusion that the Institution of Civil Engineers was not instituted for the purposes of science exclusively. I cannot agree, therefore, with what was said about the rating case in *Institution of Civil Engineers v. Inland Revenue Comrs.* (6). The decision in the latter case was that the Institution of Civil Engineers was established for charitable purposes only. That decision has no bearing here. It is obvious that an association may be

established for charitable purposes only and yet not be instituted for the purposes of science exclusively. The other case to which I must particularly refer is *R. v. British Non-Ferrous Metals Association* (7). The Divisional Court there seems to have been much influenced by the *Civil Engineers* case (6) about "charitable purposes only." If they had put it on one side, as they might have done, because it was a decision on a different statute, they might, I think, have come to a different conclusion. Applying the principles I have stated, I think the decision in the *Non-Ferrous* case (7) was wrong.

The second question is : What is the proper way of seeing whether a society is "instituted" for those purposes. Does the exemption depend on the purposes of the society as defined in the memorandum or on the purposes which the society in fact pursues ? In my opinion, in cases where there is a memorandum of association, it should be regarded as the best evidence of the purposes for which the society was instituted. If it appears clearly from the memorandum that some of the purposes for which the society is instituted are not the purposes of science, literature, or the fine arts, or incidental thereto, then the society cannot claim the benefit of the exemption, even though it does not for the time being in fact pursue those alien purposes : *R. v. Cockburn* (8). If, however, there is no memorandum of association or if the memorandum is not clear on the point, as, for instance, if some of the purposes may or may not be incidental to the purposes of science, literature, or the fine arts, then regard may properly be had to the purposes which the society has, in fact, pursued, for, if it, in fact, pursues alien purposes, it cannot claim the exemption : *Purvis v. Traill* (9) (3 Exch. 350, per PARKE, B.) A society cannot get exemption from rates by saying that what it is doing is *ultra vires*. The court will assume that the purposes which it pursues are purposes for which it was instituted.

Applying these rules to the British Launderers' Research Association, the first task is to interpret the memorandum, articles and bye-laws of that association and see what are the purposes for which it was instituted. The members are firms in the laundry and cleaning industries who pay an annual subscription varying with the size of their businesses. Viewing the nature and objects of the association as a whole, I think it plain that the association is instituted, not only for the purposes of science, but also for the purposes of the members of the association and others engaged in the industry. It is instituted for the purposes (*inter alia*) of encouraging and improving the education of persons who are engaged in the said industry, of disseminating information by the giving of advice and making known the nature and merits of processes, and so forth. These purposes are not merely incidental to the purposes of science. The association cannot, therefore, be said to be instituted for the purposes of science exclusively. Even if I had any doubt on the interpretation of the articles, however, it is removed by the purposes which the association, in fact, pursues. The brochures about its activities (such as courses for students, development visits, and technical advice at members' laundries, and so forth) show that it pursues the purposes of its members with as much zeal as it pursues the purposes of science.

Counsel for the association says, however, that quarter sessions came to a conclusion of fact in his favour with which the Divisional Court should not have interfered. On this point it is important to distinguish between primary facts and the conclusions from them. Primary facts are facts which are observed by witnesses and proved by oral testimony, or facts proved by the production of a thing itself, such as an original document. Their determination is essentially a question of fact for the tribunal of fact, and the only question of law that can arise on them is whether there was any evidence to support the finding. The conclusions from primary facts are, however, inferences deduced by a process of reasoning from them. If and in so far as those conclusions can as

well be drawn by a layman (properly instructed on the law) as by a lawyer, they are conclusions of fact for the tribunal of fact and the only questions of law which can arise on them are whether there was a proper direction in point of law and whether the conclusion is one which could reasonably be drawn from the primary facts: see *Bracegirdle v. Oxley* (10). If and in so far, however, as the correct conclusion to be drawn from primary facts requires, for its correctness, determination by a trained lawyer—as, for instance, because it involves the interpretation of documents, or because the law and the facts cannot be separated, or because the law on the point cannot properly be understood or applied except by a trained lawyer—the conclusion is a conclusion of law on which an appellate tribunal is as competent to form an opinion as the tribunal of first instance.

Applying these principles to the Case Stated, the primary facts are stated in para. 2 (a) to (j). Paragraph 2 (k) contains a conclusion of fact, but it is not a conclusion on the question at issue. The question is whether the association was instituted for the purposes of science exclusively. That is a conclusion of law to be drawn from the primary facts, particularly, but not exclusively, from the memorandum and articles of association, and involves questions of interpretation of those documents and of the Act. The Divisional Court were able, and, indeed, bound to form their own opinion as to the proper conclusion to be drawn from those primary facts, and I find myself in entire agreement with them.

The final question is whether a society which is supported in part by a government grant can be said on that account to be “supported in part by voluntary contributions.” In my opinion, “voluntary contributions” are payments made without compulsion and without any view to recompense save the gratitude of one’s fellow men. They are payments made by private citizens for the public benefit, and out of a sense of public duty, thus relieving the State of an expenditure which otherwise it might have had to bear. They do not include government grants. No ordinary person would regard an institution which was supported only by government grants as being supported by voluntary contributions. This view is borne out by the words of LORD HALSBURY in *Savoy Overseers v. Art Union of London* (11) ([1896] A.C. 305). It is interesting to trace, however, how a different decision has been reached in some cases in the Divisional Court. When the *Royal College of Music* case (2) was in the Divisional Court there was evidence of voluntary contributions of £1,132, and a government grant of £500. The court, in its judgment, said that the voluntary contributions amounted to £1,632. That may well have been a slip. It was quite immaterial whether they were £1,132 or £1,632, but that casual statement has been treated in subsequent cases in the Divisional Court as a decision that a government grant is a voluntary contribution: see *Hornsey School of Art v. Edmonton Union* (12), the *Non-Ferrous Metal* case (7) and *Westminster City Council v. Royal United Service Institution* (13). None of these cases gives any reasons in support of that view. Counsel for the association argued that we should not upset those decisions after 50 years, but they were not uniform. All the time there was a decision of the Divisional Court the other way, for in *Liverpool v. West Derby Union* (14), one of the grounds of the decision was that a grant by an education authority was not a voluntary contribution. KENNEDY, J., said (92 L.T. 470) emphatically that to call it “a voluntary contribution is to do violence to the ordinary meaning of language.” Moreover, on the question whether annual subscriptions were voluntary contributions the House of Lords in the *Art Union* case (11) overruled a course of decisions going back for 50 years. So we should overrule those on this point. In my opinion, therefore, a government grant is not a voluntary contribution.

It follows that the association here is not entitled to exemption from rates. It is not instituted for the purposes of science exclusively, and it is not supported

in whole or in part by voluntary contributions. In my opinion, this appeal should be dismissed.

BUCKNILL, L.J. : I agree that the appeal should be dismissed for the reasons given by DENNING, L.J., in his judgment, to which I have nothing to add.

JENKINS, J. : I also agree.

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Appeal dismissed with costs.

Solicitors : *Callingham, Griffith & Bate* (for the association) ; *L. Worden*, Town Clerk, Hendon (for the Hendon Rating Authority).

[*Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.*]

B CARDIFF RATING AUTHORITY AND ANOTHER v. GUEST
KEEN BALDWIN'S IRON & STEEL CO., LTD.

[COURT OF APPEAL (Bucknill and Denning, L.J.J., and Jenkins, J.), November 24, 25, December 3, 13, 1948.]

C *Rating — Valuation — Plant and machinery — “ Unit basis ” — “ Contractor’s theory ” — Blast and fixed melting furnaces and coke ovens — Tilting melting furnaces and gas and blast mains — “ Structure ” — “ In nature of structure ” — Movability — Rating and Valuation Act, 1925 (c. 90), s. 22 (1) (b) — Plant and Machinery (Valuation for Rating) Order, 1927 (S.R. & O., 1927, No. 480), sched., class (4).*

D

A rating authority made a proposal to raise the assessment of the respondent's iron and steel works to £80,327 net annual value and £20,082 rateable value, and the proposal was confirmed by the assessment committee. On appeal to quarter sessions the assessment was reduced to £58,000 net annual value and £14,500 rateable value. The rating authority and the assessment committee appealed against the substituted assessment on the grounds that the recorder was wrong (i) in reducing the assessment by £6,090 net annual value in respect of 4 blast furnaces, 2 fixed steel melting furnaces, and 69 coke ovens, and (ii) in holding that 5 tilting melting furnaces, certain gas mains, and hot and cold blast mains were not rateable. The tilting furnaces each resembled a large bath 30ft. long and 18ft. wide weighing over 300 tons. They were made of steel plates and joists, bolted, riveted and welded together on site, and were lined with brickwork to a considerable thickness. They rested by their own weight on steel rollers placed on curved roller paths which were themselves supported on concrete piers. The gas and blast mains consisted of 13,000 ft. of steel piping made up of 20 ft. lengths, bolted together on site and resting on, but not attached to, steel vertical supports or metal bridge structures at a height of from 10 ft. to 35 ft. from the ground.

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The external diameter of the mains varied from 20 ins. to 96 ins. and the hot blast mains were lined with brickwork. It appeared from the Case that the recorder accepted in their entirety the capital values contained in the valuation made on behalf of the rating authority, and he also accepted the percentages by which, adopting the “ contractor’s theory ” of valuation, the net annual value proposed for the hereditament had been reached. The recorder, however, did not adhere to that theory of valuation when determining the value of the blast furnaces, melting furnaces, and coke ovens because they were “ short lived,” but he adopted instead the “ unit basis ” of valuation whereby he assumed a net annual value in respect of each unit. The rating authority argued that the works ought to have been valued as one entire hereditament, and to treat any particular plant as a separate hereditament was to err in law :—

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HELD : (i) there was no reason why the contractor's theory should

not be adopted for part of the works and the unit basis for the blast and fixed melting furnaces and coke ovens if for any reason that course seemed desirable, and it was not the law that the contractor's theory should be adhered to unless there was good reason for departing from it.

(ii) the tilting melting furnaces and gas and blast mains were "in the nature of a structure" within the meaning of class 4 of the schedule to the Plant and Machinery (Valuation for Rating) Order, 1927, and the furnaces were none the less so because they were movable, and, therefore, both were rateable.

South Wales Aluminium Co., Ltd. v. Neath Assessment Area Assessment Committee ([1943] 2 All E.R. 587), criticised.

Decision of the DIVISIONAL COURT OF THE KING'S BENCH DIVISION ([1948] 1 All E.R. 830), affirmed in principle, but appeal allowed in part.

[AS TO BASIS OF ASSESSMENT OF PLANT AND MACHINERY, see HALSBURY, Hailsham Edn., Vol. 27, pp. 392-394, paras. 826, 827; and FOR CASES, see DIGEST, Vol. 38, pp. 531-534, Nos. 772-795.]

Cases referred to :

- (1) *British Launderers' Research Association v. Central Middlesex Assessment Committee and Hendon Rating Authority*, (ante p. 21);
- (2) *Mersey Docks and Harbour Board v. Birkenhead Assessment Committee*, [1901] A.C. 175; 70 L.J.K.B. 584; 84 L.T. 542; 65 J.P. 579; 38 Digest 526, 735.
- (3) *South Wales Aluminium Co., Ltd. v. Neath Assessment Area Assessment Committee*, [1943] 2 All E.R. 587; 108 J.P. 45; 2nd Digest Supp.

APPEAL by the ratepayers (a company) and CROSS-APPEAL by the rating authority and the assessment committee from an order of the Divisional Court of the King's Bench Division, dated Apr. 20, 1948 ([1948] 1 All E.R. 830), on a Case stated by the recorder of Cardiff.

Cardiff Rating Authority made a proposal to increase the assessment of the iron and steel works, occupied by the company at East Moors, Cardiff, and known as the Dowlais Works, to £80,327 net annual value and £20,082 rateable value. On Aug. 4, 1943, the Cardiff Assessment Committee, having heard the proposal and the company's objections thereto, confirmed the proposal. The company appealed to quarter sessions, who heard the appeal on Sept. 26, 27 and 28, 1944, and on May 23, 1945, in a reserved judgment, allowed the appeal and reduced the assessment to £58,000 net annual value and £14,500 rateable value. The rating authority and the assessment committee appealed to the Divisional Court on the ground that (i) the "contractor's theory" of valuation should be applied to the valuation of certain blast furnaces, melting furnaces, and coke ovens comprised in the hereditament, and (ii) certain overhead gas mains, cold blast mains and hot blast mains, and certain melting furnaces known as tilting furnaces comprised in the hereditament were rateable plant and machinery. The company formally raised the question of the rateability of certain electrical equipment which the court was precluded from deciding in their favour by the decision of the Court of Appeal in *Richard Thomas & Co., Ltd. v. Monmouth County Valuation Committee and Assessment Committee* ([1944] 1 All E.R. 417). The Divisional Court held that the recorder was not wrong in law in adopting a "unit basis" of valuation in certain instances, but that he erred in deciding on the basis of movability that the tilting furnaces and gas and blast mains were not rateable. The Court of Appeal affirmed the findings of the Divisional Court, but allowed the appeal in respect of the adoption of certain figures by the Divisional Court.

Comyns Carr, K.C., and *R. Gwyn Rees* for the company.

Rowe, K.C., and *Roskin* for the rating authority.

Roskin for the assessment committee.

Cur. adv. vult.

Dec. 3. **BUCKNILL, L.J. :** I will ask DENNING, L.J., and JENKINS, J., to give their judgments.

The following judgments were read.

DENNING, L.J. : The learned recorder adopted the contractor's basis for the steel works as a whole, but reduced the figure by reason of the short life of the furnaces and coke ovens. It is said that he made an error of law in so doing.

I have had occasion in *British Launderers' Research Association v. Central Middlesex Assessment Committee* (1) to distinguish between a question of fact and a question of law, and I need not repeat what I there said. Applied to cases such as the present, I have no doubt that the "net annual value" of a hereditament is a conclusion of fact. The proper figure can be as well ascertained by a layman, properly directed on the law, as by a lawyer. It is the rent which a hypothetical tenant from year to year might reasonably be expected to pay. Once the net annual value has been found by the tribunal of fact, the only questions of law which can arise are whether the tribunal of fact properly directed itself, and whether its conclusion was one to which it could reasonably come. If it came to its conclusion of fact by a process of reasoning which was demonstrably incorrect, as, for instance, if it had regard to a consideration which was entirely irrelevant, that would be an error in point of law. That is what counsel for the rating authority says has happened here. He says that the contractor's basis should be taken without any deduction for the short life of the furnaces and coke ovens. In applying the contractor's basis, the tribunal of fact assumes that a hypothetical tenant would pay a rent equal to reasonable interest on the effective capital value. Counsel says that a hypothetical landlord who built a furnace and agreed to repair it would reasonably expect a rent equal to the interest on the capital outlay, together with an amount sufficient to create a sinking fund to meet the cost of rebuilding after five years. If the landlord was not bound to repair, but the hypothetical tenant was, the rent would be the interest on the capital outlay, leaving the tenant to provide his own sinking fund. Counsel, however, admitted that that test would not be exhaustive. A hypothetical tenant would have regard to the amount he could earn by the use of the furnace. That might depend on uncertain factors, such as the state of the market, or black-out conditions in war time. Counsel says that, if the assessment had been reduced for such reasons as those, he could not have complained, but that it was reduced because of the short life, which was a wrong reason. Counsel also admitted that the initial capital outlay would not be the right figure to work on. It should be the effective capital value at the time of assessment, which might be a very different figure, but he said that the effective capital value would take into account the short life of the furnace, and that, therefore, once the effective capital value was ascertained, as it was here, no further deduction should be taken on account of the short life. If the contractor's basis was a test prescribed by law, I think that the argument of council for the rating authority would be correct, but it is nothing of the kind. It is only one of the ways in which the tribunal of fact can form some idea of what a hypothetical tenant would pay. No one ever lets or rents a steel works. Even when the contractor's basis is taken, the assessment on that basis is open to great variations up and down, as, for instance, in assessing the effective capital value and in deciding what percentage to take on it. Take a furnace. The effective capital value at the beginning of its life of five years would be very different from that at the end of it. What is the figure to be taken? The possible variations may become so great that the contractor's basis ceases to be a significant factor in the assessment. In such a situation the tribunal of fact may prefer to take some other basis, such as the "unit basis." That is a basis which is often applied when there is a composite plant consisting of a number

of units, such as a battery of furnaces. Any one unit will obviously have a different value from any other, according to its age. As one becomes useless, a new one takes its place, and so on. In the case of such a battery, a convenient method is to assess it at so much a unit and multiply by the number of units. In applying the unit basis the tribunal has before it the evidence of experts, giving their opinion of the value based on their experience and on comparison with the assessments made on similar hereditaments in other parts of the country, as, for instance, the assessment of a battery of furnaces in Durham taken at so much per unit, that is, per furnace. Then, using those figures as a guide and making allowance for individual factors, the tribunal makes its own assessment. No one can say that that is not a proper basis of assessment, especially as it helps to secure uniformity of treatment over the industry. The truth is that in these cases the tribunal of fact can approach their task from several possible bases. The basis which they take for one part of the hereditament may be different from that for another. They may work out figures on two different bases and arrive at an assessment in between the two. The selection of the basis or bases and the application of them, singly or in combination, are only methods of arriving at the final figure of assessment. The parties can urge before quarter sessions all their arguments on this basis or that, but, once quarter sessions have fixed the figure, that, as a rule, is final. An appellate court will not interfere unless the method is demonstrably incorrect or the figure is so obviously wrong that it must have been reached by an incorrect method: see *Mersey Docks and Harbour Board v. Birkenhead Assessment Committee* (2).

In the present case I do not think that the learned recorder was demonstrably incorrect. He took the contractor's basis for part of the works and the unit basis for the furnaces and coke ovens. He was entitled to do that. The reason which he gave for not applying the contractor's basis to the furnaces and coke ovens (the shortness of their life) may or may not be a good reason, but that does not matter. It was not necessary for him to give any reasons for rejecting the contractor's basis. If, for any reason, he thought that it was better to take the unit basis, he was entitled to take it. The argument of the rating authority comes to this, that, because there was no good reason for departing from the contractor's basis, therefore, the learned recorder should have adopted it. If we were to accede to that view, it would mean that as a matter of law the learned recorder ought to adopt the contractor's basis, but that is not the law.

The learned recorder held that the tilting furnaces and the mains were not rateable at all. They are, of course, parts of the plant, and are only rateable if they come within the categories specified in class 4 of the Plant and Machinery (Valuation for Rating) Order, 1927. The tilting furnaces come within "furnaces" and the mains come within "flues" and "flumes and conduits," but, nevertheless, in order to be rateable each must be "a building or structure" or "in the nature of a building or structure." The learned recorder has held that these are not structures, or in the nature of structures, and counsel for the company says that his finding is a finding of fact with which an appellate court should not interfere. That is, however, an over-simplification. The primary facts, that is, the real facts relating to the physical state of the tilting furnaces and mains, are not in dispute. The question is what is the proper conclusion from those primary facts. In so far as that involves the proper interpretation of the words of the Order, it is a question of law. Once, however, those words have received a clear interpretation, which can be applied by laymen as well as by lawyers, then, so long as there is a proper direction as to their meaning, the conclusion of fact is one for a tribunal of fact, with which an appellate court will not interfere unless the conclusion is one which could not reasonably be drawn from the primary facts.

In the present case the learned recorder seems to have thought that these were not structures or in the nature of structures because they were moveable. In my opinion, that was a misdirection. A structure is something which is constructed, but not everything which is constructed is a structure. A ship, for instance, is constructed, but it is not a structure. A *structure* is something of substantial size which is built up from component parts and intended to remain permanently on a permanent foundation, but it is still a structure even though some of its parts may be moveable, as, for instance, about a pivot. Thus, a windmill or a turntable is a structure. A thing which is not permanently in one place is not a *structure*, but it may be "in the nature of a structure" if it has a permanent site and has all the qualities of a structure, save that it is on occasion moved on or from its site. Thus, a floating pontoon, which is permanently in position as a landing stage beside a pier, is "in the nature of a structure," even though it moves up and down with the tide and is occasionally removed for repairs or cleaning. It has, in substance, all the qualities of a landing stage built on piles. So, also, a transporter gantry is "in the nature of a structure," even though it is moved along its site. It has the same qualities as a fixed gantry, save that it moves on its site. Applying this interpretation to the facts of this case, I think that a tilting furnace is "in the nature of a structure." It has a permanent site and has the same qualities as any other furnace, save that it moves. The only difference is that, in order to run off the molten ore, it is tipped up instead of being tapped. Again, the mains are "in the nature of a structure." They have a permanent site and have the same qualities as any fixed mains, save that they are moved occasionally for cleaning or repairs.

I must say a word as to *South Wales Aluminium Co., Ltd. v. Neath Assessment Area Assessment Committee* (3). If that decision turned on the question whether the cell was in the nature of a building, I cannot agree with it. The Order requires the thing in question to be "in the nature of a structure," and a structure is often not a building. A crane gantry or a turntable is a structure, but not a building. Again, if the decision turns on the fact that the cell was a receptacle, I cannot agree with it. A vat is a receptacle, but it may also be a structure.

On the primary facts in the present case there was only one conclusion to which a tribunal could reasonably come, namely, that the tilting furnaces and mains were "in the nature of" structures, and were, therefore, rateable. I find myself in full agreement with the Divisional Court on this point. The Divisional Court, however, assessed the tilting furnaces on the contractor's basis—not on the unit basis. I cannot understand why they did so. The learned recorder had made it clear that if they were rateable he would have assessed them on the same basis as the other furnaces, namely, the unit basis. The Divisional Court held that they could not interfere with his assessment in regard to the other furnaces, and I do not see how they could interfere in regard to the tilting furnaces. The figure of £5,937 found by the Divisional Court should, therefore, be reduced to £2,437. I say nothing as to the electrical plant. The point was not argued before us, as it is covered by a previous decision of this court. The result is that the Divisional Court were right in dismissing the appeal by the rating authority in respect of the assessment of the furnaces and coke ovens and right in allowing the appeal by the rating authority in respect of the rateability of the tilting furnaces and mains, but wrong in their assessment of them. That means that the appeal of the occupiers should be allowed and the assessment varied accordingly, and the appeal of the rating authority should be dismissed.

JENKINS, J.: This case concerns the net annual value and rateable value of Guest Keen Baldwins Iron and Steel Co., Ltd.'s Iron and Steel Works at East Moors in the city of Cardiff, known as the Dowlais Works. The com-

pany appealed to Cardiff Quarter Sessions against an increased assessment of £80,327 net annual value and £20,082 rateable value in respect of the hereditament in question which had been proposed by the Cardiff Rating Authority, and, on objection by the company, confirmed by the Cardiff Assessment Committee. At quarter sessions the learned recorder allowed the company's appeal, substituted for the above-mentioned assessment an assessment of £58,000 net annual value and £14,500 rateable value, and ordered that the company's costs should be paid as to two-thirds by the rating authority and as to one-third by the assessment committee. From that decision the rating authority and assessment committee appealed by way of Case Stated to the King's Bench Division on (in effect) three questions. They claimed (1) that the learned recorder was wrong in reducing the assessment by £6,090 (net annual value) in respect of four blast furnaces, two fixed steel melting furnaces and sixty-nine coke ovens; (2) that he was wrong in holding that five tilting furnaces were not rateable; and (3) that he was wrong in holding that certain gas mains and hot and cold blast mains were not rateable. The Divisional Court, in a considered judgment dated Apr. 20, 1948, held that the learned recorder's decision should be upheld on question (1), but that the appeal should be allowed on questions (2) and (3), with consequential additions to the assessment of £58,000 (net annual value) arrived at by him of £5,937 (net annual value) on question (2) and £1,234 (net annual value) on question (3), making a total increase of £7,171; that the order as to costs made by the learned recorder should be revoked; and that the rating authority and the assessment committee, as appellants, should have their costs of the appeal. A discussion as to costs, following the delivery of the judgment, resulted in a decision to the effect that the company should pay half the costs of the rating authority and the assessment committee in the court of quarter sessions in addition to their costs of the appeal. The order of the Divisional Court, accordingly, increased the assessment from £58,000 to £65,171, with the directions as to costs which I have mentioned. The company now appeals from that order, contending (in effect) (a) that the Divisional Court was wrong in reversing the learned recorder's decision on questions (2) and (3); (b) that, even if the Divisional Court's decision on question (2) was right, the consequential increase on that account should have been £2,437 only and not £5,937; and (c) that in any event the learned recorder's decision as to the costs of the hearing before him should not have been disturbed. There is a cross-appeal by the rating authority and the assessment committee against the Divisional Court's refusal of their appeal on question (1). At the hearing before the Divisional Court reference was, by consent, made to the learned recorder's judgment to amplify or explain his decisions on the three questions in issue, and a similar course was adopted before this court.

Question (1), the subject of the cross-appeal, which, as I have already mentioned, concerns the learned recorder's reduction of the assessment by £6,090 in respect of four blast furnaces, two fixed steel melting furnaces, and sixty-nine coke ovens, arises in this way. The learned recorder accepted in the main the method of valuation propounded by the rating authority and assessment committee, which was the method known as "the contractor's theory" of valuation. This method, as I understand it, consists of estimating, by reference to its condition, efficiency, and so forth, the effective capital value of a given subject of assessment, and taking as its net annual value a percentage estimated as representing the return which a contractor providing the subject of assessment for letting or hire to an occupier would expect to receive on his outlay represented by the effective capital value. The learned recorder made certain adjustments in favour of the company in the valuation arrived at on the "contractor's theory," against which the rating authority and assessment committee did not seek to appeal, but as regards the four blast furnaces, two

fixed steel melting furnaces, and sixty-nine coke ovens he rejected this method altogether in favour of an alternative method propounded on behalf of the company known as the "unit method" of valuation. This method, as I understand it, involves a direct estimate of the net annual value of the given subject of assessment by reference to comparative evidence of the net annual values assessed on similar subjects elsewhere. It seems to be called the "unit" system because it is commonly applied to multiple installations, such, for instance, as coke ovens. If, for example, the subject in question is a battery of five coke ovens, evidence may be adduced of the annual values placed on batteries of varying numbers of similar coke ovens elsewhere to support a figure of so much per oven as the "unit" in the calculation, and the "unit" figure so arrived at multiplied by five will, according to this method, represent the annual value of the battery in question. The learned recorder found that the blast furnaces and melting furnaces have in part to be renewed or rebuilt every five years at a cost not far below their original cost of construction and that the coke ovens had an overhaul, at proportionately similar expenditure, once in every fifteen years. On these facts he held (in effect) that, having regard to the "short-lived" character of the plant in question, "it would be very forced and anomalous from the tenant's point of view" to base the rent on the capital value, and that such parts of the blast furnaces, melting furnaces, and coke ovens as had a shorter life than twenty years should be valued, not on that basis, but on a unit valuation. He then proceeded to fix figures of net annual value for each of the four blast furnaces, two fixed steel melting furnaces, and sixty-nine coke ovens, the resulting aggregate figure being less by £6,090 than the figure representing the net annual value of the same items arrived at on the "contractor's theory."

Counsel for the rating authority and assessment committee strove in the Divisional Court, and again before us, to show that, in arriving at this conclusion, the learned recorder had erred in law. I entirely agree with the Divisional Court that no error in law has been made out. The adoption of the "unit" method for these particular items was, I think clearly, as the Divisional Court held, no more than a step in the calculation of the net annual value of the hereditament as a whole and did not involve the error of treating those items as a separate hereditament. The question whether the "contractor's theory" of valuation, in relation to assets such as these, makes adequate allowance for the hypothetical tenant's liability under the Rating and Valuation Act, 1925, s. 22 (1) (b) to

" . . . bear the cost of the repairs and insurance and the other expenses, if any, necessary to maintain the hereditament in a state to command "

the estimated rent, is, I think, clearly a question of fact. Counsel for the rating authority and assessment committee contended that full allowance was made for this liability by the "contractor's theory," based, as it is, on the "effective capital value" of the item in question and not simply on capital cost without any allowance for obsolescence and so forth. Counsel for the company contended the contrary. I fail to see how any conclusion in favour of either contention could be reached without hearing all the evidence on both sides. The learned recorder, having heard the evidence, decided (in effect) that the "contractor's theory" did not make adequate allowance for the hypothetical tenant's liability to repair and maintain these "short-lived" assets. That is simply a finding of fact, and I can see no justification for reopening it on appeal. Counsel for the company further argued (as I understood him) that, although under s. 22 (1) (b) of the Act of 1925 the rent which the hypothetical tenant would be prepared to pay is estimated on the footing that he is to be liable for the cost of repairs and maintenance, the life of the asset in question is irrelevant when the "contractor's theory" is followed because the hypothetical contractor would expect, in addition to the maintenance of the capital value

of the asset, precisely the same return on his outlay in providing it, whether its life was 5 or 50 years. I can derive no assistance from this line of argument. So far as I can see, it can be contended with at least equal plausibility that a tenant who would be prepared to pay, say, 5 per cent. on a capital value of, say, £100,000, in addition to providing a yearly contribution to a sinking fund at a rate sufficient to replace the £100,000 in 50 years, would only be prepared to pay a substantially lower percentage if his yearly sinking fund contribution had to be at a rate sufficient to replace the £100,000 in only 5 years, for, if it is assumed that the hypothetical tenant would be equally prepared to pay 5 per cent. in both cases, one gets the result (ignoring interest on sinking fund contributions) that each year's enjoyment of the assets would cost the hypothetical tenant in the former case only £7,000 and in the latter case as much as £25,000. Trade conditions might, of course, be such that the hypothetical tenant could see his way to earning by his use of the wasting asset upwards of a quarter of its capital value each year. If so, the hypothetical contractor would, no doubt, get his 5 per cent. If not, he would have to abate his demands, or else go without a tenant. Considered *in vacuo*, that is to say, apart from the facts and circumstances of a particular case, this argument seems to me to carry the matter no further one way or the other, and I fail to see how it can in any way advance the contention that the learned recorder erred in law in refusing to apply the "contractor's theory" with respect to the items in question. For these reasons I am of opinion that the Divisional Court was clearly right in affirming the learned recorder's decision on question (1).

Questions (2), as to the rateability of the five tilting furnaces, and (3), as to the rateability of certain gas mains and hot and cold blast mains, can be taken together, as, so far as these questions involve any question of law, both turn on the true construction of the criterion of rateability provided with respect to things of these kinds provided by the Rating and Valuation Act, 1925, s. 24, and the Plant and Machinery (Valuation for Rating) Order, 1927, made thereunder. Section 24 (putting it shortly) provides by sub-s. (1) that (with an exception not material for the present purpose) in the valuation of any hereditament for rating purposes :

"(a) All such plant or machinery in or on the hereditament as belongs to any of the classes specified in sched. III to this Act shall be deemed to be a part of the hereditament : (b) Subject as aforesaid, no account shall be taken of the value of any plant or machinery in or on the hereditament."

Sub-sections (3), (4) and (5) contain machinery under which the Plant and Machinery (Valuation for Rating) Order, 1927, has been made and takes effect as if it were substituted for sched. III to the Act. The Order sets out in a schedule the various "classes of machinery and plant to be deemed to be part of the hereditament." The relevant class for the present purpose is class 4. That class contains an enumeration of particular items of machinery and plant introduced by these words :

"The following parts of a plant or a combination of plant and machinery whenever and only to such extent as any such part is, or is in the nature of, a building or structure."

The enumeration of particular items includes (among a great many other things) "furnaces," "flues," and "flumes and conduits." It also includes "elevators and hoists," "floating docks and pontoons with any bridges or gangways not of a temporary nature used in connection therewith," "foundations, settings, gantries, supports, platforms and stagings for plant and machinery," "tanks," "vats," and "windmills."

The facts found by the learned recorder with respect to the five tilting furnaces are stated in the Case Stated as follows :

A "Each of these tilting furnaces is a furnace resembling a very large bath, in which metal is melted, and which is capable of being tilted and is in fact tilted in operation by means of an electric motor for the purpose of pouring molten metal and slag from it into other receptacles. Each tilting furnace is made of steel plates and joists, bolted, riveted and welded together on site, and is lined internally with special brick lining of considerable thickness. The approximate size, weight and capacity of a tilting furnace are as follows : Length, 30 ft. ; width, 18 ft. ; superficial area (of molten metal when full), 685/715 sq. ft. ; weight, over 300 tons ; capacity, 200/250 tons of steel. Each tilting furnace rests by its own weight on steel rollers resting on curved roller paths, which are themselves supported on concrete piers. For the purpose of renewing the rollers and roller paths when necessary it is possible by the use of suitable appliances to lift each tilting furnace off its supporting piers."

B The facts found by the learned recorder with respect to the gas mains and hot and cold blast mains are stated in para. 16 of the Case Stated as follows :

C "Upon the said hereditament are 13,000 ft. run of overhead gas mains, cold blast mains and hot blast mains, made up of 20 ft. lengths, bolted together on site, and carried from one point to another throughout the steelworks and resting on, but not attached to, steel vertical supports or metal bridge structures at a height of from 10 ft. to 35 ft. above ground. D The external diameter of these mains varies from 20 ins. to 96 ins. About one-third is 60 ins. or over : one-third is between 36 ins. and 60 ins. The hot blast mains are lined with brickwork so as to conserve the heat, and outside the brickwork is the outer casing of steel."

I should add that there was no dispute as to the rateability of the supporting structures as distinct from the mains themselves.

E The learned recorder's reasons for holding that the items in question were not rateable are not stated in the Case. After stating the facts as above, he disposes of the matter in the following two short paragraphs : "*Contentions*. (18). It was contended before me by the [company] that the plant and machinery referred to . . . was not rateable plant and machinery, while the [rating authority] contended that the said plant and machinery was rateable in law. *Decision*. (19). I accept the contentions of the [company] and held that all the aforesaid plant and machinery was not rateable in law or in fact and excluded the same when arriving at the aforesaid net annual value of £58,000." The Divisional Court, however, on reference to the relevant passages in the learned recorder's judgment, came to the conclusion that the learned recorder's reason for his decision was that these items, being moveable, and the tilting furnaces being, moreover, moved when in use, could not be "buildings or structures or in the nature of buildings or structures" within the meaning of the opening words of class 4 in the schedule to the Order of 1927. I agree with the Divisional Court that the judgment does show quite clearly that the learned recorder's decision did proceed on this ground. In other words, I think he construed the requirement to the effect that items of the types described in class 4 must, in order to be rateable, be "buildings or structures or in the nature of buildings or structures" as making physical attachment to the soil an essential condition of rateability in these cases. The Divisional Court further held (in effect) that this was a misconstruction of the criterion of liability prescribed in the Order of 1927 with respect to class 4, and, therefore, involved an error in law. With this conclusion I also agree.

H Counsel for the company contended that the learned recorder, in deciding that these particular items were not rateable, was simply deciding questions of

fact on which his conclusion should not have been disturbed by the Divisional Court. I quite agree that in general the question whether a particular item of one of the types listed in class 4 is or is not a building or structure or in the nature of a building or structure is a question of fact, but the learned recorder here has placed a special (and, as I have said, in my view, erroneous) construction on the expression "building or structure or in the nature of a building or structure" and has held that the particular items in question do not fall within the expression as so interpreted. That is clearly a decision involving a question of law, namely, the true construction of the relevant part of the Order of 1927. It would be undesirable to attempt, and, indeed, I think impossible to achieve, any exhaustive definition of what is meant by the words "a building or structure or in the nature of a building or structure." They do, however, indicate certain main characteristics. The general range of things in view consists of things built or constructed. I think, in addition to coming within this general range, the things in question must, *in relation to the hereditament*, answer the description of buildings or structures, or, at all events, be in the nature of buildings or structures. That suggests built or constructed things of substantial size—I think of such size that they either have been in fact, or would normally be, built or constructed on the hereditament as opposed to being brought on to the hereditament ready made. It further suggests some degree of permanence in relation to the hereditament, *i.e.*, things which, once installed on the hereditament, would normally remain *in situ* and only be removed by a process amounting to pulling down or taking to pieces. I do not, however, mean to suggest that size is necessarily a conclusive test in all cases or that a thing is necessarily removed from the category of buildings or structures or things in the nature of buildings or structures because by some feat of engineering or navigation it is brought to the hereditament in one piece. For instance, floating docks or pontoons, items specifically mentioned in class 4, would not, I think, be excluded merely on account of having been towed complete to the hereditament instead of having been built or constructed there. The question whether a thing is or is not physically attached to the hereditament is, I think, certainly a relevant consideration, but I cannot regard the fact that it is not so attached as being in any way conclusive against its being a building or structure or in the nature of a building or structure. This is, I think, clearly shown by some of the items specifically mentioned in class 4, *e.g.*, floating docks and pontoons would necessarily not be so attached. Nor can I regard the fact that a thing has a limited degree of motion in use, either in relation to the hereditament or as between different parts of itself, necessarily prevents it from being a structure or in the nature of a structure if it otherwise possesses the characteristics of such. The list in class 4 includes such things as elevators and hoists, transporter gantries, transversers and turntables, and weighbridges. It is true that things in class 4 are rateable only "to such extent" as they are buildings or structures or in the nature of buildings or structures, but I cannot regard this as necessarily excluding from rateability the moveable parts of things which from their inclusion in the list are clearly regarded as capable of being in the nature of buildings or structures and from their very descriptions must clearly possess some degree of mobility in relation to the hereditament or as between the different parts of themselves.

On the facts found by the learned recorder, it is, in my view, clear that, once the false criterion of moveability or physical attachment to the hereditament is discarded, the tilting furnaces and mains, to which questions (2) and (3) relate, are structures or in the nature of structures within the meaning of the Order of 1927. I think, so far as the tilting furnaces are concerned, the true view is that the entire installation in each case from the concrete supports upwards constitutes a single structure or thing in the nature of a structure

for this purpose, but I would be prepared, if necessary, to hold that the actual body of the furnace in each case is in itself a structure or in the nature of a structure, in which case the supports would still be rateable under the special item of foundations, etc., included in class 4. I do not, however, think that the separate mention in the class of foundations, etc. (which would include the foundations, etc., of non-rateable things) precludes the supporting members of a given piece of plant from being treated as forming part of and constituting one entire structure with the piece of plant in question where, as I think is the case as regards any one of the tilting furnaces here, the whole, from supports upwards, constitutes a single functional entity.

For these reasons, I agree with the Divisional Court that the learned recorder's decision on questions (2) and (3) cannot stand, and that the items in question should be held to be rateable. With respect, however, it seems to me to be clear that the proper addition to the net annual value on account of the five tilting furnaces should be £2,437 only, being the figure arrived at by the learned recorder on the "unit" basis of valuation, which he held (with the approval of the Divisional Court) to be the method by which "short-lived" assets should be valued. Accordingly (apart from the question of costs, which is reserved for further argument), I would only allow the appeal to the extent of substituting £2,437 for £5,937 as the increase in the net annual value to be made in respect of the five tilting furnaces, and would dismiss the cross-appeal.

BUCKNILL, L.J.: I agree with the judgments which have been delivered by my brethren, and have nothing to add.

Dec. 13. **BUCKNILL, L.J.:** As regards the costs, we think that the order of the learned recorder should be restored as regards the costs before him. As regards the costs in the Divisional Court and the costs here, we think that the proper order is that each party should pay their own costs.

Appeal allowed. Assessment reduced to £61,671. Recorder's order as to costs restored, and no costs in the Divisional Court or in the Court of Appeal.

Solicitors: *Church, Rendell & Co.*, agents for *Llewellyn & Hann*, Cardiff (for the company); *Theodore Goddard & Co.*, agents for *S. Tapper Jones*, town clerk, Cardiff, and for *W. J. Thomas*, clerk to Cardiff Assessment Committee (for the rating authority and the assessment committee).

[*Reported by C. St.J. NICHOLSON, Esq., Barrister-at-Law.*]

BISHOPSGATE MOTOR FINANCE CORPORATION, LTD. v. TRANSPORT BRAKES, LTD.

[COURT OF APPEAL (Bucknill, Singleton and Denning, L.JJ.), November 29, 1948.]

Sale of Goods—Market overt—Market constituted by charter or statute—Private sale—Goods offered by auction in public market—Subsequent private sale in same market—Sale of Goods Act, 1893 (c. 71), s. 22 (1).

A let a motor car on hire purchase to B who put it up for auction at a public market. The bidding did not reach the reserve price and the motor car was withdrawn, but, in the course of the same market, B sold it privately to C, who had been present at the auction, but had made no bid, and who bought it in good faith and without knowledge of any defect in B's title. C subsequently sold the car to D. The right to hold the market had been granted by a charter in 1747 which had been amended by the Maidstone Markets Act, 1824, and the Ministry of Health Provisional Orders Confirmation (Maidstone and Stockton-on-Tees)

Act, 1933. Cars were sold in the market by private sale as well as by public auction, a dealer or owner often selling a car himself after an auctioneer had failed to sell it. In an action by A against D for the return of the car or damages, it was contended by A that the sale was not in a market overt because (a) the effect of the statutes was to extinguish the charter, and a market overt could rest only on a grant and not on a statute; (b) the protection of a sale in market overt applied only where the goods were put up for sale by a trader in the market; and (c) the sale, being by private treaty, was not "according to the usage of the market," within the Sale of Goods Act, 1893, s. 22 (1).

HELD: on construction the Acts of 1824 and 1933 did not extinguish the charter of 1747, but, assuming that they did, a market overt can be established under statutory powers.

Moyce v. Newington (1878) (4 Q.B.D. 32; 39 L.T. 535), *not followed*.

Ganly v. Ledwidge (1876) (I.R. 10 C.L. 33) and *Delaney v. Wallis and Sons* (1884) (15 Cox C.C. 525), *applied*.

(ii) there was no authority for the proposition that, to obtain the protection of market overt, goods must be sold by a trader in the market; if goods were exposed for sale and sold in the market in the day time, a sale was equally good if made by their owner as if made, for example, by an auctioneer.

The Market-Overt Case (1596) (5 Co. Rep. 83 b), *distinguished*.

(iii) since cars were sold in the market by private sale as well as by public auction, the car was sold to C "in market overt, according to the usage of the market," within the Sale of Goods Act, 1893, s. 22 (1), and, therefore, C was able to give a good title to D, with the result that A could not recover.

Observations by BUCKNILL, L.J., and DENNING, L.J., on the effect of the registration book of a motor car.

Decision of HUMPHREYS, J. ([1948] 1 All E.R. 408), *affirmed*.

[AS TO SALE IN MARKET OVERT, see HALSBURY, Hailsham Edn., Vol. 22, pp. 99-102, paras. 179-184; and FOR CASES, see DIGEST, Vol. 33, pp. 560-563, Nos. 428-487.]

Cases referred to:

- (1) *Joblin v. Watkins & Roseveare (Motors), Ltd.*, (1948), 64 T.L.R. 464.
- (2) *Manchester Corpn. v. Lyons*, (1882), 22 Ch.D. 287; 47 L.T. 677; 33 Digest 551, 342.
- (3) *Moyce v. Newington*, (1878), 4 Q.B.D. 32; 48 L.J.Q.B. 125; 39 L.T. 535; 43 J.P. 191; 33 Digest 560, 434.
- (4) *Ganly v. Ledwidge*, (1876), I.R. 10 C.L. 33; 33 Digest 560, 434i.
- (5) *Delaney v. Wallis & Sons*, (1884), 15 Cox C.C. 525; 33 Digest, f. 563.
- (6) *Lee v. Bayes*, (1856), 18 C.B. 599; 25 L.J.C.P. 249; 27 L.T.O.S. 157; 20 J.P. 694; 33 Digest 560, 431.
- (7) *Ward v. Stephens*, (1886), 12 V.L.R. 378; 33 Digest 560, 428i.
- (8) *Market-Overt Case*, (1596), 5 Co. Rep. 83 b; *sub nom.*, *Worcester's (Bp.) Case*, Moore, K.B. 360; *sub nom.*, *Palmer v. Wolley*, Cro. Eliz. 454; *sub nom.* *Anon.*, Poph. 84; 33 Digest 561, 458.
- (9) *Crane v. London Dock Co.*, (1864), 5 B. & S. 313; 4 New Rep. 94; 33 L.J.Q.B. 224; 10 L.T. 372; 28 J.P. 565; 33 Digest 561, 444.
- (10) *Clayton v. Le Roy*, [1911] 2 K.B. 1031; 81 L.J.K.B. 49; 104 L.T. 419; 75 J.P. 229; *reversd. on other grounds*, [1911] 2 K.B. 1046; 33 Digest 562, 461.
- (11) *Comyns v. Boyer*, (1596), Cro. Eliz. 485; 33 Digest 531, 79.

APPEAL by the plaintiffs from a judgment of HUMPHREYS, J., dated Feb. 25, 1948, and reported [1948] 1 All E.R. 408, dismissing the plaintiffs' claim for the return of a motor car or for damages for its detention.

The plaintiffs were the owners of the car which they let under a hire-purchase agreement to one Bronstein. Bronstein sold it in a public market to a third party, who subsequently sold it to the defendants. HUMPHREYS, J., held that the plaintiffs could not recover as the property had passed by sale in market overt to the third party and through him to the defendants. The Court of Appeal now dismissed the plaintiffs' appeal. The facts appear in the judgment of

A BUCKNILL, L.J.

I. H. Jacob for the plaintiffs.

Skelhorn for the defendants.

Bernard Lewis for the third party.

B BUCKNILL, L.J. : In my opinion, this appeal must be dismissed. The action was brought by the plaintiffs for the return of a motor car or for £340—its value—but in the notice of appeal the sum of only £183 15s. 4d. is claimed, having regard to the fact that some further payments have been made by the hirer in respect of the contract of hire purchase. The defence raised was that the car was sold in market overt and that the defendants are entitled to take advantage of the Sale of Goods Act, 1893, s. 22 (1), which is in the following terms :

C “Where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller.”

D In this case there is no question about the buyer buying in good faith, and, so far as any notice of any defect or want of title on the part of the seller is concerned, I will deal with that point when I speak about the registration book of the car.

E On Oct. 7, 1946, the plaintiffs handed over the possession of the car under a hire purchase agreement to one Mark Bronstein. In the agreement Mr. Bronstein is described as a married man and a householder, living at 28, Albert Gardens, Stepney, E.1., a cabinet maker, with a banking account. In para. 6 of the hire purchase agreement it is stated that :

“ . . . the vehicle shall remain the absolute property of the owners and the hirer shall not have any right or interest in the same other than that of hirer under this agreement.”

F The price of the car was to be £340. Bronstein made the first payment of £115, and the balance was to be paid by eighteen monthly instalments of £13 18s. 10d. on the seventh day of each month commencing in November, 1946. On Tuesday, Oct. 29, 1946, before the first monthly instalment was paid, Bronstein took the car to Maidstone and asked some auctioneers, who had a place in Maidstone market, to sell it by auction. G He was in possession of the registration book which contained his name and address—“Mark Bronstein, 28, Albert Gardens, Commercial Road, E.1.” Counsel for the plaintiffs has referred us to *Joblin v. Watkins & Roseveare (Motors), Ltd.* (1) in which CROOM-JOHNSON, J., held that the registration book of a car was not a document of title within the Factors Act, 1889, s. 1 (4). It has to be pointed out that the Road Vehicles (Registration and Licensing) Regulations, 1941, reg. 9 (1), provides :

H “On the sale or other change of ownership of a vehicle the then owner of the vehicle shall deliver the registration book to the transferee or other new owner and forthwith notify in writing the change of ownership to the council whose name appears in the registration book . . .”

CROOM-JOHNSON, J., in the course of his judgment, said (64 T.L.R. 464) :

“Though one reason for the book is to make known who is the owner of the vehicle to which it refers, its primary purpose is to show who is the

person liable to pay the road fund licence tax in respect of the vehicle. I do not think it is anything more than that."

Mr. Bronstein having spoken to the auctioneers, the car was placed in the car park allotted to cars which were to be sold by auction in the Maidstone market. Tuesday was market day. The market opens at 7.30 a.m. The car arrived at about 10.30 a.m., and at about 11.45 a.m. the auctioneer put it up for auction. The car did not reach the reserve price, but, later, Bronstein approached the auctioneer and asked him to put it up for auction again with a lower reserve price. This the auctioneer did, but, again, the reserve was not reached. After that, a Mr. Bourgein, who carries on business at the Winsor Garage, West Malling, approached Bronstein and asked him if he could buy the car. They eventually came to terms and Bronstein sold the car to Bourgein on that day in the market for £295. The car had not been moved from the car park during the whole of that day and it was there when Bourgein took it away. Bourgein subsequently sold the car to the defendants and handed over the registration book which he had received from Bronstein.

The question is whether this was a sale in market overt and counsel for the plaintiffs has taken several points on this aspect of the case. Speaking generally, the position of the market at Maidstone is this. There has been a market there certainly since the reign of Queen Elizabeth and probably before. From time to time the charter seems to have been extinguished because of the conduct of the citizens of Maidstone, but in 1747 a charter to hold a market on Thursday of every week was drawn up and bestowed on the mayor and citizens of the city. It is not specified what kind of articles or merchandise are to be sold there, but it says that the "mayor, jurats and commonalty" of the town may "take reasonable picage money for the showing of goods and merchandises there to be sold or exposed for sale." In 1824, the Maidstone Markets Act was passed which in some respects extended the powers of sale by moving the market to a more commodious place and gave powers to set up various stalls, slaughterhouses, and so on.

The first point counsel for the plaintiffs made was that the Act of 1824 extinguished the charter of 1747. The second point was that a market overt can rest only on a grant and not on a statute. In my view, counsel for the plaintiffs failed to establish either of those points. On the point whether the statute of 1824 extinguished the charter of 1747, the evidence—so far as it is a question of fact—is all one way. Mr. Moys, the deputy town clerk of Maidstone, said :

"The original charter was granted in 1549, and I believe there were two further charters, but the first three were withdrawn owing to some misbehaviour in the town at that time, and the charter of 1747 is at present in force, and, so far as the market is concerned, has been amended by the Act of 1824 and the Ministry of Health Provisional Orders Confirmation (Maidstone and Stockton-on-Tees) Act, 1933."

This is a very definite statement by the deputy town clerk that the charter was in force, and, when HUMPHREYS, J., came to give his judgment—there being no other evidence about it—he said ([1948] 1 All E.R. 408): "The Maidstone Markets Act, 1824, made certain alterations not material for the purpose of this judgment . . ." The court has been somewhat hampered in investigating what precisely was contained in the private Act of 1824 as it has only had one copy of the Act to share between three members of the court, but, so far as I can see, there is nothing in that Act to show that there was any intention on the part of the legislature to extinguish the charter and to substitute the statute for it. On that point I would refer to *Manchester Corpn. v. Lyons* (2), and especially to the judgment of COTTON, L.J., when considering the question of the effect of a statute on an earlier market grant. COTTON, L.J., said (22 Ch.D. 307):

“In every such case it is a question to be determined by a consideration of the whole of the Act whether the rights given by the Act are intended to supersede the rights which previously existed.”

A As far as I can see, there is no intention here to that effect, but, even if that point were established by counsel for the plaintiffs, I think that he fails to establish his second limb of the argument, namely, that a market overt must rest on a grant and cannot rest on a statute. His authority for that proposition was, first, *Moyce v. Newington* (3), where was considered the question of the conversion of certain sheep which had been sold at Maidstone market. COCKBURN, C.J., in his judgment, said (4 Q.B.D. 34) :

B “It is to be observed that, though the sale from Wale to the plaintiff took place in open market, it was admitted before us that the market, having been recently established by the corporation of Maidstone under a local Act, was not one in respect of which the protection arising from a sale in market overt would attach.”

C Counsel for the plaintiffs argued that this was a blessing—rather a lukewarm blessing—bestowed by COCKBURN, C.J., on the point that a market established by an Act is not a market overt, but, having regard to the complexity of the subject and the fact that there was no argument on the point, I myself think it probable that the Chief Justice on that admission did not intend to give any decision on the point. As against that, there are two cases in Ireland, *Garly v. Ledwidge* (4) and *Delaney v. Wallis and Sons* (5)—the latter in the Court of Appeal—which clearly lay down that markets established under statutory powers are markets overt. I may also refer to BENJAMIN ON SALE, 7th ed., D p. 19, where it is said :

E “As to modern markets established under statutory powers, in the case of the Dublin cattle market the Queen’s Bench Division in Ireland had ‘no hesitation in holding that this great public market, established by the corporation under Parliamentary powers, is a market overt.’ And such a market would certainly seem to fall within the definition of a market overt given by JERVIS, C.J. [in *Lee v. Bayes* (6)] . . . as ‘an open, public, and legally constituted market’.”

F It is interesting to see that that view has been adopted in *Ward v. Stephens* (7), decided in Australia. In my view, therefore, the second limb of the argument also fails.

G The next point which counsel for the plaintiffs argued was that, in a market where a toll is payable, the sale is only protected if the toll is paid by the person who effects the sale. There is no evidence in this case other than that which was given at the trial, namely, that the toll of a shilling was paid by the auctioneer who put the motor car up for auction. He collected the shilling from the vendor and that seems to me to be in accord with the charter of 1749, which entitles the authorities at Maidstone to charge a toll for the showing of the article for the purposes of sale. It seems to me a sensible and reasonable method of dealing with the matter that the man who brings an article into the market to sell it has to pay a shilling. He has to pay it himself if he sells personally ; even if he does not sell, he has to pay the toll. If an attempt is made to sell it by H auction, he also has to pay the toll.

The next point which counsel for the plaintiffs made was that to get the protection of a sale in market overt the goods must be put up for sale by a trader in the market. There is, however, no authority for that proposition. *The Market-Overt Case* (8), a very old case, to which counsel for the plaintiffs referred, was based on entirely different facts. In that case some plate which had been stolen was sold in a scrivener’s shop in London on market day, and the court held that that was not a sale in market overt. The court consisted of

the Chief Justice of England (POPHAM, C.J.), the Chief Justice of the Common Pleas (ANDERSON), the Master of the Rolls (SIR THOMAS EGERTON, M.R.), and the Attorney-General. The court held (5 Co. Rep. 83b):

" . . . if plate be stolen and sold openly in a scrivener's shop on the market day . . . that this sale should not change the property, but the party should have restitution; for a scrivener's shop is not a market overt for plate; for none would search there for such a thing . . . But if the sale had been openly in a goldsmith's shop in London, so that any one who stood or passed by the shop might see it, there it would change the property . . . So every shop in London is a market overt for such things only which by the trade of the owner are put there to sale . . .

COKE added:

" . . . and when I was recorder of London, I certified the custom of London accordingly."

If one considers the reason for, or desirability of, protecting people who buy with the honest belief that the vendor has a good title to sell, provided the necessary safeguards are taken of selling in the market in the day-time and exposing the article for sale, there does not seem to me to be any reason in principle why a sale should not be equally good if made by the owner himself as it admittedly would be, for the purpose of this point, if the motor car had been sold by auction by the auctioneers.

I come now to the last point, and, perhaps, the defendants' best point. It is that this sale by private treaty was not a sale according to the usage of the market. HUMPHREYS, J., dealt with the point and stated ([1948] 1 All E.R. 409) that, according to the evidence of Mr. Forknall, the auctioneer:

"There was no custom or usage, to his knowledge, for dealers or owners of motor-cars to sell or offer cars for sale at the market except for sale by auction through his firm or the firm of Messrs. Parker & Sons, auctioneers."

The learned judge, in dealing with the evidence of Mr. Forknall, said (*ibid.*):

" . . . he had nothing to do with such transactions. There was no practice in the market of motor-car dealers or owners selling direct to members of the public."

HUMPHREYS, J., then went on as follows (*ibid.*):

"There is, therefore, no doubt that the sale in question took place in a public market. It can, I think, hardly be disputed that the sale and purchase of the car in question, if it had been effected by auction, would have been a sale in market overt, according to the usage of the market. There would, in that event, have been present all the element of publicity and open dealing by persons of repute to whom recourse could be had if required. The only substantial point advanced by the plaintiffs, it seems to me, is that the sale between two private persons was not such a sale. On this aspect of the matter reference may be made to the judgment of BLACKBURN, J., in *Crane v. London Dock Co.* (9), where he said (5 B. & S. 319): 'Then comes the question which it is necessary to decide, namely, whether this was a sale in market overt. It is pretty clear that the privilege given by law to a sale in market overt, of binding property against the true owner, was originally given in consequence of its policy of encouraging markets and commerce—I agree with the plaintiff's counsel so far. But I think that, for that purpose, the vendor must buy the goods under circumstances such as would induce him to think the sale a good sale in market overt;—namely, he must buy a thing which is openly exposed in market overt under such circumstances that he might say to himself no person but the owner would dare to expose them for sale here, and therefore I have a right to assume that

the shopkeeper has a right to sell them. I think this principle runs through all the cases, that the goods must be corporally present and exposed in the market.' ”

Having applied his mind to that judgment and to the facts of the case, and bearing in mind that, although there may be no custom to sell motor cars in the market except by auction, there was evidence that it was frequently done, A HUMPHREYS, J., dealt with the matter in this way ([1948] 1 All E.R. 409) :

“ On the whole, I think the defendants have established that the purchase of the car was in market overt. The third party bought in a long established market where, to his knowledge, motor-cars had been publicly sold for years. He bought a car which had been so publicly offered for sale, he paid a fair price for the car, and there was nothing in the transaction calculated to arouse his suspicion. In my view, the mere fact that his purchase was not made through an auctioneer did not operate to remove the sale from the category of sales in market overt so as to prevent his acquiring a good title to the car.” B

I agree with the conclusion of the learned judge and I do not feel that I can put it in better language than that or in as good language. If there had been clear proof that a car had never been sold in the market except by public auction and that there was a usage to that effect and no other usage, or that a sale between two private persons was an unusual transaction, there might be something to be said for the point that it did not come within the Sale of Goods Act, 1893, s. 22, but that is not the evidence in this case. It is largely D a question of fact that cars were undoubtedly sold by private sale as well as by public auction. All the principles which support a sale in market overt are present in this case. For those reasons I think that the sale did take place in market overt, that the claim fails, and that the appeal should be dismissed.

SINGLETON, L.J. : The plaintiffs, Bishopsgate Motor Finance Corporation, E Ltd., are a company which finances the purchase of motor vehicles. About Oct. 7, 1946, Mr. Mark Bronstein was anxious to purchase from dealers a second-hand Hillman motor car, No. EUW.124, and it was arranged that the plaintiffs should carry through that transaction for him. The property in the motor car became theirs and they hired it out to Bronstein who paid £115 down and then had to pay eighteen monthly payments of £13 18s. 10d. The possession of the motor car by F Bronstein was, apparently, too much for him ; he only kept it for about three weeks. On Oct. 29, 1946, it was put up for sale by auction in Maidstone market. It was bought on that day by Mr. Bourgein. Bronstein went on paying his instalments for a few months, but he did not complete them and he disappeared. Some time later, it was found that the motor car was in the possession of G Transport Brakes, Ltd., the defendants. They had bought it from Bourgein. Consequently, an action was brought by the plaintiffs against Transport Brakes, Ltd., claiming the return of the motor car or damages.

The material part of the defence is in these terms :

“ The said car was bought by the Winsor Garage [*i.e.*, Bourgein] on a day in October, 1946, in market overt according to the usage of the market at Maidstone in the county of Kent, in good faith and without notice of any defect or want of title on the part of the seller of the said car.” H

That, of course, brings into play the Sale of Goods Act, 1893, s. 22 (1), which provides :

“ Where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller.”

It appears to me, then, that there are two things to be ascertained : (i) Was this sale in market overt ? (ii) Was it according to the usage of the market ? If so, the buyer can claim a good title and the plaintiffs' claim in this action fails. To find the answer to those two questions, the facts must be examined. As to the question whether this was a sale in market overt, there has been established in Maidstone for many centuries a market or markets. As my Lord pointed out, the deputy town clerk said in evidence that the charter of 1747 is the one at present in force so far as the market is concerned and that it has been amended by the Maidstone Markets Act, 1824, and the Ministry of Health Provisional Orders Confirmation (Maidstone and Stockton-on-Tees) Act, 1933. There had been earlier charters giving rights to the mayor and councillors to hold markets and sales at various times, but it is not necessary to consider them. Counsel for the plaintiffs submitted that the effect of the Act of 1824 was to wipe out the charter of 1747 entirely. I cannot see that that is right, particularly having regard to s. 52 of the Act of 1824 [whereby the Act was not to be construed as taking away or diminishing any right or privilege belonging to the Maidstone corporation unless there was an express provision in the Act to that effect.] Furthermore, counsel for the plaintiffs submitted that the only matter at which the court need look was the Act of 1933, which confirmed certain provisional Orders, one of which was the Maidstone Order, 1933. I do not think that that submission is right. For reasons given by my Lord, I think that one is entitled to look further back, but I am not sure that it matters much. Paragraph 3 (1) of the Maidstone Order, 1933 (which is set out in the schedule to the Act of 1933), says :

"Notwithstanding anything in the local Act [the Act of 1824] the council may hold a corn market on Thursday in every week and a cattle and general market (for all goods and merchandise other than goods and merchandise which are brought to the corn market) on Tuesday in every week."

Counsel contended that the general market was held under that power only and that this was not the case of a sale in market overt because a market overt must be created by a charter or grant—something of long, long ago—and cannot be created by an Act of Parliament. That submission seems to me to be completely covered by the two decisions in the Irish courts to which my Lord has referred. The first was *Ganly v. Ledwidge* (4), of which the head-note reads :

"The protection attendant upon a sale in market overt is not confined to ancient markets created by charter or prescription, but extends to modern markets established under powers conferred by Act of Parliament."

In that case :

"The new cattle-market was established by the corporation of Dublin under the provisions of 'The Dublin Improvement Act' (12 and 13 Vict., c. 79, ss. 79 and 80), and on every Thursday a public market for the sale of cattle is held in it . . ."

Ganly v. Ledwidge (4) was followed in *Delaney v. Wallis & Sons* (5), in the Irish Court of Appeal. I am bound to say I cannot see why there should be any such limit on the creation of market overt as counsel for the plaintiffs suggests. I do not see why it cannot be created by statute, and, in my view, that point fails.

What is the meaning of "market overt" ? This has been discussed more than once. In *Lee v. Bayes* (6) it was held that :

"A sale by public auction at a horse repository out of the city of London, is not a sale in market overt."

Counsel arguing that case made this submission :

"The horse having been stolen, no property in it of course could pass

to the defendant unless he had purchased it in market overt. . . This is a place to which any of the public may resort for the purpose of buying."

CRESSWELL, J., said (18 C.B. 601) :

"So they may to any open shop ; but that does not, except by custom in London, constitute a market overt."

A During the argument JERVIS, C.J., gave the following definition of "market overt" :

"It is an open, public, and legally constituted market . . ."

So far as I know, no better definition has ever been given, and it was adopted by the editor of BENJAMIN ON SALE in the passage at p. 19 which my Lord read. On the evidence given in the court below, I regard this market as fulfilling in every way the requirements of market overt, and it seems to me beyond doubt that the sale of the motor car was a sale in market overt.

B The only remaining question is whether the sale was according to the usage of the market. I regard that as a more difficult question, but, again, when the evidence is examined, I think we ought to hold that the sale was according to the usage of the market. The evidence was this. The car was taken in the morning to the public market where sales by auction are held and where goods are sold otherwise than by auction. A toll of one shilling was paid by the auctioneers to the collectors of the corporation and was collected by the auctioneers from the vendor, Bronstein. The car was then put up for sale by auction, but it did not reach the reserve price. Later, Bronstein asked the auctioneer to put up the car again at a reserve of some £25 less. Again D the bidding did not come up to the reserve. The auctioneer then passed on to another car, but Bourgein, who had seen the plaintiffs' car earlier, looked at it further and Bronstein asked him if he would like to buy it. In the result, a sale was effected at £290 which is said to have been a reasonable price for the car. Bourgein, having done some repairs to the car or some reconditioning of it, later sold it to the defendants in this action. It is not said E that the defendants were otherwise than honest in every sense, and it is admitted that Bourgein, who bought the car at the market, acted in good faith and that he paid a reasonable price for it. The argument of counsel for the plaintiffs is that the sale was not according to the usage of the market because things which were sold at this time were usually sold by auction. The auctioneer, F Mr. Forknall, was asked about that and he said :

"Well, of course, you get a dealer who comes and puts a car into an auction sale with no intention of selling it, but merely to find out who is likely to be interested and to see how they will go, and then have a deal afterwards."

The learned judge asked :

G "It does not matter what the intention is—he puts it in auction ?
(A)—Yes, and then trades afterwards."

A little later the learned judge said :

H "Therefore, you cannot have dealers coming in and saying, 'Here is my car. Now, then, what offers for it ?' Unless they are licensed, they are not allowed to ? (A)—No, but they can by private treaty after the auction."

Thus, it appears on the evidence that there were at this market both sales by auction and also sales by private treaty. On the evidence, which was not contradicted in that regard, in my view, it was open to the learned judge to find not only that the car was sold in market overt, but also that it was sold according to the usage of the market.

We were referred to a judgment of SCRUTTON, J., in *Clayton v. Le Roy* (10), and, in particular, to the passage where he said ([1911] 2 K.B. 1044) :

"A custom which takes away one man's property and gives it to another must, in my view, be carefully watched, especially when it is not a universal custom, but limited to certain favoured localities."

The learned judge was dealing with a case of a sale in a shop at that time, but, assuming as I do that his words could be taken generally, I venture respectfully to agree that every such custom must be watched carefully. I think it has been in this case. HUMPHREYS, J., found in favour of the defendants ([1948] 1 All E.R. 409) that this was, indeed, "a sale in market overt according to the usage of the market," and I agree that his judgment should be upheld.

DENNING, L.J. : I agree. In the development of our law, two principles have striven for mastery. The first is the protection of property. No one can give a better title than he himself possesses. The second is the protection of commercial transactions. The person who takes in good faith and for value without notice should get a good title. The first principle has held sway for a long time, but it has been modified by common law itself and by statute so as to meet the needs of our own times. The modification here in question is one conferred by the common law itself.

It has always been held that a sale in market overt—according to the usage of the market—to one who takes in good faith and for value without notice confers a good title on the buyer. The law is fully explained in COKE'S INSTITUTES, pt. II, pp. 220 and 713. In my opinion, this beneficial rule of the common law applies not only to open markets created by grant or prescription, but also to open markets authorised by statute. When the legislature authorises the holding of a market, it must be taken to intend to attach to it all the privileges attaching to a market by grant or prescription. It follows that Maidstone market is a market overt and that, *prima facie*, sales in that market confer a good title. If the true owner seeks to set aside a sale on the ground that it was not in accordance with the usage of the market, the burden is on him to show it: see *Comyns v. Boyer* (11). The fact that the toll has not been paid to the corporation is not a ground for setting aside a sale, at all events in those cases where it is payable by the one who exposes the goods for sale: see COMYN'S DIGEST, Market E. The title of the buyer cannot depend on the chance whether the seller has done his duty and paid the toll. The fact that the goods are sold, not by an auctioneer, but by a dealer or the apparent owner is also no ground for setting aside the sale, unless, indeed, the usage of the market only allows sales to be made by auctioneers. That, however, is not the case here. It is plain on the evidence that after an auctioneer has failed to sell, the dealer—or apparent owner—often sells himself. There is, therefore, no ground for saying that the market is confined to sales by auctioneers.

The protection we have granted today to the buyer of a motor car in market overt protects him only in so far as he buys in good faith and without notice. It seems to me that the system of registration books for motor cars, if properly worked, should do a great deal to protect both the true owner and the innocent purchaser. The registration book of a car, or the "log-book" as it is called, may not itself be a document of title, but it is the best evidence of title. The transfer of the log-book does not itself transfer the property in the car. The property, as a rule, is only transferred by sale and delivery, but a transfer is open to suspicion unless the log-book is handed over. The wise buyer insists on it in order to be sure that the seller is the owner and that the car may lawfully be on the road. If the log-book is not produced or if it contains the name of a third person as the owner, or if it has been obviously tampered with, the buyer is immediately put on inquiry. If he should complete the purchase without getting the position cleared up, he does so at his own risk. So, also, a log-book may be produced which is good on the face of it, but the number on the motor car may have been obviously altered to correspond with the log-book

by the use of a number-plate which is "faked." Such a fact should put the buyer on inquiry. If he makes none, he does so at his own risk. Assuming, therefore, that the true owner keeps his log-book safe in his own name and in his own hands, it is unlikely that any stranger will get a good title to the car. A thief can only dispose of the car by forging some other log-book so as to give it the same number as the car, or by altering the number-plate so as to correspond with the number of another log-book, each of which is difficult to do in a way that is not noticeable to a careful purchaser. The plaintiffs here did not keep the log-book in their own hands or in their own name. They were a finance company who allowed the hirer to have the car and take the log-book in his own name. By reason of that fact, he was able to dispose of the car to an innocent purchaser. It would be carrying the protection of property too far if we were to say that the plaintiffs can defeat the title of that purchaser. I agree that the appeal should be dismissed.

Appeal dismissed with costs of the defendants and the third party against the plaintiffs.

Solicitors: *M. & H. Shanson* (for the plaintiffs); *Rider, Heaton, Meredith & Mills*, agents for *Osborne, Ward, Vassall, Abbot & Co.*, Bristol (for the defendants and the third party).

[*Reported by C. N. BEATTIE, Esq., Barrister-at-Law.*]

D JOBLIN v. WATKINS AND ROSEVEARE (MOTORS), LTD.

[KING'S BENCH DIVISION (Croom-Johnson, J.), June 30, 1948.]

Sale of Goods—Mercantile agent—Document of title—Motor car registration book—Factors Act, 1889 (c. 45), s. 1 (4)—Road Vehicle (Registration and Licensing) Regulations, 1941 (S.R. & O., 1941, No. 1149), reg. 9 (1).

In November, 1945, the plaintiff purported to buy a second-hand motor car for £275 from one, S., who had formerly been employed as the defendants' agent to buy cars, but whose employment had been terminated in April, 1945. S. was given the option of re-purchasing the car for £300 on or before Dec. 6, 1945, and in pursuance of this arrangement he gave the plaintiff a cheque, which was post-dated Dec. 6, 1945, and the car registration book, which showed that the last owner of the car was one A. In fact, the car was the property of the defendants, having been bought by them from A. The plaintiff did not receive delivery of the car and on presentment the post-dated cheque was dishonoured. The plaintiff thereupon brought an action against the defendants claiming the delivery of the car or damages.

CROOM-JOHNSON, J., held: (i) the transaction between the plaintiff and S. was merely a device to enable S. to obtain temporary financial accommodation and did not amount to a "sale" or a "pledge or other disposition" of the car within the meaning of the Factors Act, 1889, s. 2 (1).

(ii) the registration book was not a document of title within the definition in s. 1 (4) of the Act, or by virtue of the Road Vehicles (Registration and Licensing) Regulations, 1941, reg. 9. Although one reason for the book was to make known who was the owner of the vehicle to which it referred, its primary purpose was to show who was the person liable to pay the road fund licence tax in respect of the vehicle. "Document of title" within s. 1 (4) meant a document possession of which by the person putting it forward entitled him to dispose of the goods.

David Henderson for the plaintiff.

Foot for the defendants.

Solicitors: *A. Carter & Co.*, agents for *Hamlyn Taylor & Neck*, Paignton (for the plaintiff); *Kenneth Brown, Baker, Baker*, agents for *Foot & Bowden*, Plymouth (for the defendants).

BENSON v. HOME OFFICE.

[KING'S BENCH DIVISION (Tucker, L.J. (sitting as an additional judge)), December 2, 1948.]

Crown—Proceeding against—Cause of action statute barred before commencement of Crown Proceedings Act, 1947—Limitation Act, 1939 (c. 21), s. 30 (1)—Crown Proceedings Act, 1947 (c. 44), s. 1.

By the Crown Proceedings Act, 1947, s. 1: "Where any person has a claim against the Crown after the commencement of this Act, and, if this Act had not been passed, the claim might have been enforced, subject to the grant of His Majesty's fiat, by petition of right, or might have been enforced by a proceeding provided by any statutory provision repealed by this Act, then, subject to the provisions of this Act, the claim may be enforced as of right, and without the fiat of His Majesty, by proceedings taken against the Crown for that purpose in accordance with the provisions of this Act." By s. 12, this provision was deemed to have had effect as from Feb. 13, 1947.

On Jan. 15, 1948, the plaintiff, a former official in the surveyor's department of the Metropolitan Police, issued a writ in an action against the Home Office for wrongful dismissal on May 30, 1930.

HELD: the right of action was barred by the Limitation Act, 1939, since, although the Crown Proceedings Act, 1947, s. 1, applied to causes of action arising both before and after the coming into operation of the Act, it only applied if the plaintiff had a claim enforceable, which was subject to the grant of a fiat, by way of petition of right, or by a proceeding provided by certain statutes, and did not revive a cause of action which, against a defendant other than the Crown, would have been statute-barred.

[FOR THE CROWN PROCEEDINGS ACT, 1947, ss. 1 and 12, see HALSBURY'S STATUTES, Vol. 40, pp. 320 and 329, and BUTTERWORTH'S LEGISLATION SERVICE, Vol. 47, pp. 60 and 73-74. FOR THE LIMITATION ACT, 1939, see HALSBURY'S STATUTES, Vol. 32, pp. 223-244.]

TRIAL OF PRELIMINARY ISSUE in an action for damages for wrongful dismissal.

The dismissal took place on May 30, 1930, and the writ was issued on Jan. 15, 1948. The question was whether the action was barred by the Limitation Act, 1939, or whether it was maintainable by virtue of the Crown Proceedings Act, 1947, ss. 1 and 12 (1). **TUCKER, L.J.**, held that the action was statute-barred.

R. W. Vick for the plaintiff.

John Foster for the defendants.

TUCKER, L.J.: This is an action brought by Horace Archibald Benson against the Home Office. It is a claim for damages for breach of contract, the breach alleged being wrongful dismissal which took place on May 30, 1930, when the plaintiff was dismissed from his employment as an official in the surveyor's department of the metropolitan police with effect from May 16, 1930. For the purpose of this action, I am assuming that those allegations are correct. By the defence the dismissal as from May 16, 1930, is admitted, and, further it is pleaded: "In the further alternative, the defendants will rely on the Limitation Act, 1939." An order was made by **MASTER HORRIDGE** directing that:

"... the issue or issues raised by para. 6 of the defence herein be tried without pleadings alone as a separate issue or issues and be entered in the short cause list for trial at Middlesex by a judge alone and be set down within 14 days . . . And it is ordered that the residue of the application for the directions of the trial be adjourned generally with liberty to restore."

Accordingly, the matter comes before me for trial of the issue whether or not this claim is barred by the statute of limitations. On the face of it, it would appear to be so barred, the writ having been issued on Jan. 15, 1948, and the

cause of action complained of having arisen in May, 1930, but it is said by counsel for the plaintiff that, on the proper construction of the Crown Proceedings Act, 1947, he is entitled to bring this action although he could not have sustained it before the passing of the Act. The Act came into force on Jan. 1, 1948, and is made effective as from Feb. 13, 1947, by s. 12, with certain exceptions which are not material to the present proceedings. Section 12 (1) provides :

A " . . . where by virtue of this sub-section proceedings are brought against the Crown in respect of a tort alleged to have been committed on or after the said 13th day of February and before the commencement of this Act, the Crown may rely upon the appropriate provisions of the law relating to the limitation of time for bringing proceedings as if this Act had at all material times been in force."

B So, the position with regard to tort is that, although the Act takes effect as from Feb. 13, 1947, none the less the Crown is given the right to rely on all the statutes of limitation in respect of proceedings for tort alleged to have been committed on or after Feb. 13, 1947. That is a special provision with regard to tort.

C In my view, the section, if any, which is applicable to the present issue is s. 1, which is as follows :

D "Where any person has a claim against the Crown after the commencement of this Act, and, if this Act had not been passed, the claim might have been enforced, subject to the grant of His Majesty's fiat, by petition of right, or might have been enforced by a proceeding provided by any statutory provision repealed by this Act, then, subject to the provisions of this Act, the claim may be enforced as of right, and without the fiat of His Majesty, by proceedings taken against the Crown for that purpose in accordance with the provisions of this Act."

E Counsel for the plaintiff contends that that section is effective to give him a cause of action against the Crown for damages for breach of contract which, but for that section, would, by the time this writ had been issued, have been statute-barred and unenforceable. I cannot so construe the section. It speaks of a person having "a claim against the Crown after the commencement of this Act . . ." Counsel for the defendants argues that, while those words are not confined to causes of action arising after the commencement of the Act, but apply to causes of action in respect of matters which have happened before the passing of the Act, they can only refer to cases in which the subject has an enforceable claim or one which might have been enforced, subject to the grant of a fiat, by way of petition of right, and he says that this is not such a claim because, by the date of the passing of this Act or by Feb. 13, 1947 (whichever is the relevant date) the plaintiff had not got a claim which might have been so enforced because it was barred by the statute of limitations and had been so barred for many years. I think that is the true construction of the section. It certainly would be very remarkable if it had been intended by this Act not only to confer rights on subjects whose claims would otherwise have been enforceable, but also to revive causes of action which long ago the plaintiff would have been precluded from bringing by reason of the statute of limitation if the defendant had been some person other than the Crown.

H In my view, on the clear reading of s. 1, after the commencement of this Act the plaintiff had not a claim which might have been enforced. For these reasons I think that the defence is an answer to the plaintiff's claim, and I decide the preliminary issue in favour of the defendants.

Judgment for the defendants with costs.

Solicitors : J. L. Myers (for the plaintiff) ; the Treasury Solicitor (for the defendants).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]



CANNON v. HARTLEY.

[CHANCERY DIVISION (Romer, J.), November 19, 22, 1948.]

Deed—Covenant to settle “property”—Inclusion of reversionary interest—Claim for damages for breach of covenant—Right of volunteer to sue—Volunteer a covenantee.

On Jan. 23, 1941, a deed of separation was executed by the defendant of the first part, his wife of the second part and the plaintiff, their daughter and only child, of the third part. After reciting that “unhappy differences” had arisen between husband and wife and that they had agreed to live apart in future, the deed stated that “in pursuance of the said agreement and in consideration of the matters hereinafter appearing the husband and the wife hereby mutually covenant with each other and declare as follows and he [the husband] hereby covenants also separately with the daughter in the terms of cl. 4, 5, 6 and 7.” Clause 3 prescribed for payment of income by the husband to the wife, and, by cl. 4, it was provided that during the daughter’s life and the lives also of the husband and the wife a payment would be made by way of income to the daughter. Clause 7 prescribed: “If and whenever during the lifetime of the wife or the daughter the husband shall become entitled at one and the same time by gift *inter vivos* from or under the will or codicil or on the intestacy of either of his parents or any other person to any money or property exceeding in net amount or value £1,000 he will forthwith at his own expense and to the satisfaction of the wife and the daughter or the survivor of them settle one half of such money or property upon trust for himself for life and for the wife for life after his death and subject thereto in trust for the daughter absolutely but as to his life interest charged with the payment of the monthly sums hereinbefore mentioned.”

By the will of his father, who died on Dec. 3, 1944, the defendant became entitled, subject to a life interest of his mother, to a quarter share of a residuary trust fund absolutely. The defendant’s wife died on June 23. It was conceded that this interest and reversion was worth more than £1,000. The defendant having failed to settle this interest on the terms of cl. 7 of the deed, the plaintiff brought an action for damages for breach of covenant.

HELD: (i) the reversionary interest to which the defendant became entitled dependent on the death of his mother was “property” within the meaning of cl. 7 of the deed.

Re Hughes’ Settlement ([1924] 2 Ch. 356; 133 L.T. 470), *distinguished*.

(ii) the plaintiff was entitled to succeed since, although a volunteer, she was not only a party to the deed but also a direct covenantee under the covenant on which she sued, and did not require the assistance of the court to enforce the covenant as she had a legal right to enforce it.

Re Pryce ([1917] 1 Ch. 234; 116 L.T. 149), and *Re Kay’s Settlement* ([1939] 1 All E.R. 245; [1939] Ch. 329; 160 L.T. 172), *distinguished*.

[AS TO THE EFFECT ON REVERSIONARY INTERESTS OF A COVENANT TO SETTLE AFTER-ACQUIRED PROPERTY, see HALSBURY, Hailsham Edn., Vol. 29, pp. 575-577, para. 840; and FOR CASES, see DIGEST, Vol. 40, pp. 501-506, Nos. 484-524.]

Cases referred to:—

- (1) *Re Hughes’ Settlement*, [1924] 2 Ch. 356; 94 L.J.Ch. 57; 133 L.T. 470; 40 Digest 518, 631.
- (2) *Re D’Angibau*, (1880), 15 Ch.D. 228; 49 L.J.Ch. 756; 43 L.T. 135; 40 Digest 527, 717.
- (3) *Hearle v. Greenbank*, (1749), 3 Atk. 695; 1 Ves. Sen. 298; 27 Digest 138, 1134.

- (4) *Colyear v. Mulgrave (Countess)*, (1836), 2 Keen, 81; 5 L.J.Ch. 335; 12 Digest 46, 245.
- (5) *Re Plumptre's Marriage Settlement*, [1910] 1 Ch. 609; 79 L.J.Ch. 340; 102 L.T. 315; 40 Digest 499, 470.
- (6) *Re Ellis's Settlement*, [1909] 1 Ch. 618; 78 L.J.Ch. 375; 100 L.T. 511; 40 Digest 499, 469.
- A (7) *Spickernell v. Hothan*, (1854), Kay 669; 2 Eq. Rep. 1103; 32 Digest 360, 435.
- (8) *Fletcher v. Fletcher*, (1844), 4 Hare, 67; 14 L.J.Ch. 66; 43 Digest 799, 2364.
- (9) *Re Pryce*, [1917] 1 Ch. 234; 86 L.J.Ch. 383; 116 L.T. 149; 40 Digest 527, 719.
- B (10) *Re Kay's Settlement*, [1939] 1 All E.R. 245; [1939] Ch. 329; 108 L.J.Ch. 156; 160 L.T. 172; Digest Supp.
- (11) *Pullan v. Koe*, [1913] 1 Ch. 9; 82 L.J.Ch. 37; 107 L.T. 811; 43 Digest 1019, 4602.

ACTION for damages for breach of covenant.

C By a deed, dated Jan. 23, 1941, and executed between the defendant, of the first part, his wife, of the second part, and the plaintiff, their daughter, of the third part, the defendant covenanted, *inter alia*, that, if, during the lifetime of the wife or the daughter, he should become entitled to "any money or property" exceeding £1,000 in value, he would settle one half thereof on trust for himself for life and for his wife for life after his death, and, subject thereto, in trust for the daughter absolutely, his own life interest being charged with

D payment to the daughter of certain sums previously mentioned in the deed. Under the will of his father, who died on Dec. 3, 1944, the defendant became entitled to a share in his father's residuary estate, subject to his mother's life interest therein, this reversionary interest being more than £1,000 in value. The defendant's wife died on June 23, 1946. The defendant refused to settle, on the terms of the deed of 1941, the interest to which he had become entitled

E under his father's will, on the ground that, as it was merely a reversionary interest, it was not caught by the deed. ROMER, J., now held that the reversionary interest was "property" within the meaning of the deed, and gave judgment for the plaintiff. The facts appear in the judgment.

V. M. C. Pennington for the plaintiff.

A. A. Baden Fuller for the defendant.

F **ROMER, J.:** This is an action in which a daughter sues her father. The circumstances in which the action arises may be shortly stated.

G On Jan. 23, 1941, the defendant, the lady who was then his wife, and the daughter (who was then *sui juris*) entered into a deed described as a deed of separation, the defendant being the party of the first part, the wife being the party of the second part, and the plaintiff, described as their only child and a spinster—she has since married—being the party of the third part. After reciting that "unhappy differences" had arisen between husband and wife and that they had agreed to live apart from each other in future and to make such arrangements as were thereafter contained, it was witnessed that

H " . . . in pursuance of the said agreement and in consideration of the matters hereinafter appearing the husband and the wife hereby mutually covenant with each other and declare as follows and he" [the husband] "hereby covenants also separately with the daughter in the terms of clauses 4, 5, 6 and 7,"

and then there follow certain provisions about living apart and so on. Clause 3 provides for payment of income by the husband to his wife, and there is also a provision under cl. 4 that during the daughter's life, and during the life also of the husband or wife, a payment will be made by way of income

to the daughter. Then comes the important clause, cl. 7, which reads as follows :

"If and whenever during the lifetime of the wife or the daughter the husband shall become entitled at one and the same time by gift *inter vivos* from or under the will or codicil or on the intestacy of either of his parents or any other person to any money or property exceeding in net amount or value £1,000 he will forthwith at his own expense and to the satisfaction of the wife and the daughter or the survivor of them settle one half of such money or property upon trust for himself for life and for the wife for life after his death and subject thereto in trust for the daughter absolutely but as to his life interest charged with the payment of the monthly sums hereinbefore mentioned."

There is nothing else in the settlement to which I need refer. The defendant's father, Mr. Charles Rowley Hartley, died on Dec. 3, 1944, and, having made a will under which he appointed his son, the defendant, and his solicitor to be the executors and trustees, he gave his residuary estate in common form to his trustees upon trust (for sale or conversion), and the whole of the trust funds, upon the following trusts. These were "to pay the income of the residuary trust fund to my said wife during her life," and "subject as aforesaid my trustees shall after the death of my said wife divide the residuary trust fund into four equal parts and shall stand possessed thereof upon trust," among other things, "to pay or transfer one of such parts to my said son Bernard Charles Hartley absolutely."

On June 23, 1946, the defendant's wife died. The action is brought to obtain damages for alleged breach of covenant by the defendant in refusing to settle, on the terms of cl. 7 of the deed of separation, the interest to which he had become entitled under his father's will, which is an interest in reversion of one quarter part of his father's residuary estate. Certain matters of fact have been agreed between the parties, and I need not refer to them, except to say that it is agreed on all hands that the one quarter part of the residuary estate is worth more than £1,000, as also is the value of the defendant's reversionary interest of one fourth at the present time.

The first point that is taken by the defendant is that, on the true construction of cl. 7 of the deed of separation, this interest is not caught at present because it is still an interest in reversion. It is contended that the only money or property which is caught by cl. 7 is money or property which has fallen into possession during the lifetime of the wife or the daughter. It is said, therefore, that, as up to now this interest in the father's estate has not fallen into possession, the obligation on the defendant has not yet arisen, but, subject to at least one other point which has not yet been argued, it is conceded that, if during the lifetime of the daughter the husband's mother should die, the defendant's one quarter interest in his father's estate having become an interest in possession, it would then fall within the scope of cl. 7. In support of his contention counsel for the defendant relies on the opening words of cl. 7—

"If and whenever during the lifetime of the wife or the daughter the husband shall become entitled at one and the same time . . ." as showing the point of time that was in the minds of the parties at which that entitlement should commence. He points out that there are two successive life interests in contemplation before the ultimate gift of capital, which fit in with "money or property in possession," but are difficult to fit in with "money or property in reversion." He then says that the life interest of the husband is charged with the payment of certain sums mentioned previously in the settlement, and that also tends to show that there must be an actual life interest on which the charge can operate. Finally, he says that the reference to "any money or property exceeding in net amount or value £1,000," having regard to the difficulties of valuing anything which is in reversion, again points in the

direction of the view that only money or property in possession was in contemplation.

A Considering this clause merely from the point of view of the language in which it is couched, I find great difficulty in seeing how it can fairly be said that this reversionary interest is excluded. It is plain that the wording of the clause would include money or property in possession, and, in so far as such money or property is concerned, no difficulty would arise with regard to a life interest, or the valuation of or charges on a life interest. It is said that these elements suggest sufficiently strongly that interests in reversion are excluded, but a vested interest in reversion is plainly property, and, but for the words which are directed to value, I am unable to see how the reversionary interest in a valuable estate, dependent on the falling in of one life, namely, that of the defendant's mother, can be described as anything B but "property"—a description used in contrast to "money," the term by which it is immediately preceded. The difficulty, if any, may be said to arise from the reference to "valuation"—"exceeding in net amount or value £1,000." There again, if, in fact, as is the case here, there is no difficulty in valuing the reversionary interest at any given moment of time, that would not appear C to me to present any difficulty, although it might possibly give rise to some difficulty in the matter of property on the reversion of which it was difficult, or, perhaps, even impossible, to place a fair value. It seems to me, however, that this language is so clear, apart from the reference to value, that that reference, which does not, at all events so far as the present case is concerned, give rise to any difficulty, cannot cut down the clear meaning of the language used.

D I was referred to a decision of TOMLIN, J., in *Re Hughes' Settlement* (1) as supporting the argument addressed to me on behalf of the defendant, but on that case I merely make two observations. It is totally different from the present case. There the wife had already, at the date of the marriage settlement, a reversionary interest in a particular fund and that interest became an interest in possession during the marriage. It is not a case such as the E present where, at the date of the deed, the husband had no interest whatever in the fund and the clause in question is directed solely, as the language shows, to a future interest which had no existence at all at the time of the deed. The difficulty which arises in the way of considering those different conceptions is shown in NORTON ON DEEDS, where the various positions are discussed in the form of propositions at pp. 659, 660, 662 and 664, and the proposition F which is now before me is set out. The only other remark I propose to make on *Re Hughes' Settlement* (1) is that TOMLIN, J., made it plain that these questions are always questions of construction, and must be decided according to the actual language which the parties have thought proper to employ. I decide this case on the language of cl. 7 of this document, and I hold that G the reversionary interest to which the defendant has become entitled is caught by that clause.

H Nov. 22. It was argued on behalf of the defendant that the plaintiff, not having given any consideration for the covenant by her father contained in cl. 7 of the deed, was not only unable to apply to a court of equity for the enforcement of the covenant by way of specific performance, but was also disqualified from suing at common law for damages for breach of the covenant.

ROMER, J. : It is, of course, well established that in such a case as this a volunteer cannot ask a court of equity to exercise relief of a nature which is peculiar to the jurisdiction of equity, but for my part I thought it was reasonably clear that, the document being under seal, the covenantee's claim

for damages would be entertained, and that is still my belief. The matter has, I think, been a little confused by reference to cases where volunteers who are not parties to, for example, a marriage settlement have sought to obtain an indirect benefit through the medium of the trustee which they themselves could not legally obtain. It has, however, been recognised that the court of equity will in some cases assist persons who are not parties to a settlement and persons who by the nature of things could not have been parties to the settlement (for example, the children of a marriage) in an attempt to enforce the provisions of the settlement and the covenants therein contained. That was well established and recognised by the time of *Re D'Angibau* (2). The headnote of that case is :

"By a settlement made on the marriage of a lady then, and therein described as, 'an infant of the age of nineteen years and upwards,' it was agreed that, after the marriage, as soon as the case would admit, certain personal estate standing in the names of the trustees of her father's will in which the lady would take a vested interest on her marriage subject to an annuity for her mother's life, should be assigned to trustees, in trust for investment with the consent of the husband and wife, and to pay the income to the wife for her separate use, and after her death to her husband till bankruptcy or alienation ; and then to hold the capital on trusts for the issue of the marriage ; and, in default of such issue, in trust for such person or persons as the wife should by deed or will appoint. The wife appointed the fund by deed to her husband, and died without issue, being still an infant. An action having been brought by the trustee in the husband's bankruptcy, who was also the legal personal representative of the wife, against the next of kin of the wife, claiming the property :—*Held*, by JAMES and BRETT, L.JJ. (*dissentiente* COTTON, L.J.), affirming the decision of SIR GEORGE JESSEL, M.R., that the appointment by the wife, while still a minor, was valid. *Hearle v. Greenbank* (3) commented on. *Held*, also, by the whole court, that whether the appointment was valid or not, the wife's next of kin, being volunteers, could not claim under the settlement in opposition to her legal personal representative."

COTTON, L.J., expresses himself as follows (15 Ch.D. 242) :

"The first question for consideration is, whether the settlement of 1874 can be considered as a declaration of trust constituting the relation of trustee and *cestui que trust* as between the husband and his assignees on the one part, and the demurring defendants on the other part, because if it can be so treated effect will be given to the trusts even in favour of volunteers. But on the construction of the settlement it is clear that the husband never constituted himself or intended to be a trustee of the fund. He contracts to make a settlement by transferring the fund to trustees, who were to hold it upon trust, and the distinction between a complete voluntary trust and a voluntary contract to create a trust is clear. If it is once established that the settlement is not a declaration of trust, there is, in my opinion, an answer to the contention of the defendants that the court, at their instance, would interfere with the legal title of the plaintiff. If the court enforces a contract to create a trust, whether contained in a marriage settlement or in any other instrument, it will enforce it in its entirety. But as a rule the court will not enforce a contract as distinguished from a trust at the instance of persons not parties to the contract : *Colyear v. Countess of Mulgrave* (4). The court would probably enforce a contract in a marriage settlement at the instance of the children of the marriage, but this is an exception from the general rule in favour of those who are specially the objects of the settlement. The demurring defendants were not parties to the contract nor within

the consideration of the marriage, and, in my opinion, they are not entitled to enforce against the legal title of the plaintiff the contract to create a trust contained in the settlement."

The principles as there stated by the learned Lord Justice are, of course, well established. Considerations of that sort arose in *Re Plumptre's Marriage Settlement* (5), a decision of EVE, J. The headnote of that case is :

A "By a marriage settlement made in 1878 certain funds coming from
the wife's father were settled upon the usual trusts of a wife's fund, with
an ultimate trust, in the events which happened, for the wife's statutory
next of kin. And it was also agreed that all real and personal property
to which the wife was entitled at the date of the marriage, or to which
B she, or her husband in her right, at any time during the coverture, should
be or become entitled, whether in possession, reversion, or otherwise,
should be assured and transferred by the husband and wife respectively
to the trustees to be held upon the trusts of the settlement. In August,
1884, a sum of £1,018 15s. was invested by the husband in the purchase
of certain stock in the name of the wife. This was subsequently sold by
C the wife and re-invested in the purchase of £1,125 Grand Trunk Railway
of Canada 4 per cent. debenture stock, which remained registered in her
name down to the date of her death, intestate, and without leaving any
issue on Feb. 2, 1909. The stock was now standing in the name of the
husband, to whom letters of administration to his wife's estate had been
granted. *Held*, that the stock in question, which was a gift by the husband
D to the wife, was caught by the agreement to settle the wife's after-acquired
property. *Re Ellis's Settlement* (6) ([1909] 1 Ch. 186) followed. But *held*,
on the authority of *Spickernell v. Hotham* (7) (1854) Kay 669 that no
action could be brought by the trustees to recover damages against the
husband or the estate of the wife. *Held*, also, that the next of kin of the
wife, being volunteers and strangers to the marriage consideration, could
E not enforce the contract to settle as against the administrator of the wife,
and that, therefore, the trustees were not bound to take any steps to
obtain a transfer of the stock."

The part of the summons that was taken out which came before the court
and which is relevant for present purposes was that which asked "whether,
regard being had (a) to the fact that there was no issue of the marriage of
F the said wife, and (b) to the fact that in the events which had happened the
persons who, on the death of the husband, would become absolutely entitled
in possession to the premises subject to the trusts of the settlement, were
volunteers, the trustees were bound to take any steps to enforce the transfer
of the stock to them as such trustees." EVE, J., after referring to the contention
of counsel for the next of kin "that they are not necessarily volunteers there-
G under for the purpose of enforcing the covenant against the husband, and
further that, even assuming the facts to be as stated in the question, the court
is not concerned to consider whether his clients could obtain the performance
of the covenant by proceedings in equity inasmuch as the applicants, parties
to the contract, are trustees of the covenant for all their *cestuis que trust*,
and can and ought to enforce it by action at law, that is to say, by an action
H to recover as damages for breach of the covenant a sum equal to the value
of the property which would have been vested in them had the covenant been
complied with", and, after dealing with the second point which arose on the
statute of limitations affecting the trustees' right to sue, deals with the
position of the next of kin as follows ([1910] 1 Ch. 618) :

"The result, therefore, is that the next of kin, if they are entitled to
any relief, must resort to this court to obtain it. Now what is their position
here? They are not in my opinion *cestuis que trust* under the settlement,

for nothing therein amounts to a declaration of trust, or to anything more than an executory contract on the part of the husband and wife; it is, so far as the next of kin are concerned, what COTTON, L.J., calls a voluntary contract to create a trust as distinguished from a complete voluntary trust such as existed in the case of *Fletcher v. Fletcher* (8) on which Mr. Clayton so strongly relied. The collaterals are no parties to the contract; they are not within the marriage consideration and cannot be considered otherwise than as volunteers, and in these respects it makes no difference that the covenant sought to be enforced is the husband's and that the property sought to be brought within it comes from the wife. For each of the foregoing propositions authority is to be found in the judgment of the Court of Appeal in *Re D'Angibau* (2); and in the same judgment is to be found this further statement—that where, as in this case, the husband has acquired a legal title as administrator of his wife to property which was subject to the contract to settle, volunteers are not entitled to enforce against that legal title the contract to create a trust contained in the settlement.”

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Accordingly, he answers the question which I have read by saying that the trustees were not bound to take any steps to enforce the covenant.

C

It is to be observed that in that case the next of kin were not parties to the settlement. They could not have been parties to the settlement. Secondly, they were outside the consideration of the settlement and were, therefore, volunteers. Thirdly, they were invoking the assistance of the court. That case is clearly no authority for the proposition that a direct covenantee, although a volunteer, cannot sue for damages on any covenant of this description, but the defendant relies (and so far as I can make out it is the sheet anchor of his case) on some observations made by EVE, J., in *Re Pryce* (9), and on the subsequent decision of SIMONDS, J., in *Re Kay's Settlement* (10). I think one sufficiently gets the point of the observations in *Re Pryce* (9) by referring to *Re Kay's Settlement* (10). The headnote in *Re Kay's Settlement* (10) is:

D

E

“A voluntary settlement executed by a spinster contained a covenant in the usual form to settle any after-acquired property, with certain exceptions. The settlor afterwards married and had three children. Having become entitled under a will to a legacy and a share of residue which fell within the covenant, and a share in an appointed fund, she was asked by the trustees of the settlement to settle this property, but refused to do so. *Held*, on an application by the trustees for directions, that the children, being volunteers, had no right to enforce the covenant, and, therefore, the trustees ought to be directed not to take any proceedings to enforce the covenant, by action for damages for breach, or otherwise.”

F

The case was elaborately argued. SIMONDS, J., after referring to the facts of the case, said ([1939] Ch. 338):

G

“It is in these circumstances that the trustees have issued this summons, making as parties to it, first, the settlor herself and, secondly, her infant children, who are beneficiaries under the settlement. But, be it observed, though beneficiaries, her children are, for the purpose of this settlement, to be regarded as volunteers, there being no marriage consideration, which would have entitled them to sue, though they are parties to this application. The trustees ask whether, in the event which has happened of the settlor having become entitled to certain property, they should take proceedings against her to compel performance of the covenant or to recover damages on her failure to implement it.

H

“I am bound to say that that does not seem to me to be a very happy form of proceeding, though perhaps it is difficult to see how else the trustees

should act. It is to be observed that one of the persons made a party is the very person as to whom the trustees ask the question whether she should be sued. She, the settlor, has appeared by Mr. *Evershed* and has contended, as she was entitled to contend, that the only question before the court was whether the trustees ought to be directed to take such proceedings; that is to say, she contended that the only question before

A the court was precisely that question which EVE, J., had to deal with in *Re Pryce* (9). She has said that the question before me is not primarily whether, if she were sued, such an action would succeed (as to which she might have a defence, I know not what), but whether, in the circumstances as they are stated to the court, the trustees ought to be directed to take proceedings against her.

B “As to that, the argument before me has been, on behalf of the children of the marriage, beneficiaries under the settlement, that, although it is conceded that the trustees could not successfully take proceedings for specific performance of the agreements contained in the settlement, yet they could successfully, and ought to be directed to, take proceedings at law to recover damages for the non-observance of the agreements contained in the settlement, first, the covenant for further assurance of the appointed share of the first-mentioned £20,000 and, secondly, the covenant with regard to after-acquired property. In the circumstances I must say that I felt considerable sympathy for the argument which was put before me by Mr. *Winterbotham* on behalf of the children, that there was, at any rate, on the evidence before the court today, no reason why

D the trustees should not be directed to take proceedings to recover what damages might be recoverable at law for breach of the agreements entered into by the settlor in her settlement. But on a consideration of *Re Pryce* (9) it seemed to me that so far as this court was concerned the matter was concluded and that I ought not to give any directions to the trustees to take the suggested proceedings.

E “In *Re Pryce* (9) the circumstances appear to me to have been in no wise different from those which obtain in the case which I have to consider. In that case there was a marriage settlement made in 1887. It contained a covenant to settle the wife's after-acquired property. In 1904 there was a deed of gift under which certain interests in reversion belonging to the husband were assured by him absolutely to his wife. The husband

F was also entitled to a one-third share in certain sums appointed to him by the will of his father in exercise of a special power of appointment contained in a deed of family arrangement. The share of the £9,000 fell into possession in 1891 on the death of his father, and was paid to him, unknown to the trustees of his marriage settlement, and spent. The interests given by the husband to the wife and his share of the £4,700

G came into possession in 1916 on the death of the husband's mother, and were outstanding in the trustees of his parent's settlement and of the deed of family arrangement respectively. The husband died in 1907, and there was no issue of the marriage. Subject to his widow's life interest in both funds, the ultimate residue of the wife's fund was held in trust for her statutory next of kin, and the husband's fund was held in trust for him absolutely. The widow was also tenant for life under her husband's will. The trustees of the marriage settlement in that case took out a summons ‘to have it determined whether these interests and funds were caught by the provisions of the settlement, and, if so, whether they should take proceedings to enforce them.’ In those proceedings, apparently, the plaintiffs were the trustees of the marriage settlement, and the only defendant appears to have been the widow of the settlor; that is to say, there were no other parties to the proceedings to whose beneficial interest

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it was to argue in favour of the enforceability and enforcement of the covenant, but the trustees no doubt argued in favour of their interests, as it was their duty to do.

"EVE, J., in a considered judgment, held that although the interests to which I have referred were caught by the covenant of the wife and the agreement by the husband respectively, yet the trustees ought not to take any steps to recover any of them. In the case of the wife's fund he said that her next of kin were volunteers, who could neither maintain an action to enforce the covenant nor for damages for breach of it, and that the court would not give them by indirect means what they could not obtain by direct procedure; therefore he declined to direct the trustees to take proceedings either to have the covenant specifically enforced or to recover damages at law. The learned judge, as I have said, took time to consider his judgment. Many of the cases which have been cited to me, though not all of them apparently, were cited to him, and after deciding that no steps should be taken to enforce specific performance of the covenant he used these words: 'The position of the wife's fund is somewhat different, in that her next of kin would be entitled to it on her death; but they are volunteers, and although the court would probably compel fulfilment of the contract to settle at the instance of any persons within the marriage consideration—see *per* COTTON, L.J., in *Re D'Angibau* (2)—and in their favour will treat the outstanding property as subjected to an enforceable trust—*Pullan v. Koe* (11)—'volunteers have no right whatever to obtain specific performance of a mere covenant which has remained as a covenant and has never been performed': see *per* JAMES, L.J., in *Re D'Angibau* (2). Nor could damages be awarded either in this court, or, I apprehend, at law, where, since the Judicature Act, 1873, the same defences would be available to the defendant as would be raised in an action brought in this court for specific performance or damages.'

"That is the exact point which has been urged on me with great insistence by Mr. Winterbotham. Whatever sympathy I might feel for his argument, I am not justified in departing in any way from this decision, which is now twenty-one years old. The learned judge went on: 'In these circumstances, seeing that the next of kin could neither maintain an action to enforce the covenant nor for damages for breach of it, and that the settlement is not a declaration of trust constituting the relationship of trustee and *cestui que trust* between the defendant and the next of kin, in which case effect could be given to the trusts even in favour of volunteers, but is a mere voluntary contract to create a trust, ought the court now for the sole benefit of these volunteers to direct the trustees to take proceedings to enforce the defendant's covenant? I think it ought not; to do so would be to give the next of kin by indirect means relief they cannot obtain by any direct procedure, and would in effect be enforcing the settlement as against the defendant's legal right to payment and transfer from the trustees of the parents' marriage settlement.' It is true that in those last words the learned judge does not specifically refer to an action for damages, but it is clear that he has in his mind directions both with regard to an action for specific performance and an action to recover damages at law—or, now, in this court.

"In those circumstances it appears to me that I must follow the learned judge's decision and I must direct the trustees not to take any steps either to compel performance of the covenant or to recover damages through her failure to implement it."

It appears to me that neither *Re Pryce* (9) nor *Re Kay's Settlement* (10) is any authority for the proposition which has been submitted to me on behalf

A of the defendant. In neither case were the claimants parties to the settlement in question, nor were they within the consideration of the deed. When EVE, J., referred to the volunteers in *Re Pryce* (9) it seems to me that what he intended to say was that they were not within the class of non-parties, if I may use that expression, to whom COTTON, L.J., recognised in *Re D'Angibau* (2) the court would afford assistance. In the present case the plaintiff, although a volunteer, is not only a party to the deed of separation but is also a direct covenantee under the very covenant on which she is suing. She does not require the assistance of the court to enforce the covenant for she has a legal right herself to enforce it. She is not asking for equitable relief, but for damages at common law for breach of covenant. For my part, I am quite unable to regard *Re Pryce* (9) which was a totally different case dealing with totally different circumstances, or anything which EVE, J., said therein, as amounting to an authority negating the plaintiff's right to sue in the present case. I think that what EVE, J., was pointing out in *Re Pryce* (9) was that the next of kin who were seeking to get an indirect benefit in that case had no right to come to a court of equity because they were not parties to the deed and were not within the consideration of the deed, and, similarly, they would have no right to proceed at common law if they attempted to do so in an action for damages as the courts of common law would not entertain a suit at the instance of volunteers who were not parties to the deed which was sought to be enforced any more than the court of equity would entertain such a suit.

D It was suggested to me in argument that in such a case as the present, where the covenant is to bring in after-acquired property, an action for damages for breach of that covenant is, in effect, the same as a suit for specific performance of a covenant to settle. I myself think that the short answer to that is that the two things are not the same at all. The plaintiff here is invoking no equitable relief. She is merely asking for monetary compensation for a breach of covenant.

E It was next said that, in relation to the claim for damages, having regard to the fact that cl. 7 of the settlement contemplates that certain terms of the settlement on which after-acquired property should be settled are, in default of agreement, to be decided by arbitration, an element of uncertainty is introduced into the clause which is such that the court would not or should not entertain a claim for damages for its breach. In my judgment, that argument is unsound because the beneficial interests contemplated to arise in relation to this after-acquired property are clearly set out and the only thing which had to be agreed, and in default of agreement would have to be arbitrated, was pure machinery for carrying out the beneficial interest so defined.

F Finally, it was suggested to me that, as this action is for damages by a daughter against her father and as the *quantum* of damages must be related to the father's expectation of life, a conception arises which, from reasons, as I understand it, of delicacy the court would decline to entertain. I can only describe that proposition as novel and I reject it without further comment. I shall, accordingly, direct an enquiry as to the damages sustained by the plaintiff for breach by the defendant of the covenant with the plaintiff contained in cl. 7 of the deed of separation, and the plaintiff will have her costs of the action, the costs of the enquiry to be reserved.

Order accordingly.

Solicitors: *Gregory, Rowcliffe & Co.* (for the plaintiff); *Hopwood, Mote & Leedham-Green* (for the defendant).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

LONDON PASSENGER TRANSPORT BOARD *v.* UPSON AND ANOTHER.

[HOUSE OF LORDS (Lord Porter, Lord Wright, Lord Uthwatt, Lord du Parc and Lord Morton of Henryton), June 17, 18, 21, 22, December 9, 1948.]

Street—Pedestrian crossing—Controlled crossing—Duty of "approaching" driver—Interrupted view of crossing—Injury to foot passenger thereon—Pedestrian Crossing Places (Traffic) Regulations, 1941 (S.R. & O., 1941, No. 397), reg. 3.

The Pedestrian Crossing Places (Traffic) Regulations, 1941, reg. 3, provides: "The driver of every vehicle approaching a crossing shall, unless he can see that there is no foot passenger thereon, proceed at such a speed as to be able if necessary to stop before reaching such crossing."

A pedestrian was knocked down by an omnibus while on a pedestrian crossing controlled by traffic lights. The lights were in favour of the omnibus driver, but his view of the crossing was masked by a stationary taxi-cab which was drawn up at the kerb on the crossing. When the omnibus became stationary, its front wheels were on the crossing.

HELD: a crossing controlled by lights did not cease to be "a crossing" within the meaning of reg. 3 even when a green light was being shown to on-coming traffic, and, therefore, as the omnibus driver was prevented by the stationary taxi-cab from seeing that there was no foot passenger on the crossing, and, nevertheless, approached at such a speed that he could not stop before reaching the crossing, he was guilty of a breach of reg. 3, and the breach was a contributory cause of the accident. The pedestrian's contributory negligence did not adeem the driver's failure to obey the regulation, but, under the Law Reform (Contributory Negligence) Act, 1945, s. 1 (1), merely reduced the amount which the pedestrian was entitled to recover.

Decision of the COURT OF APPEAL ([1947] 2 All E.R. 509; [1947] K.B. 930; 177 L.T. 475), *affirmed*.

[FOR THE PEDESTRIAN CROSSING PLACES (TRAFFIC) REGULATIONS, 1941, see HALSBURY'S STATUTES, Vol. 34, p. 350.]

[FOR THE LAW REFORM (CONTRIBUTORY NEGLIGENCE) ACT, 1945, s. 1 (1), see HALSBURY'S STATUTES, Vol. 38, p. 357.]

Cases referred to:

- (1) *Chisholm v. London Passenger Transport Board*, [1938] 4 All E.R. 850; [1939] 1 K.B. 426; 108 L.J.K.B. 239; 160 L.T. 79; Digest Supp.
- (2) *Bailey v. Geddes*, [1937] 3 All E.R. 671; [1938] 1 K.B. 156; 107 L.J.K.B. 38; 157 L.T. 364; Digest Supp.
- (3) *Knight v. Sampson*, [1938] 3 All E.R. 309; 159 L.T. 257; Digest Supp.
- (4) *Sparks v. Edward Ash, Ltd.*, [1943] 1 All E.R. 1; [1943] 1 K.B. 223; 112 L.J.K.B. 289; 168 L.T. 118; 107 J.P. 44; 2nd Digest Supp.
- (5) *British Fame (Owners) v. Macgregor (Owners), The Macgregor*, [1943] 1 All E.R. 33; [1943] A.C. 197; 112 L.J.P. 6; 168 L.T. 193; 2nd Digest Supp.
- (6) *Caswell v. Powell Duffryn Associated Collieries, Ltd.*, [1939] 3 All E.R. 722; [1940] A.C. 152; 108 L.J.K.B. 779; 161 L.T. 374; 2nd Digest Supp.
- (7) *Lewis v. Denye*, [1940] 3 All E.R. 299; [1940] A.C. 921; 109 L.J.K.B. 817; 163 L.T. 249; 2nd Digest Supp.
- (8) *The Generous*, (1868), L.R. 2 A. & E. 57; 37 L.J. Adm. 37; 17 L.T. 552; 41 Digest 859, 7257.
- (9) *Fardon v. Harcourt Rivington*, (1932), 146 L.T. 391; Digest Supp.
- (10) *Grant v. Sun Shipping Co., Ltd.*, [1948] 2 All E.R. 238; [1948] A.C. 549.

A APPEAL by the defendants, London Passenger Transport Board, from a decision of the Court of Appeal (COHEN and ASQUITH, L.JJ., LORD GREENE, M.R., *dissenting*), dated July 31, 1947, and reported [1947] 2 All E.R. 509, dismissing the defendants' appeal from a judgment of HUMPHREYS, J., in an action brought by the plaintiffs, a husband and wife, claiming damages for injuries received by the female plaintiff when she was knocked down by one of the defendants' motor omnibuses. HUMPHREYS, J., apportioned the negligence equally between the driver of the omnibus and the female plaintiff, and, having assessed the damages at £500, awarded the plaintiff £250 and costs. The Court of Appeal dismissed the defendants' appeal from this order on the ground that the omnibus driver was in breach of reg. 3 of the Pedestrian Crossing Places (Traffic) Regulations, 1941, and that the breach had contributed to the accident. The House of Lords now dismissed an appeal from the decision of the Court of Appeal. The facts appear in the opinion of LORD PORTER.

Fox-Andrews, K.C., and *Armstrong-Jones* for the appellants.

Russell Vick, K.C., *I. F. Reuben* and *Aarvold* for the respondents.

C The House took time for consideration.

Dec. 9. The following opinions were read.

D LORD PORTER: My Lords, this appeal raises certain questions as to what constitutes negligence at common law in the case of the driver of an omnibus in approaching and passing over a pedestrian crossing, and a further question on the construction of and obligations imposed by the Pedestrian Crossing Places (Traffic) Regulations, 1941 (S.R. & O., 1941, No. 397).

E The case was tried by HUMPHREYS, J., in the first instance and he found the driver of the omnibus guilty of negligence at common law. In the Court of Appeal ([1947] 2 All E.R. 509) COHEN and ASQUITH, L.JJ., reversed this finding but held the driver guilty of a breach of the regulations. LORD GREENE, M.R., dissented and attached neither blame nor liability to the driver or the appellants. The facts have been found by and are best taken from the judgment of HUMPHREYS, J. (*ibid.*, 513). They are as follows:

F "This action arises out of an accident which took place on Nov. 23, 1945, in Baker Street, that part of Baker Street where it is crossed by Blandford Street. That crossing is controlled from one side of Baker Street to the other by traffic lights. There is also a refuge in the road at the centre line and there is a pedestrian crossing. The plaintiff was minded to cross Baker Street from the north eastern corner to the north western corner and she proposed to cross by the refuge. She did that by walking on the pedestrian crossing and, as far as I can see, in the middle of the crossing. She had to walk a distance from the kerb to the nearest point of the refuge about 17 ft. 9 ins. She safely negotiated something like 15 ft. of that 17 ft. 9 ins. and then she was knocked down and injured by one of the defendants' omnibuses which was coming south down Baker Street, and she was knocked down by the offside front wing of that omnibus. I ought to say here that there was a taxicab drawn up actually with its wheels on the pedestrian crossing. There was, in fact, blocking that pedestrian crossing, or part of it, a taxicab which was drawn up quite close to the kerb, and the evidence was that the taxi driver was off his seat, having stopped there to pick up a fare . . . The effect of that, of course, was that, as far as the plaintiff was concerned, her view of the oncoming traffic, the traffic dangerous from her point of view, *i.e.*, the south-bound traffic in Baker Street, was masked by the width of the taxicab. I do not think it was given in evidence, but I suppose 5 ft. is a reasonable amount to assume as the width of the taxicab. In the same way the view which the omnibus

driver would have of her when she was on the pedestrian crossing would also be masked 5 ft."

The learned judge accepted the evidence of the driver that he was going 15 miles an hour and held that that was a perfectly reasonable pace, found that the lights were in his favour, that he first saw the respondent after she emerged from behind the taxicab at about the middle of his part of the crossing and at about a distance of 9 ft., that he braked hard and eased off to the left a little but could not turn far, because to have done so would have been to hit the refuge in the centre of the crossing, and that he had his omnibus under perfect control. The driver also said, and HUMPHREYS, J., accepted his evidence, that the respondent did not look as if she saw him, that he doubted if an accident could have been avoided even if she had been looking, and, in reply to a question put in cross-examination, that he knew people do cross against the lights, "they will do it and it is a thing you look out for." From the evidence of the conductor, who appears to have seen the appellant hurrying across the pavement before she was hidden by the taxicab, and of a lady passenger who spoke to seeing the appellant hesitating on the pavement and then plunging across the street, the learned judge concluded that the appellant's movements across the pavement before she reached the taxicab should have been observed by the driver. I do not think it necessary to quote further the findings of the learned judge inasmuch as those already given are the salient facts in the case. In these circumstances HUMPHREYS, J., did not think it necessary to come to a definite conclusion as to the result of the regulations of 1941 but found both the lady and the driver guilty of negligence at common law, the lady because she failed to take the precaution of looking to see whether the lights were green or red, and the driver because :

" . . . he knew that, although the lights were in his favour, people might cross, and he knew and recognised that an omnibus driver . . . is not entitled to run people down on a pedestrian crossing . . . on the ground that the pedestrian is so negligent that, therefore he can run him down."

Therefore, the omnibus driver ought to have been on the look-out to see whether there was anybody approaching the taxicab who was apparently about to pass in front of it and might be expected to appear on the crossing just about the time the driver got there. The learned judge continued :

" He did not see her. Two witnesses for the defendants said they did see her, she was perfectly plain to be seen, hurrying towards the kerb obviously with the intention of crossing. I think the driver plainly exhibited that form of negligence, negative negligence, which consisted in not seeing that there was something which was going to result in danger to a pedestrian who was lawfully in the road on that crossing."

My Lords, I have quoted the learned judge's words somewhat fully because, as it seems to me, the facts as found by him and those on which the case was argued before your Lordships were not quite the same. Before your Lordships, counsel for the respondents, as I understood them, laid little emphasis on the suggestion that the lady should have been seen by the driver hurrying across the pavement before she reached the taxicab. What they did say was that the driver should have anticipated that some person who, owing to the presence of the taxicab could not be seen, might negligently try to pass over the crossing, and that the driver should have driven slowly enough to enable him to pull up before reaching the crossing in case such an eventuality occurred. In the Court of Appeal, however, reliance appears to have been placed on the facts as found by the learned judge and they were dealt with by LORD GREENE, M.R., when he said ([1947] 2 All E.R. 512) :

" . . . the fact that, if the driver had looked in that direction, he would have seen the plaintiff is no ground for saying that it was his duty to look

in that direction. The fact that a driver could have seen something if he had looked is, of course, conclusive against him when he was under a duty to look. To say that he was under a duty to look because, if he had looked, he would have seen, is, with respect, entirely to misunderstand the nature and foundation of the duty to keep a proper lookout."

A My Lords, if the driver could and ought to have seen the female respondent hurrying towards the crossing before she reached the taxicab and to have anticipated that she was about to, or might, hasten across the crossing, and did not do so, undoubtedly he would be guilty of negligence at common law. With all respect to the learned judge, however, I cannot think that the evidence justified such a finding. It is true that the conductor with a free mind and an eye unconcentrated on the highway did see her at that moment, but the other independent witness spoke rather to her hovering on the kerb, undecided whether to cross or not. In any case there is no evidence of the number of pedestrians on the side-walk and both conductor and witness were at least 14 ft. behind the driver and may well have seen what was invisible to him owing to the obstruction of the taxicab.

C I think that the driver must be acquitted of any negligence in failing to see the female respondent before she disappeared from view behind the taxicab. Was he, then, negligent in not anticipating that some unseen person would suddenly emerge in front of the taxicab, in spite of the fact that the lights were in favour of the bus? I cannot take such a view. It is true that the taxicab obstructed some 5 ft. of the crossing and that it and a refuge in the middle of the road hampered the driver's freedom of movement, but he had a signal in his favour, was going at a moderate speed, and, to my mind, should no more be expected to anticipate that anyone would cross against the lights than that someone would suddenly emerge from behind a vehicle drawn up at the side of the road at a place where there was no pedestrian crossing. In neither case do I think that it matters that the manoeuvring space had been narrowed by a taxicab on one side and a refuge on the other. In my view, a foot passenger at a pedestrian crossing with the lights against her is, at least, in no better position than such a person crossing the road at any uncontrolled spot. A driver must, of course, keep a proper look-out even for negligent pedestrians, but, short of proceeding at a walking pace—and even that may not be enough—it is hardly possible to be certain of avoiding accidents where the injured party is guilty of gross negligence. Moreover, it must be remembered (i) that foot passengers, too, have a duty to perform and, in particular, that by the Road Traffic Act, 1930, s. 45 (4):

G "A failure on the part of any person to observe any provision of the highway code . . . may in any proceedings . . . be relied upon by any party to the proceedings as tending to . . . negative any liability which is in question in those proceedings."

(ii) that para. 98 of the Highway Code, which was in force at the material time, reads:

H "At controlled crossings, *i.e.*, wherever traffic is controlled by police or signals, cross the road only when the appropriate line of traffic is held up."

(iii) that the driver was entitled to place some reliance on these provisions. Speaking for myself, I can find no step taken by the driver which constitutes a negligent act.

There remains, however, the effect of the Pedestrian Crossing Places (Traffic) Regulations, 1941. They are ill-drafted and ill-considered, but, such as they are, effect must be given to them. The relevant regulations are regs. 3, 4 and 5, and are in the following terms:

"3. The driver of every vehicle approaching a crossing shall, unless he can see that there is no foot passenger thereon, proceed at such a speed as to be able if necessary to stop before reaching such crossing. 4. The driver of every vehicle at or approaching a crossing where traffic is not for the time being controlled by a police constable or by light signals shall allow free and uninterrupted passage to any foot passenger who is on the carriageway at such crossing, and every such foot passenger shall have precedence over all vehicular traffic at such crossing. 5. The driver of every vehicle at or approaching a crossing at a road intersection where traffic is for the time being controlled by a police constable or by light signals shall allow free and uninterrupted passage to every foot passenger who has started to go over the crossing before the driver receives a signal that he may proceed over the crossing."

Of these regulations, reg. 3 states the general duty of a driver when approaching a crossing, regs. 4 and 5 state the duty which he owes to foot passengers when he is at or approaching a crossing and they have stepped off the pavement. In considering its application to this case, reg. 5 is, perhaps, most material in its negative implications, *i.e.*, it enacts that uninterrupted passage is to be allowed to everyone who has started to go over the crossing before the light turns green, and, inferentially, declares that such passage need not be given once the light has turned green. But I do not think that reg. 5 overrides reg. 3 even at a controlled crossing, and reg. 4 is not applicable to the present case. What then is the true effect of reg. 3? If it is to be taken in its most literal sense, vehicles would have to come to a dead stop at every pedestrian crossing, inasmuch as, however slowly they were going, someone might step in front of them at the last moment and so be injured. Such a construction would make nonsense of the regulation, and, therefore, it is necessary to consider whether so strict an interpretation must be put on it.

Two questions arise as to the interpretation of the wording and were argued before your Lordships, *viz.*, (i) What is an approaching vehicle? and (ii) What is to be regarded as the moment at which the driver must be able to see that there is no foot passenger on the crossing? A vehicle, the appellants contended, must cease to be an approaching vehicle at some point, and that point must be that at which, if going at a reasonable speed, the driver could stop before reaching the crossing. If this were not so, he must decrease his speed at every crossing until he has reached a state of immobility when he arrives at the studs. My Lords, if this result necessarily followed I should hesitate unless compelled to reject the contention, but the wording is against such a construction. The word "approaching" is used in regs. 4 and 5 as well as in reg. 3, and in regs. 4 and 5 in conjunction with the word "at." In the first place, it is unlikely that "approaching" should be used in two separate senses in the three successive regulations, and, in the second, I find it difficult to accept the view that there are three states in the progress of a vehicle — "approaching," "at," and some intermediate and indeterminate stage when it is neither at nor approaching the crossing. The safeguard to the driver, in my view, comes, not from a narrowed construction of the word "approaching," but from a correct appreciation of the meaning of the phrase "unless he can see that there is no foot passenger thereon." When must he so see? Not, I think, up till the very moment he reaches the studs. If so late a time were taken, he would again be under the disability of having to slow down to a stop on each occasion that he intended to pass over a crossing. The regulations do not specify the distance between him and the crossing at which his ability to see must be tested, and, therefore, I think, it must be at a reasonable distance. DU PARCQ, L.J., adverted to this approach to the matter in his dissenting judgment in *Chisholm v. London Passenger Transport Board* (1) when he said ([1938] 4 All E.R. 866):

A “It is, I think, a reasonable view that, if a motorist, keeping a good look out, and going at such a speed that he can pull up in a few feet, sees a foot passenger come upon the crossing so late that it is impossible for the car to stop before reaching the crossing, the motorist will not be guilty of a breach of the regulations. It might fairly be said on his behalf that he ‘could see that there was no foot passenger on the crossing’ down to the last moment when he could reasonably expect a foot passenger to be there, and that he did all that in him lay to ‘allow free and uninterrupted passage to any foot passenger who was on the carriageway at such crossing’.”

Earlier the learned Lord Justice said (*ibid.*) :

B “The words ‘approaching a crossing’ in reg. 3 refer, in my view, not to a point 100 or 50 yds. from the crossing, but to the space which begins, say, 15 or 20 ft. from the crossing.”

C My Lords, I have quoted from this judgment because I find myself in general agreement with the principle that the moment at which the motorist must be able to see whether the crossing is clear or not does not continue until the crossing itself is reached, but with profound respect I am unable to accept the suggestion that the distance up to which the crossing must be observed to be empty persists up to a few feet or, for that matter, 15 or 20 ft. I think the true position is that the motorist must be able to see whether the crossing is clear or not up to the time when, going at the speed he is going, provided it is a reasonable speed, he would still be able to stop before reaching the crossing. D This view appears to me to be in accordance with that held by SCOTT and MACKINNON, L.JJ., as expressed in *Chisholm’s* case (1), and, if I may adopt the method of exposition of MACKINNON, L.J., if a motorist proceeding at x miles per hour, whatever that speed may be, provided it is a reasonable speed, can stop in y yards, he must see that the crossing is clear until he has approached to a stop within that distance. If he does not or cannot do so, E he has committed an offence against the regulations. But he has not broken them if someone steps on the crossing after he has reached such a spot. This construction of the regulation does, I think, make it workable, and is not inconsistent with *Bailey v. Geddes* (2) and *Knight v. Samson* (3) which deals with the effect of the regulations.

F Applying that principle to the present case, it leaves the driver of the omnibus guilty of a breach of the regulations because, in my opinion, had he had a clear view of the crossing uninterrupted by the presence of the taxicab, he could, going at the speed he was going, have pulled up in time. In other words, before he had reached the spot at which it was no longer incumbent on him to see that the crossing was clear, his vision was hindered by the taxicab, and his inability to see whether there was or was not anyone on the crossing at G that moment was, in my view, the cause of the accident. As it was, though he could not see the female respondent until after she emerged from in front of the taxicab, he almost managed to stop before reaching the crossing, and so to avoid the accident. Had he had the second or so more time which would have been afforded him by seeing her step on to the crossing, he would have been able to avoid it. I should dismiss the appeal.

H LORD WRIGHT : My Lords, the female respondent (whom I shall hereafter refer to as “the respondent”) was seriously injured when run into by a motor omnibus belonging to the appellants, on Nov. 23, 1945, in Baker Street, where it is intersected by Blandford Street. The accident took place on a pedestrian crossing controlled by lights under the Pedestrian Crossing Places (Traffic) Regulations, 1941, made under the Road Traffic Act, 1934, s. 18. I shall hereafter refer to them as “the regulations.” The crossing which was from the north east side of Baker Street to the north west side was divided

in the centre by an island or refuge. The distance from the eastern kerb to the side of the refuge was 17 ft. 9 ins. The collision occurred in daylight, the day being fine and clear. The respondent was knocked down by the appellants' omnibus when she had traversed the crossing to within 2 ft. of the refuge. She was struck by the offside wing of the omnibus which was coming southwards down Baker Street and was proceeding at the rate of about 15 miles an hour. The driver did not see the respondent until she was about 9 ft. from him. He actually stopped the vehicle with its front wheels still on the crossing, but was unable to avoid a collision. The driver's view of the roadway of the crossing was obscured as to part because a stationary taxicab was drawn up on the crossing, close to the eastern kerb. The cab was about 5 ft. in width. The driver could not, therefore, to the extent of that space, see whether the crossing was free of pedestrians until he saw the respondent when she stepped beyond the taxicab, and when, as already stated, she was about 9 ft. away from him. At the time the green light was showing, so that the control was in his favour. HUMPHREYS, J., the trial judge, held that the appellants' driver was to blame for not being on the look-out to see whether there was anybody who might come out in front of the taxicab after passing it. The judge did not think it necessary to discuss the regulations. He also held that the respondent was guilty of contributory negligence for not looking at the lights which controlled the traffic before she emerged past the cab. He assessed the damages at £500 and apportioned the blame equally between the two parties. In the Court of Appeal, LORD GREENE, M.R., was for holding that the respondent was solely to blame. He was also prepared to hold that the appellants' driver was not in fault either for common law negligence or for breach of the regulations which I shall discuss later, but the majority of the court, while agreeing with the judge that the respondent was guilty of contributory negligence, which, indeed, was not contested before this House, held the appellants liable for breach of the regulations. Before your Lordships, this latter was the issue primarily argued. Some confusion was introduced throughout because reg. 3 was not expressly pleaded, but the majority of the Court of Appeal held that, as the substance of the matter was set out, the issue was open, and the majority of the Court of Appeal were prepared to decide the case on it. I read their decision as being based on the breach of reg. 3, as a separate and independent cause of action, subject, however, to reduction of the damages :

“ . . . to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.”

Such is now the effect of the Law Reform (Contributory Negligence) Act, 1945, s. 1 (1) which takes the place of the previous rule of the common law that a person's claim would be defeated if the damage were partly due to his own fault and partly to the fault of the defendant. It was under the old rule that previous cases of this character were decided, as *e.g.*, the latest of the series cited, *Sparks v. Edward Ash, Ltd.* (4). It had been recognised in that and the earlier decisions that contributory negligence of the plaintiff might be a material issue on which a defendant might rely by way of defence in cases of breach of the Traffic Regulations. But whereas in *Sparks'* case (4) it was, if established, a defence *in toto*, under the Act of 1945, it is now a defence *pro tanto*. The Act introduced into the common law the rule long ago adopted in the Admiralty Court where there is a finding of “both to blame.” In such Admiralty cases this House has said that, where the findings of fact in the court below are not reversed in the appellate courts and the decision that both vessels are to blame stands, the case in which an appellate tribunal will undertake to revise the distribution of blame will be rare. So it was stated by VISCOUNT SIMON, L.C., ([1943] 1 All E.R. 34) in *British Fame (Owners) v. Macgregor (Owners)*, *The Macgregor* (5). I apprehend that your Lordships will think that the same rule or practice which has thus been adopted for sea collisions will

be applied in the case of land collisions. The trial judge is in a much better position to decide such questions of distribution than an appellate court save in exceptional cases. I think that this course should be adopted in the present case. It is true that there is a distinction where the respondent's contributory negligence falls within the class of ordinary common law negligence, and where the appellants' responsibility can be based on the breach of a statutory obligation, but both would fall within the language of s. 1 of the Act of 1945. Each

- A has reference to the same type of damage, and each party shares in the responsibility for the damage because, in the words of the section, the damage is the result partly of the respondent's own fault and partly of the appellants' fault. The words of the section are thus equally appropriate to the common law liability and to the statutory responsibility. In *Sparks'* case (4), GODDARD, L.J., sitting in the Court of Appeal, observed ([1943] 1 All E.R. 12) that, in view of what was held in *Caswell v. Powell Duffryn Associated Collieries, Ltd.* (6) in regard to breaches of a statutory duty, he could not see the difference between one statute and another, and compared the provisions of the Factory Acts with the regulations made under the Road Traffic Acts. He described the action in *Caswell's* case (6) as a common law action based on the statute intended to protect the workman, and similarly, he said, an action based on the Pedestrian Crossing Places (Traffic) Provisional Regulations, 1935 [the regulations in question in *Sparks'* case (4)] was based on a statutory regulation intended to protect the pedestrian and (adopting the old expression) was equally an action on the case in which damage was the gist of the action. He went on to say that the question for the court was whether the damage was caused by the defendant's breach of the statutory regulations. Now, since the Act of 1945, he would say "was caused in whole or in part."

I think that the authorities such as *Caswell's* case (6), *Lewis v. Denye* (7) and *Sparks'* case (4) show clearly that a claim for damages for breach of a statutory duty intended to protect a person in the position of the particular plaintiff is a specific common law right which is not to be confused in essence with a claim for negligence. The statutory right has its origin in the statute, but the particular remedy of an action for damages is given by the common law in order to make effective for the benefit of the injured plaintiff his right to the performance by the defendant of the defendant's statutory duty. It is an effective sanction. It is not a claim in negligence in the strict or ordinary sense. As I said ([1939] 3 All E.R. 739) in *Caswell's* case (6) :

- F "I do not think that an action for breach of a statutory duty such as that in question is completely or accurately described as an action in negligence. It is a common law action based on the purpose of the statute to protect the workman, and belongs to the category often described as that of cases of strict or absolute liability. At the same time it resembles actions in negligence in that the claim is based on a breach of a duty to take care for the safety of the workman."

- G But, whatever the resemblances, it is essential to keep in mind the fundamental differences of the two classes of claim. Here I shall, perhaps, be guilty of hypercriticism if I were to quarrel with the expression of ASQUITH, L.J., in the Court of Appeal ([1947] 2 All E.R. 516) that the common law duty is enhanced by the duty contained in the regulations. One duty does not, in truth, enhance the other, though the same damage may be caused by action which might equally be characterised as ordinary negligence at common law or as breach of the statutory duty. On the other hand, the damage may be due either to negligence or to breach of the statutory duty. In the present case ASQUITH, L.J., decided, as I understand, in favour of the respondent, not on the ground of negligence, which he did not find, but specifically on the ground of breach of statutory duty. There is, I think, a logical distinction which accords with what I regard as the correct view that the causes of action

are different. It follows that the correct pleading would be to allege each cause of action separately so as to avoid the confusion which seems to me to have crept in at certain points of these proceedings. I have desired before I deal specifically with the regulations to make it clear how, in my judgment, they should be approached, and also to make it clear that a claim for their breach may stand or fall independently of a claim for negligence. There is always a danger, if the claim is not sufficiently specific, that the due consideration of the claim for breach of statutory duty may be prejudiced if it is confused with the claim in negligence.

The Pedestrian Crossing Places (Traffic) Regulations, 1941, may now be considered. Of these reg. 3 is most directly relevant. It is in the following terms :

"The driver of every vehicle approaching a crossing shall, unless he can see that there is no foot passenger thereon, proceed at such a speed as to be able, if necessary, to stop before reaching such crossing."

Regulation 3 clearly deals with either controlled or uncontrolled crossings. Then comes reg. 4, which reads as follows :

"The driver of every vehicle at or approaching a crossing where traffic is not for the time being controlled by a police constable or by light signals shall allow free and uninterrupted passage to any foot passenger who is on the carriageway at such crossing, and every such foot passenger shall have precedence over all vehicular traffic at such crossing."

Regulation 5 deals with a controlled crossing and is in these terms :

"The driver of every vehicle at or approaching a crossing at a road intersection where traffic is for the time being controlled by a police constable or by light signals shall allow free and uninterrupted passage to every foot passenger who has started to go over the crossing before the driver receives a signal that he may proceed over the crossing."

Regulation 6 contains a general prohibition of a vehicle stopping on the crossing and reg. 7 forbids a foot passenger from delaying on the crossing.

The respondent's principal case is that there was a breach by the appellants' driver of reg. 3. It has been found that the driver did not proceed on "approaching" the crossing so as to be able to stop before reaching the crossing. The taxicab unlawfully drawn up on the crossing prevented the driver from seeing that there was no foot passenger on it. Hence he was bound to proceed at a pace which would enable him, if necessary, to stop before reaching the crossing. The driver was, indeed, proceeding at a reasonable rate apart from the regulation, but he was, in fact, unable to stop before reaching the crossing and, in consequence, he hit and injured the respondent. She was, indeed, herself negligent in coming out beyond the taxicab without sufficiently considering the green light and the approaching traffic. She made a miscalculation—it is true it was comparatively venial, because she got across to within 2 ft. of the refuge before she was struck. That was her contributory negligence. But the driver's failure to obey reg. 3 caused, or contributed to, the accident. It was not admeed by the miscalculation on the part of the respondent ; that only goes here to reduce the amount of her recovery under s. 1 of the Act of 1945. The driver's breach of the statutory duty was sufficient to impose liability *pro tanto*. The only word in the regulation which has made me pause is the word "approaching." The word connotes some, but an indefinite, degree of proximity. It must be reasonably applied because it may, perhaps must, involve interference with the flow of traffic, which can only be justified so far as necessary to promote the purpose of saving the lives and limbs of the public. Regulation 4 obviously distinguishes between "at" and "approaching," as does reg. 5 also. These regulations deal separately with uncontrolled and controlled crossings, whereas reg. 3 deals with both types

without qualification. But they are important to some extent in considering reg. 3. They give a *terminus ad quem* for the word "approaching." But the point of time or place at which the duty to regulate the speed attaches is not defined. That, I think, must be left to the judgment of the court, which has to decide what a reasonable driver would do in the particular facts of the case, so far as the regulation is not specific. I find valuable guidance in some observations made by DU PARCQ, L.J., sitting in the Court of Appeal, in *Chisholm v. London Passenger Transport Board* (1) in the course of a powerful dissenting judgment, with the reasoning of which I substantially agree. He said ([1938] 4 All E.R. 866):

"The words 'approaching a crossing' in reg. 3 refer, in my view, not to a point 100 yds. or 50 yds. from the crossing, but to the space which begins, say, 15 ft. or 20 ft. from the crossing. It is when a driver enters on that final piece of roadway that, unless he can then see that there is no foot passenger on the crossing, he must be prepared to proceed at a speed which will enable him to stop before reaching the crossing . . . Nevertheless any construction of reg. 3 which was more generous to the motorist, even if the words of the regulation could bear it—as, in my view, they cannot—would encourage him to ignore reg. 4, which contains the important words 'at or approaching a crossing,' and gives precedence at the crossing, not to the motorist, but to the foot passenger."

If the driver, whether "at or approaching" the crossing, sees any foot passenger on it, he must give him precedence. If he cannot see any foot passenger when approaching, he must moderate his speed as required by the regulations. If he has complied with reg. 3 in the particular contingency which it contemplates, he is void of offence under reg. 3. It may be that cases within reg. 3 are comparatively rare, but where there are such cases reg. 3 is imperative and mandatory, though it still leaves open the issue of the contributory negligence of the foot passenger. He is not given a licence to neglect any reasonable precaution for his own safety, though the law does not forbid him to traverse a crossing with the light against him if he can do so safely. That may also be an important question on the issue whether the breach of reg. 3 can be treated in any particular case as in whole or in part causing the accident. It is only if that is found that a plaintiff's action for damages can succeed. He must show (i) breach of the regulation, (ii) damage caused by it. I agree with the reasoning of COHEN, L.J., for his decision that the driver acted in breach of reg. 3 and that such breach was a contributory cause of the accident. I think also that COHEN, L.J., dealt sufficiently and satisfactorily with the decisions cited to your Lordships, and I do not feel obliged to deal further with them in detail. I share the regrets of ASQUITH, L.J., arising from the insufficiency of the pleading. He felt, however, entitled, having regard to the course of the proceedings, to treat the pleading as having been amended. I ought to add that I agree with LORD DU PARCQ in criticising, in the opinion which he is about to deliver, the passages which he quotes from the judgment of LORD GREENE, M.R., in the present case. I agree that the appeal should be dismissed.

LORD UTHWATT [read by LORD MORTON OF HENRYTON]: My Lords, at the hearing of the appeal the appellants' counsel stated his willingness that the case should be dealt with as if the pleadings had specifically alleged that the driver of the omnibus had broken the Pedestrian Crossing Places (Traffic) Regulations, 1941, reg. 3, and had thereby injured the female respondent. On that basis the appeal must, in my opinion, fail.

First, it is clear that the duty arising under reg. 3 was imposed with a view to protecting persons on the crossings therein referred to from the peril of approaching vehicles. The female respondent can rest her claim, therefore,

merely on a breach of that duty directly causing damage to her when on the crossing. It is not necessary for her to prove negligence on the part of the driver or an aggressive act directed against her. Next, the female respondent was on such a crossing as is referred to in reg. 3, for it is idle to suggest that a crossing controlled by lights ceases to be a crossing within the meaning of reg. 3 when the lights show green to on-coming traffic. Lastly, at no point of time could the driver see that there was no foot passenger on the crossing and at all times (until the female respondent emerged to his view when he was some 9 ft. from the crossing) he kept his speed of 15 miles an hour. I cannot see how, on any construction of the phrase "vehicle approaching a crossing," the driver can be acquitted of a breach of the regulation directly causing the injury suffered by the female respondent. The question of the proper construction of reg. 3 was, however, debated before your Lordships and on that question I desire to express my general agreement with the observations of DU PARCQ, L.J., in *Chisholm v. London Passenger Transport Board* (1). I differ only from him—I doubt whether there is between us more than a difference of expression—in that I think that the speed of the vehicle, as well as its distance from the crossing, should be taken into account in determining the point at which the vehicle begins to be an "approaching" vehicle. I would prefer to fix that point at the place at which, on a common sense view, the crossing first emerges as a possible obstacle to further safe progress by that vehicle if it continued to proceed at its then speed. If the driver at any time after the vehicle has become an approaching vehicle is unable to see that there is no foot passenger on the crossing, he has, subject only to the application of the principle, *lex non cogit ad impossibilia*, broken the regulation if the speed of his vehicle is not at that time such as to enable him, if necessary, to stop before reaching the crossing. The necessity of complying with the regulation is a matter which at all points of time the driver must bear in mind. The difficulties attending compliance with the regulation are, I think, easily exaggerated, for drivers can keep a look-out to the sides of the road as well as to the front. Undoubtedly, however, cases might well occur where, consistently with reading the regulation as directed to regulating the movement of traffic and not to stopping traffic (and, I think, it ought to be so read), it is impossible in any rational sense to comply with it. In such cases, the principle as to impossibility, the limits of which will be found stated in *The Generous* (8), takes the matter outside the purview of the regulation.

In the view that I have formed, it is not necessary for me to deal with the question of negligence. I desire only to register my dissent from the view expressed by LORD GREENE, M.R. ([1947] 2 All E.R. 512) that drivers are :

" . . . entitled to drive on the assumption that other users of the road, whether drivers or pedestrians, would behave with reasonable care . . . "

It is common experience that many do not. A driver is not, of course, bound to anticipate folly in all its forms, but he is not, in my opinion, entitled to put out of consideration the teachings of experience as to the form those follies commonly take. I would dismiss the appeal.

LORD DU PARCQ : My Lords, the learned counsel for the appellants invited your Lordships to deal with this appeal on the footing that, notwithstanding the omission of any reference to the material statutory regulations in the statement of claim, the respondents were entitled to rely on any breach of them which the evidence established. Even without this invitation it would, I think, have been difficult for your Lordships to dispose of the appeal without regard to these regulations. To attempt to do so would be to shut one's eyes to considerations which are both relevant and important.

I hope that I shall not be thought to be lacking in respect for the forcibly expressed dissenting judgment of the learned MASTER OF THE ROLLS when I say that it seems to me to be beyond doubt that the driver of the appellants'

omnibus was guilty of a breach of the Pedestrian Crossing Places (Traffic) Regulations, 1941, reg. 3. I agree with the majority in the Court of Appeal that there is no justification for the suggestion that a crossing controlled by lights ceases to be "a crossing" within reg. 3 while a green light is being shown to on-coming traffic. There is nothing in the context to make possible a construction which does such violence to the language of regs. 2 and 3, and I should not feel justified in refusing to give the words their ordinary meaning even if it seemed difficult to suppose that the Minister could have intended them to bear it. I find no such difficulty here. It must be agreed, I think, that one object of these regulations is to save foot passengers from injury and, since foot passengers are not prohibited from using a "pedestrian crossing-place" controlled by lights even when a green light is being shown to on-coming traffic, though it is sometimes negligent and often perilous for them to do so, it does not seem to me to be surprising that the Minister should think that the lives and limbs even of persons who may have been careless should to some extent be protected.

When once it is granted that the respondent, Mrs. Upson, was on "a crossing" (within the meaning of reg. 3) when she was knocked down by the appellants' omnibus, consequences follow which I find so clearly stated by COHEN, L.J., that I will borrow his language. The Lord Justice said ([1947] 2 All E.R. 515) :

"On the evidence it is plain that at all material times the presence of the stationary taxicab prevented the driver having an uninterrupted view of the whole of the crossing. That being so, it was impossible for him to see that there was no foot passenger thereon, and it was, therefore, his duty under the regulation to proceed at such a speed as to be able, if necessary, to stop before reaching the crossing. On the driver's own evidence he saw the plaintiff when she was 9 ft. away from the omnibus, and when he stopped the front wheels of the omnibus were on the crossing. Had he been driving at such a pace as to enable him to stop short of the crossing, it must, in my opinion, follow that he could have stopped within these 9 ft."

This brief statement, to my mind, disposes of the appellants' case. It is right, however, in deference to the opinion of LORD GREENE, M.R., that I should state my reasons for respectfully differing from him.

My Lords, the learned MASTER OF THE ROLLS has stated with great clarity a view of the law of negligence which, in my opinion, ought not to receive the approval of your Lordships' House. The MASTER OF THE ROLLS said ([1947] 2 All E.R. 511) :

"The driver of the omnibus was entitled to assume that the plaintiff, like other pedestrians, would conform to common sense and ordinary care in the presence of an adverse signal, particularly in view of the provisions of the Highway Code."

The MASTER OF THE ROLLS then quoted the instruction to pedestrians in para. 98 of the Highway Code in force at the material time, by which they are advised "at controlled crossings . . ." to "cross the road only when the appropriate line of traffic is held up." Dealing with the admitted fact that the appellants' driver was well aware that foot passengers do frequently use a crossing when the lights are in favour of the vehicular traffic on the road, LORD GREENE, M.R., said (*ibid.*, 512) :

" . . . the fact that a driver knows that other people on occasions do things that no careful driver would be expected to anticipate does not mean that he is under a duty to anticipate such action."

It followed from these premises that the appellants' driver was entitled to drive on the assumption that no pedestrian would disobey the light signal. The presence of the taxicab which obscured his view made no difference.

There was no evidence of negligence. Therefore, as the alleged breach of regulation was "relied on as evidence of negligence and nothing more," the case against the appellants failed. My Lords, if the premises are granted, this reasoning is impeccable, but I do not accept the premises as sound. It is assumed in them that a pedestrian is disobeying an adverse signal if he crosses a light-controlled "pedestrian crossing" at a time when the green light is signalling to vehicular traffic permission to advance, whereas, in truth, the pedestrian is under no legal compulsion to keep off the crossing at such a time, and the signal is never "adverse" to him in the sense that it prohibits him from crossing. The most that can be said is that he often takes a risk, which may be such that it is negligent to take it, if he crosses when the traffic is not being held up. If he crosses while the traffic is being permitted to proceed, he deprives himself, to some extent, of the special protection which the "pedestrian crossing" is designed to give to pedestrians. He does not, however, lose the protection which reg. 3 affords. Apart from this assumption, the propositions advanced by the learned MASTER OF THE ROLLS do not, I think, accord with the law as it has been laid down in your Lordships' House. The correct principle was stated by LORD DUNEDIN in *Fardon v. Harcourt-Rivington* (9) when he said (146 L.T. 392):

"If the possibility of the danger emerging is reasonably apparent, then to take no precautions is negligence; but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions."

I regard this statement and that of LORD MACMILLAN in the same case, which was to the like effect, as applying generally to actions in which the negligence alleged is an omission to take due care for the safety of others. It must follow that (if I may repeat what I said ([1948] 2 All E.R. 247) in *Grant v. Sun Shipping Co., Ltd.* (10) in this House):

"... a prudent man will guard against the possible negligence of others, when experience shows such negligence to be common."

The driver of the appellants' omnibus agreed in cross-examination that he knew

"... that people in London have a habit of crossing a road when the lights are not in their favour."

Even apart from the duty imposed on him by the regulations, he was, therefore, bound to take precautions against the possibility that some person was concealed from his view by the stationary cab and might suddenly emerge from its protection. On this ground alone, it must at least be said that there was evidence to support the conclusion that the driver had failed to take reasonable care for the safety of others and was, therefore, negligent. A driver is never entitled to assume that people will not do what his experience and common sense teach him that they are, in fact, likely to do. It is true that in some circumstances it is not reasonably possible for a driver to do anything to save a pedestrian from the consequences of the pedestrian's own act, just as the pedestrian can sometimes truly say that, although he knows that drivers are sometimes negligent, he could not reasonably have been expected to avoid the particular act of negligence which has caused him injury. These are questions for a jury, but I must say, with all respect, that a direction to a jury in the terms of the propositions enunciated by the learned MASTER OF THE ROLLS would be, in my opinion, unduly favourable to a defendant driver.

Another reason given by the learned MASTER OF THE ROLLS for his opinion that the decision of HUMPHREYS, J., should be reversed was that the omnibus had ceased to be an "approaching" vehicle within the meaning of reg. 3 at the moment when the respondent stepped on the crossing. He said, relying

on certain observations made in the Court of Appeal in *Chisholm v. London Passenger Transport Board* (1) that, if there had been no taxicab on the crossing, the omnibus would not at that moment have been an "approaching" vehicle, and argued that it could not be said to be an "approaching" vehicle merely because there was a taxicab there which obscured the omnibus driver's view. My Lords, it is never very satisfactory to consider a case on the hypothesis that its facts were other than we know them to have been. The words in reg. 3, A "unless he can see that there is no foot passenger thereon," are important words. When the reason why a driver cannot see that there is no one on the crossing is that his view is obscured, it seems to me that his duty under the regulation is plain. He must go at such a speed that, if someone emerges from behind the obstruction even at the last moment, he can stop. This, no doubt, B means that he must approach a crossing very slowly when (as in this case) the driver of some other vehicle has caused it to stop on a crossing, either lawfully in an emergency, or illegally in contravention of reg. 6. If he approaches the crossing slowly and, if no danger is apparent when he reaches it, crosses it slowly, he will have complied with the regulations. I think that the MASTER OF THE ROLLS, in his reference to *Chisholm's* case (1), was, naturally and C properly, if I may say so, disregarding the observations which I made in a dissenting judgment, and following the guidance given him by SCOTT, L.J., and MACKINNON, L.J. I hope, however, that I may be forgiven, especially as counsel at your Lordships' Bar were agreed that the opinion as to a driver's duty which I had expressed was correct, if I say that I still adhere to it. SCOTT, L.J., in one passage of his judgment ([1938] 4 All E.R. 859), suggested D that a pedestrian might reasonably essay to cross at a pedestrian crossing if the nearest approaching car was 50 to 70 yds. away. If by this the Lord Justice meant that it would necessarily be negligent to cross if a car were at a less distance from the crossing than 50 yds., and that the driver of the approaching car would not then be at all to blame if he collided with the pedestrian, I think that his *dictum* might give some support to the present E appellants' case. I would, however, respectfully dissent from it, if it is to be so construed. If it were generally accepted and acted on, no greater protection would be given to a foot passenger on a crossing, even an "uncontrolled" crossing, than on any other part of the road. Indeed, the foot passenger might be well advised to avoid pedestrian crossings, since most juries, I think, would be disposed in ordinary circumstances to attach some blame to a driver who F failed to avoid a foot passenger crossing the road (not at a pedestrian crossing) in a busy London street if he had seen the foot passenger start to cross considerably less than 50 yds. ahead of the driver's vehicle. I would, however, agree with the latter words of SCOTT, L.J. (*ibid.*):

" . . . in the case of any crossing where there is a likelihood of pedestrians wanting to cross, all cars ought to reduce to a moderate speed before G they get to a point at which they become 'approaching' cars within reg. 3."

I should myself interpret the words "moderate speed," so far as reg. 3 is concerned, as meaning such a speed as permits them to stop before reaching the crossing. MACKINNON, L.J., expressed his own view of the duty of a driver approaching a crossing in a different way. He assumed (*ibid.*, 862) H that a reasonable speed was x miles an hour, and that at x miles an hour the driver could pull up in y feet. Then, he said, if, when a driver is going at x miles an hour, a pedestrian enters the crossing when the vehicle is less than y ft. away, the driver will not have broken the regulation if he hits the pedestrian. I must respectfully suggest to your Lordships that, notwithstanding the air of mathematical accuracy which the algebraical symbols employed lend to this argument, it is fallacious in so far as it overlooks the fact that no speed is reasonable which is not adjusted to the circumstances of the moment,

including the fact that the driver is approaching a pedestrian crossing and may have to pull up quickly and within a very short distance. If the equivalent of *x* is found with proper regard to what I conceive to be the duty of a driver in such circumstances, the *dictum* of MacKINNON, L.J., will be innocuous, but it will, in my opinion, give no help to the present appellants. It is, I think, of some importance to notice that in *Chisholm's* case (1) MacKINNON, L.J., did not hold (as SCOTT, L.J., alone did) that there was no negligence on the part of the driver, and went no further than to say (*ibid.*) that he was doubtful whether the driver was negligent. The actual decision of the majority of the Court of Appeal in *Chisholm's* case (1) was that, in the circumstances of that case, there was contributory negligence on the part of the plaintiff. As the law then stood, that was enough to dispose of the case. In the case now before your Lordships, contributory negligence is admitted. The only question before this House is whether the appellants' driver was guilty of some negligence, or of a breach of statutory duty, which was, in part, a direct cause of the respondent's injury. In my opinion, both were proved against him, and this appeal should be dismissed.

LORD MORTON OF HENRYTON: My Lords, it is conceded by counsel for the appellants that this appeal cannot succeed if it be held that the driver of the omnibus in question committed a breach of the Pedestrian Crossing Places (Traffic) Regulations, 1941, reg. 3, and that such breach caused or contributed to the collision with the female respondent. No general proposition is involved in this concession, which is made only for the purposes of this appeal.

Regulation 3 is in the following terms :

"The driver of every vehicle approaching a crossing shall, unless he can see that there is no foot passenger thereon, proceed at such a speed as to be able if necessary to stop before reaching such crossing."

As a convenient method of considering whether the driver in question committed a breach of reg. 3, I shall propound three questions and supply to each of them an answer which seems to me inevitable, on the admitted facts of the case. (i) Was the driver of the omnibus, during some period before the collision occurred, the driver of a vehicle "approaching a crossing," within the meaning of reg. 3? This question can only be answered in the affirmative, and I agree with the observations of DU PARCQ, L.J. ([1938] 4 All E.R. 866) in *Chisholm v. London Passenger Transport Board* (1) as to the construction of this regulation. (ii) Could the driver of the omnibus, when his vehicle was approaching the crossing, see that there was no foot passenger on the crossing? To this question, again, I think there can only be one answer, *viz.*, he could not, because a taxicab obstructed his view of the crossing for a width of 5 ft. This is the result of uncontradicted evidence, and for the present purpose it is unnecessary to enter into any discussion of the question whether the female respondent was on the pavement, or on the crossing but concealed by the taxicab, at the time when the omnibus was "approaching" the crossing. It is sufficient that the driver could not see, at that time, whether there was or was not a foot passenger on the crossing. (iii) Did the driver of the omnibus "proceed at such a speed as to be able if necessary to stop before reaching such crossing?" He did not, for it did become necessary for the omnibus to stop before reaching the crossing, but the driver was unable so to stop, and the front wheels of the omnibus were on the crossing when the collision occurred. Whatever may be the precise meaning of the words "if necessary," I feel no doubt that it is "necessary" to stop, within the meaning of the regulation, if the driver must either stop or collide with a foot passenger. Thus, I can see no escape from the conclusion that the driver of the omnibus

committed a breach of reg. 3, and I can find nothing in any other of the regulations of 1941 which leads to a contrary conclusion. If this is so, the appeal must fail, as there can be no doubt that the breach of reg. 3 caused or contributed to the accident. If the driver had complied with the regulation, he would have proceeded at such a speed as to be able to stop before reaching the crossing in the event, which happened, of a person emerging from behind the obstructing taxicab.

A

For these reasons I would dismiss the appeal, but, as the question whether the driver was guilty of negligence at common law was fully argued in this House, and as the Court of Appeal differed on this point from HUMPHREYS, J., I add that, in my judgment, there was ample evidence to support the view of HUMPHREYS, J., that this question should be answered in the affirmative.

B

The facts bearing on this question are as follows. (i) The driver did not see the female respondent going across the pavement towards the kerb with the intention of crossing the road. The learned judge based his finding of negligence primarily on this fact, as he was satisfied that, if the driver had kept a proper look-out, he would have seen her. I agree that, if the driver had looked towards the near-side pavement, he would have seen her, but let me

C

assume for the moment that his failure to look in that direction did not, taken by itself, amount to negligence. (ii) Having failed to look towards the near-side pavement as he approached the crossing, the driver came to the crossing without knowing whether there was or was not a person, concealed by the taxicab, who had just stepped off the pavement and was crossing the road.

D

In his evidence the driver, a very frank and honest witness, admitted that people in London "have a habit of crossing a road when the lights are not in their favour." Knowing this, and not knowing whether some person would or would not emerge from behind the taxicab, the driver drove into the gap between the taxicab and the refuge in the centre of the road without reducing his speed of 15 miles an hour, and without sounding his horn by way of warning.

E

To my mind, the failure of the driver to keep a look-out on the near-side pavement, coupled with his failure either to slow down or to sound his horn, afford ample evidence to support a finding of negligence at common law. No doubt, wise pedestrians do not cross the road when the lights are in favour of oncoming traffic, but there is no regulation which forbids this, and many pedestrians are unwise. The learned MASTER OF THE ROLLS said in the course of his judgment ([1947] 2 All E.R. 511):

F

"The true view, in my opinion, is that a driver approaching a controlled crossing, whether it be controlled by lights or by the police, with the light signal or the police signal in his favour, is entitled to proceed on the assumption that pedestrians will conform to the indications given to them as to what their behaviour should be when the signals are against them, and that he is under no duty to keep a lookout for the possibility of a pedestrian disobeying the signals or to drive upon the assumption that a pedestrian may at any minute do so."

G

The MASTER OF THE ROLLS proceeded (*ibid.*, 512):

H

"But let me not be misunderstood. If a driver approaching such a crossing does, in fact, see that a pedestrian is crossing, or, apparently, is intending to cross against the signals, it is the duty of the driver to do everything that he can reasonably do in the circumstances to avoid running the pedestrian down. Failure to take all reasonable steps to avoid injuring someone who is himself seen to be negligent is itself negligent . . ."

With the later passage I entirely agree, but I am unable to accept the earlier passage without qualification. In particular, I could not accept it as correct in a case such as the present case, where an obstruction on a pedestrian crossing

prevents the driver from seeing whether a pedestrian has begun to cross the road against the signals. In such a case, I think that a driver fails to exercise due care, apart altogether from the regulations of 1941, if he proceeds on the assumption that pedestrians will refrain from crossing the road until the lights change, and drives his vehicle in such a way that he cannot avoid an accident if a pedestrian emerges suddenly from behind the obstruction. I agree that this appeal should be dismissed.

Appeal dismissed with costs.

Solicitors: *A. H. Grainger* (for the appellants); *Bryan O'Connor & Co.* (for the respondents).

[Reported by C. St.J. NICHOLSON, Esq., *Barrister-at-Law.*]

LAUDER v. LAUDER

[COURT OF APPEAL (Lord Merriman, P., Singleton, L.J., and Pearce, J.), November 18, 19, 22, 23, 24, 25, 1948.]

Cruelty—Injury to health—Sulking by husband.

At times the marriage of the spouses was happy, but the husband was subject to moods and fits of depression, and on these occasions he would sulk and refuse to speak to his wife, ignoring her, sometimes for days on end, both privately and before other people. The husband knew that when he ignored the wife in this way it upset her, and the cumulative effect of this conduct over a number of years had a serious effect on the wife's nervous and emotional stability. The wife petitioned for a divorce on the ground that the husband's conduct amounted to cruelty.

HELD (SINGLETON, L.J., *dissentiente*): the husband's conduct in thus deliberately and persistently sulking, causing, as it did, injury to the wife's health, constituted cruelty which entitled her to a decree for the dissolution of her marriage.

Principles in Russell v. Russell ([1897] A.C. 395; 77 L.T. 249) *applied*.

[AS TO CRUELTY, see HALSBURY, Hailsham Edn., Vol. 10, pp. 649-654, paras. 954-962; and FOR CASES, see DIGEST, Vol. 27, pp. 281-293, Nos. 2513-2694.]

Cases referred to:

- (1) *S.S. Hontestroom v. S.S. Sagaporack*, *S.S. Hontestroom v. S.S. Durham Castle*, [1927] A.C. 37; 95 L.J.P. 153; 136 L.T. 33; Digest Supp.
- (2) *Watt (or Thomas) v. Thomas*, [1947] 1 All E.R. 582; [1947] A.C. 484; 176 L.T. 498; 2nd Digest Supp.
- (3) *Russell v. Russell*, [1897] A.C. 395; 66 L.J.P. 122; 77 L.T. 249; 61 J.P. 771; 27 Digest 291, 2661.
- (4) *Jackson v. Jackson*, [1924] P. 19; 27 Digest 308, 2852.
- (5) *Moss v. Moss*, [1916] P. 155; 85 L.J.P. 182; 114 L.T. 1147; 27 Digest 345, 3261.
- (6) *Mytton v. Mytton*, (1886), 11 P.D. 141; 57 L.T. 92; 50 J.P. 488; 27 Digest 285, 2561.
- (7) *Bethune v. Bethune*, [1891] P. 205; 60 L.J.P. 18; 63 L.T. 259; 27 Digest 288, 2618.
- (8) *Horton v. Horton*, [1940] 3 All E.R. 380; [1940] P. 187; 109 L.J.P. 108; 163 L.T. 314; 2nd Digest Supp.
- (9) *Squire v. Squire*, [1948] 2 All E.R. 51; [1948] L.J.R. 1345; 112 J.P. 319.
- (10) *Hadden v. Hadden*, *The Times*, Dec. 5, 1919.
- (11) *Buchler v. Buchler*, [1947] 1 All E.R. 319; [1947] P. 25; [1947] L.J.R. 820; 176 L.T. 341; 111 J.P. 179; 2nd Digest Supp.

APPEAL by the husband from a decision of ORMEROD, J., dated June 24, 1948, granting the wife a decree *nisi* on the ground of the husband's cruelty.

The husband contended that the conduct complained of did not amount in law to cruelty. The Court of Appeal dismissed the appeal. The facts appear in the judgments of LORD MERRIMAN, P., and SINGLETON, L.J.

Sir Charles Doughty, K.C., and *J. G. K. Sheldon* for the husband.

Theodore Turner, K.C., and *N. Parkes* for the wife.

LORD MERRIMAN, P. : This is a husband's appeal against a decision of ORMEROD, J., in which, on a wife's petition on the ground of cruelty, he pronounced a decree *nisi* in her favour.

The wife alleged a course of conduct (not including any acts of violence) of such a character as to be calculated to injure the wife's health. It is a commonplace to say that cases of that character need, as, indeed, do all cases of cruelty, to be strictly proved, and strictly proved in accordance with the well known definition of cruelty to which I will refer later. There is another principle to be kept in mind when it is sought to set aside the decision of a learned judge who for three days has seen and observed the witnesses. That principle is plainly laid down in *The Hontestroom* (1) where LORD SUMNER summarised the whole matter in three propositions. After saying ([1927] A.C. 49) : "The only alternative is boldly to ask oneself, which story is the more probable," he continued (*ibid.*) :

"My Lords, for these reasons I do not propose to re-try this case, nor do I think that the Court of Appeal should have done so. I particularly refrain, and for this reason only, from examining and criticising the judgment of SCRUTTON, L.J., in detail. The material questions to my mind are :

- (1) Does it appear from the President's judgment that he made full judicial use of the opportunity given him by hearing the *viva voce* evidence ?
- (2) Was there evidence before him, affecting the relative credibility of the witnesses, which would make the exercise of his critical faculties in judging the demeanour of the witnesses a useful and necessary operation ?
- (3) Is there any glaring improbability about the story accepted, sufficient in itself to constitute 'a governing fact, which in relation to others has created a wrong impression,' or any specific misunderstanding or disregard of a material fact, or any 'extreme and overwhelming pressure' that has had the same effect ?"

Turning to the second question, which is not the least important of the three :

"Was there evidence before him, affecting the relative credibility of the witnesses, which would make the exercise of his critical faculties in judging the demeanour of the witnesses a useful and necessary operation."

I think it is desirable also that we should remind ourselves that in *Watt (or Thomas) v. Thomas* (2), not for the first time after the principle had been so firmly established in 1927, did the House of Lords think it necessary to re-affirm the importance of the principle thus established. I do not propose to read everything that was said in that case, but I would refer to one passage in LORD THANKERTON's speech. He also laid down three principles ([1947] 1 All E.R. 587) :

- (i) Where a question of fact has been tried by a judge without a jury and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion.
- (ii) The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.
- (iii) The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmis-

takably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."

LORD THANKERTON goes on :

"It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question. It will hardly be disputed that consistorial cases form a class in which it is generally most important to see and hear the witnesses, and particularly the spouses themselves, and, further, within that class, cases of alleged cruelty will afford an even stronger example of such an advantage. Normally, the cruelty is alleged to have occurred within the family establishment, and the physique, temperament, standard of culture, habits of verbal expression and of action, and the interaction between the spouses in their daily life, cannot be adequately judged except by seeing and hearing them in the witness box. The law has no footrule by which to measure the personalities of the spouses. In cases such as the present it will be almost invariably found that a divided household promotes partisanship, and it is difficult to get unbiased evidence."

I propose to approach the present case with those principles in mind. It is clear at the outset from that statement of principle that, if there is a misdirection of himself by the learned judge, then the whole matter is at large, because it is no use a trial judge relying on his appreciation of the demeanour of the witnesses if he has misdirected himself as to the principles by which his decision should be guided.

The present case is one of those difficult cases in which it is pre-eminently necessary to bear in mind the limits, on the finding of cruelty, imposed by the well known case of *Russell v. Russell* (3). I expressly refrain from saying "the definition" of cruelty, because several of their Lordships went out of their way to say that it was impossible to give any exhaustive definition of cruelty, while at the same time, in affirming the decision of the Court of Appeal, they laid down definitely and clearly the limits within which alone cruelty should be found, and, although this exact phrase does not appear in any speech, but is imported from the decision of the Court of Appeal, these limits are always given as being "conduct of such a character as to have caused danger to life, limb or health, bodily or mental, or as to give rise to a reasonable apprehension of such danger." That was the whole point of the case. I am not going to multiply citations from this well known authority, but, taking first of all LORD HERSCHELL who delivered the leading opinion in favour of the majority view, he said ([1897] A.C. p. 445) :

"It was contended that it is impossible exhaustively to define 'cruelty.' Whether this be so or not, it is manifestly necessary to determine what elements were treated as essential to the constitution of the *saevitia*, or cruelty, which entitled to a divorce."

After going through the cases which had been cited, he said (*ibid.*, 456) :

"Upon a review of the authorities prior to the time when the Divorce Act came into operation, I think it may confidently be asserted that in not a single case was a divorce on the ground of cruelty granted unless there had been bodily hurt or injury to health, or a reasonable apprehension of one or other of these."

LORD DAVEY, who agreed with LORD HERSCHELL's opinion, said, with regard to counsel's suggestion that the causing of bodily or mental pain such as was calculated to render matrimonial relations unendurable, was legal cruelty *ibid.*, 468 :

A “In my opinion *Sir Robert Reid’s* proposition goes far beyond anything which had been laid down by the learned judges of the Ecclesiastical Court before the Divorce Act, and appears to me to be very far reaching in its possible application. I express no opinion whether the court ought or ought not, as a matter of policy, to give relief on that principle. My only duty is to say whether the appellant’s contention is conformable to the principles on which the Ecclesiastical Courts formerly acted and gave relief. I am constrained to say that in my opinion it is not, and I see no reason to differ from the reasons given by the majority of the judges in the Court of Appeal. There is no question here of personal violence, and in the circumstances of the case I see no evidence of any apprehended injury to the appellant’s physical or mental health against which he requires protection.”

B LORD DAVEY himself said it was a case of gross outrage by one person on another and an abominable action of a wife towards her husband. No less strong expressions were used by other noble Lords. One noble Lord described the wife’s conduct as scandalous and atrocious, but there was no evidence that it had caused any injury to mental health or a reasonable apprehension of such an injury. It is impossible to doubt that, if that evidence which was lacking, had been present, the decision both in the Court of Appeal and the House of Lords would have been the other way. The whole point of the case is the limit thus imposed on what in colloquial language is called cases of “mental cruelty,” a phrase which, I admit, that I abhor, but which is not a bad shorthand for the class of case we are discussing. That case explains and emphasises the principles on which such cases should be decided and the necessity for care and watchfulness in deciding them.

D Bearing those principles in mind, I turn to the learned judge’s judgment in the present case to see whether he apprehended the true nature of the matter he was called on to decide. He said :

“As I understand the case which is put forward by the wife, it is this.

E She was very much in love with her husband, and, so far as she could see, he was very much in love with her, and from time to time they were extremely happy together, but, unfortunately, from the very early stages of the marriage she discovered that her husband had a somewhat peculiar temperament. She found that he was subject from time to time to moods, as she called them, or fits of depression, and that at those times he would remain morose and sullen and silent and would not speak to her, sometimes for a few hours, sometimes for days on end, and from time to time for periods as long as a week or ten days. She said that this state of things had a distressing effect on her mind and affected her health. She said that she discussed these things with her husband and that he knew perfectly well that his attitude towards her when he was in these moods of depression was having a bad effect, and that he and she from time to time tried to co-operate to cure him of this habit of falling into fits of depression, but that in spite of that the situation went on. It went from bad to worse until in January, 1946, when the husband came home from Germany, she told him that, unless there was an improvement in his manner towards her, she just could not go on and there would have to be a separation. Then, according to her, they talked the matter over and he agreed that he must try to do better, and for the rest of the leave he behaved very well indeed, and, as a result, they had a leave which was one of the happiest times they had had together since their marriage. After that she thought that, perhaps, he had got over this queer habit of silence and his method of treating her, and she was looking forward to his leave in June, 1946. Her evidence is that in June, 1946, after a good beginning, matters went from bad to worse, and for the latter part of the leave, which was a some-

what long leave—I think it was six weeks—she says that her husband was ignoring her completely, and she decided that . . . she could go on no longer.”

Having summarised the husband's point of view, the learned judge said :

“I have to consider these two stories, and I have to decide what is the real truth in this matter. I have to decide how far this account given by the wife is a true account and whether or not it is exaggerated, or exaggerated to any large degree. I also have to decide whether, having regard to the view I may take on the evidence of the wife and the husband, the conduct of the husband is such as might amount to cruelty. Having considered carefully, as I have had the opportunity of considering during the last three days, the demeanour of the parties, and, having heard the evidence which has been given in very great detail by both the wife and the husband, I have come to the conclusion that the husband's conduct was of the nature described by the wife. I have come to the conclusion that during the whole of the married life, right up to 1946, the husband was continually in the habit of falling into moods of depression, or tempers, or call them what you will—at any rate, moods when he refused to speak to his wife and when he ignored her, sometimes for days on end, both privately and when other people were there. That is, of course, corroborated to some extent in the correspondence, with which I do not intend at this moment to deal, but it is clear that both from the letters and from his evidence he admits from time to time he did suffer from these moods, and I am satisfied, having heard the evidence of the wife, that he suffered from them to such an extent as to make her life with him almost intolerable. It is clear too, I think, on the evidence that he knew that when he ignored her in this way it was upsetting her seriously, and the cumulative effect of this, going on through the years, was in fact having a serious effect on her nervous and emotional stability.”

I have read those passages because, to my mind, they establish that the learned judge fully appreciated the necessity for the co-existence of the two essential elements in a charge of cruelty—something which could be called misconduct on the part of the husband coupled with danger actual, or, at least, apprehended, to the mental health of the wife.

It is my habit, in trying cases of this class, to begin with the latter element first. Is there in the case evidence which justifies the trial judge in holding that actual, or, at least, threatened, danger to the health, bodily or mental, of the petitioner is proved? In this case, in my opinion, the evidence is all one way. I do not propose, on the question whether on the medical evidence the learned judge was right in saying that the cumulative effect of the husband's conduct was having a serious effect on the wife's nervous and emotional stability, to say any more than that, in my opinion, there was abundant evidence to justify him in coming to that conclusion.

That brings me to what is the more serious element of controversy in this case, for it is said that the learned judge wholly misdirected himself on this matter. On the facts there can be no misdirection unless one of two things can be said—either (i) that the conduct complained of is incapable in law of being cruel conduct, or (ii) if such conduct is capable in law of being cruel conduct, there was no sufficient evidence on which the learned judge could find that such conduct existed. Manifestly, if either of those propositions can be established, the judgment is vitiated, the whole question is at large, and we are entitled to come to any conclusions that happen to appeal to us.

Let us see whether there was any such conduct. I am not going to repeat, though it is material to this point, my brief summary of *Russell v. Russell* (3) beyond saying that more than one of the noble Lords who dealt with that

appeal were careful to point out that it was impossible to give an exhaustive catalogue of the circumstances which might amount to such conduct. I have already pointed out that, had it been possible in that case, as it was not, to say that the abominable, atrocious, scandalous conduct (to adopt some of the epithets that were used about the wife's conduct) had the effect of creating at least a reasonable apprehension of danger to the mental health of the husband, the decision would have been the other way. I mention in passing that LORD HALSBURY, L.C.—and that this was in a dissenting speech is immaterial because it does not touch the main point—said ([1897] A.C. 424) :

“As no judge has ever affected to define what cruelty is exhaustively, so no judge has, in my view, ever affected to prescribe what individual elements would go to make up cruelty.”

B In *Jackson v. Jackson* (4) SIR HENRY DUKE, P., said precisely the same thing of the correlative offence of desertion which, where a wife has been driven from home, is often almost exactly co-terminous with cruelty. He said ([1924] P. 23) :

C “If there is abandonment by one of the spouses of the other, that is desertion. If one of the spouses causes the other to live separate and apart, that is desertion. I am not going to attempt an exhaustive definition of desertion. No judge, so far as I am aware, has sought to do so, and certainly there is no prospect of its being successfully done.”

Words to the same effect can be found in LORD SHAND's speech, and in other passages in the opinions of the noble Lords in *Russell v. Russell* (3).

D That, however, only deals with the elements which may go to make up the conduct of the wrongdoer. The question of the method of approach, which I should have thought was by now established beyond the slightest possibility of doubt, is dealt with by PHILLIMORE, L.J., in *Moss v. Moss* (5). Delivering the judgment of the Court of Appeal consisting of LORD COZENS-HARDY, M.R., himself, and SARGANT, J., PHILLIMORE, L.J., summed up the whole matter E in these words ([1916] P. 162) :

“To use the language of LORD DAVEY in *Russell v. Russell* (3), which is in harmony with that of LORD HERSCHELL, protection is given ‘to the complaining spouse against actual or apprehended violence, physical ill-treatment, or injury to health’; while in a later passage he explains that he refers to mental as well as physical health. The other noble and learned Lords who formed the majority agreed with these judgments. *Mytton v. Mytton* (6) and *Bethune v. Bethune* (7) are useful instances of the application of this doctrine by courts of first instance. A course of conduct creating mental distress and anxiety and thereby injuring bodily health amounts to cruelty. This is, I apprehend, that which the learned judge found to exist and upon which he founded his decision . . .”

G Before passing on, I think it is as well just to glance at *Mytton v. Mytton* (6), a decision of BUTT, J. The headnote reads as follows :

“A persistent course of harsh, irritating conduct unaccompanied by actual violence but carried to such a point as to endanger the petitioner's health, and renewed after the resumption of interrupted cohabitation, H held to constitute legal cruelty.”

The evidence of the wife petitioner as summarised was :

“ . . . that the cruelty, which commenced during the honeymoon, consisted of harsh and irritating language and tyrannical conduct, which made her life intolerable and seriously injured her health. There was no actual violence, but he had shaken his fist in her face, saying at the same time that being a lawyer he knew the law too well to commit actual violence.”

There was an interruption in cohabitation, and it is true that after the resumption of cohabitation there was an instance of drunken and disorderly conduct in the course of which the servant employed by the parties is said to have rushed from the house in terror, but that this was not necessary for the decision, except to get rid of the condonation by the resumed cohabitation, is plainly shown by the learned judge (11 P.D. 143) saying that, even up to the time before the parting occurred, if "an application had been made to the court similar to that now made it would have been granted." The parting came about because the husband had to go to Canada, and the learned judge relied on a letter which had a certain resemblance to the wife's attitude as displayed in some of the correspondence in this case. I am referring in particular to what ORMEROD, J., in the present case described as "the happiest time they ever spent together, the leave in January, 1946." BUTT, J., said (11 P.D. 143):

"It is an affectionate letter, and it expresses a hope that there is a possibility of future happiness, and it ends thus: 'Your loving wife—always—if only you would behave as you did in the last three or four days and renew that period of happiness all would be well. For the sake of those few days of happiness, how much I could forget'."

The learned judge said there would have been no doubt that the wife would have been entitled to a decree in spite of that letter, or, as he thought, because of it, for he described the impression conveyed to his mind by that letter as being "that there was constant unhappiness, and one very small oasis of happiness." I agree that neither *Moss v. Moss* (5) nor *Mytton v. Mytton* (6), though not far removed from this case, is an exact precedent.

It is argued and has been asserted repeatedly, that there is no authority for holding that sulking can amount to such conduct as can constitute cruelty. That has tempted me to refer to decisions of my own. I only do so with becoming humility and simply because of this repeated assertion that there is no authority for any such proposition. I cannot pledge my recollection that I have ever decided a case which depended solely on sulkiness, but I am prepared to say, without hesitation or reservation, that I have decided several cases which, though there may have been some element of violence, nagging, or the like which, taken by itself, no court would be prepared to treat seriously, turned in the main on an allegation of deliberate sulking and sullen silences of the kind here described. It is said that none of these decisions has been reported and it so happens that none of the counsel engaged in the present case appears to have been engaged in any such case, but in such cases I always begin by stating the principle in *Russell v. Russell* (3) and I then go on to enquire whether or not there is evidence which satisfies me that the danger-to-health element in the charge of cruelty is present. Only if that is satisfied, do I then go on to deal with the course of conduct alleged. I am prepared to say, categorically, that on more than one of these occasions I have committed myself to the statement that I can imagine no course of conduct more calculated to be destructive of married life than persistent and deliberate sulking. It happens that in the present case we were provided with an argument which I had already noted for my judgment. Counsel for the husband said that if this case had amounted to "sending the wife to Coventry" he could well understand the charge, but that it did not because the husband's conduct was involuntary. I had made a note to recall that schoolboy phrase and to remind those of us who remember our schooldays that the most dreadful punishment which could be inflicted on a small boy was to send him, as it was called, "to Coventry." It requires very little imagination to understand what that meant when applied to a sensitive, and, at the outset, at any rate, an extremely affectionate, wife, when day after day for as much as ten days the husband persistently refused to hold any social intercourse with her, and that was emphasised by his being jolly with other people if they happened to be there

while pointedly ignoring the wife. I confess I was unable to understand the argument that this could not amount to cruelty. It was subject to the qualification that the husband's action was involuntary, but that, to my mind, is sheer rubbish. The evidence is all one way on that point the husband admitted, and the wife and her mother proved, that when he was pulled up by one or other of them he would behave better for a few days. There was nothing involuntary about this. No doubt his temperament must be taken into account, but it was a temperament which he was not unable to control, and many of these incidents were brought about by things for which his wife was not responsible. There is no doubt that other of these instances were brought about by the wife in the sense only that she was resisting the imposition of his will on hers in matters in which she was entitled to have a will of her own. That position is illustrated in particular by the two instances connected with the church.

It is unfortunately true that religious differences played a considerable part in this case. Both the two incidents to which I have referred occurred when the wife was pregnant—a time when special tenderness would be required and any lack of it more keenly felt. In the case of the first pregnancy, which ended so tragically, the husband insisted that the wife should go to early mass when she was two or three months pregnant. The result was that she fainted. The point is not that her being made to go to mass was cruelty in itself, and this the learned judge fully appreciated. It is that this is an outstanding instance of the attitude of the husband to the wife—that he was prepared to bend her to his will by threatening her with one of his fits of temper and she gave way because she was afraid that such a thing would result. He admits that had she not given way such a thing would have resulted. The fact that it was in connection, as he puts it, with her soul's welfare of which he thought more than of her bodily welfare is no excuse. Still less is it an excuse when, in the second instance, his own priest had told him that he was not to force his wife to go to a confirmation class if she did not feel well enough, and yet, again at the expense of another faint, at a time when she was pregnant with the second child and was deeply anxious that there should be no such disaster over this child as there had been over the first, does he bully her for her soul's good, forsooth, in spite of what the priest had said, into going to the class, with another disastrous result.

I only want to add that, whatever may be said about the wife's conduct, it is impossible to assert that, if she has been the victim of a wrong, she was the author of her own wrong. I will only refer to one piece of evidence and that is about the occasion when she first burst out in words to her husband and said she could not stand what had been going on any more. His reaction was: "Oh, don't say that. That is the first time we have had a quarrel." How much better for everybody it would have been if, instead of these ghastly periods of sending the wife to Coventry, there had been a good "blow up" and after that they had kissed and been friends. To talk of the husband's course of conduct as "moods" is an euphemism, to put it mildly. To talk of them, as both his counsel talked of them, as "merely being quiet" and as "sitting reading a book" is a mis-use of the English language. I am not concerned to say what I should have found in this case. I do not know, and I am not entitled to ask myself because I was not at the trial and I did not see and hear these witnesses, but, if the learned judge properly exercised his functions and performed his duty to take advantage of seeing and hearing the witnesses, and came to the conclusion that this course of conduct was proved, he could, in my opinion, give no other judgment than that which he has given. I would dismiss this appeal.

SINGLETON, L.J. : The appellant, Major Francis Joseph Lauder, is an officer serving at the moment in Germany. A decree *nisi* was granted

against him by ORMEROD, J., on the ground of cruelty. It is not said that he ever raised his hand to his wife or ever spoke an unkind word to her. The case rested on "moods," or fits of depression which he had and which can properly be described as "the sulks." I confess that I have not very great experience of the practice in divorce, but I wondered from an early stage in the case whether there had been other cases reported of this kind. I ventured to ask whether there had been a case of this type reported and counsel on both sides undertook to look to see if there had been. Research was made and no case precisely like this has been found. In the course of argument my Lord told counsel for the husband that he himself had decided a number of cases of this kind. I am bound to say that I think it a great pity if matters of this kind are not reported. A

Since the Matrimonial Causes Act, 1937, it has been open to the court to grant a decree "if the respondent has since the celebration of the marriage treated the petitioner with cruelty." The petition in this case is based on allegations of cruelty. Parliament has not said, and I hope it never will be said, that a decree can be granted because two people find it impossible to get on the one with the other or because one does not like the other. The sole question to be considered by the trial judge is whether it is proved that there was cruelty as understood in law. I do not propose to refer to the authorities which my Lord has mentioned. I do propose, however, to say a few words about some more recent authorities, not that they alter, in any sense, the general principle as stated by my Lord, but because I think they provide some help towards an examination of this case. B

In *Horton v. Horton* (8), which came before BUCKNILL, J., the headnote is as follows : C

"In order to obtain relief under the Matrimonial Causes Acts on the ground of cruelty it is not enough for a husband to establish that his wife's character has developed in such a way as to make it impossible for him to live happily with her. He must prove that she has committed wilful and unjustifiable acts inflicting pain and misery on him and causing him injury to health. Where a husband petitioned for divorce on the ground of cruelty, it was held that his health was injured not merely by the development and manifestation of the wife's character acting in its own sphere, but by her wilful and unjustifiable conduct to him which was an intrusion upon and did violence to his own mode of living. That course of conduct amounted to legal cruelty." D

The learned judge said ([1940] 3 All E.R. 383) :

"When *Russell v. Russell* (3) was decided, the remedy for cruelty was a legal separation. It cannot be supposed that a wider or more liberal meaning should be attached to the word 'cruelty,' now that it is a ground for divorce. The question for me, therefore, is whether I am satisfied on the evidence that the wife has committed wilful and unjustifiable acts inflicting pain and misery upon her husband, which have caused him bodily hurt or injury to his health, or which have caused him reasonable apprehension of such hurt or injury. Mere conduct which causes injury to health is not enough. A man takes a woman for his wife for better or for worse. If he marries a wife whose character develops in such a way as to make it impossible for him to live happily with her, I do not think that he establishes cruelty merely because he finds that life with her is impossible. He must prove that she has committed wilful and unjustifiable acts inflicting pain and misery upon him and causing him injury to health." E

More recently in *Squire v. Squire* (9), the Court of Appeal, in reversing the decision of the trial judge, referred to certain authorities which seem to me to be apposite. The headnote is as follows : F

A “The proposition that a person is presumed to intend the natural and probable consequences of his acts applies to acts amounting to cruelty in matrimonial causes. If a spouse commits acts amounting to cruelty, they constitute cruelty notwithstanding that the conduct was the consequence of the spouse’s illness (not amounting to insanity) and not of any spiteful or malignant intention. *Per* TUCKER, L.J.: I must not, however, be understood to suggest that, in considering whether or not a case of cruelty has been established, the state of health of the parties is not a relevant matter to be taken into consideration, together with all the other surrounding circumstances of the case, or that the same weight is to be attached to every act whether committed in sickness or in health, or that it is not the duty of each spouse to care for and tend and show forbearance towards the other in case of illness. *Per* EVERSLED, L.J.: I do not say that proof of such an intention (*i.e.*, a spiteful or malignant intention) may not be an important, or, in some cases, even an essential consideration.”

B
C TUCKER, L.J., in his judgment ([1948] 2 All E.R. 53), referred to *Hadden v. Hadden* (10) in which SHEARMAN, J., said: “I do not question he had no intention of being cruel, but his intentional acts amounted to cruelty.” That passage seems to me to be important from the point of view of this case. EVERSLED, L.J., in his judgment, said (*ibid.*, 55):

D “I do not attempt any definition of the words ‘cruel’ or ‘cruelty’ save to say that the conduct complained of must at least satisfy the ordinary acceptance of those English words, and that, on well settled authority, it must be such as to have injured, in fact, the complainant’s mental or physical health or be such as to cause real apprehension of such injury.”

I refer to one other authority, also in the Court of Appeal, *Buchler v. Buchler* (11), where ASQUITH, L.J., said ([1947] 1 All E.R. 326):

E “As to the second head of complaint, the husband cannot be absolved from neglect and want of consideration for his wife, but this is a charge which thousands of spouses could prefer against each other with abundant justification, but without any hope or prospect of securing legal relief on the ground of constructive desertion or otherwise. It may, no doubt, be galling—or, in some sense of the word, humiliating—for a wife to find that the husband prefers the company of his men friends, his club, his newspaper, his games, his hobbies, or indeed his own society, to association with her, and a husband may have similar grievances regarding his wife, but this is what may be called the reasonable wear and tear of married life, and, if it were a ground for divorce, a heavy toll would be levied on the institution of matrimony.”

F
G
H Having referred to those authorities, and bearing in mind those which my Lord cited and the general principles laid down, I think it right to approach this case keeping in view the position of both parties. The husband had fits of depression which were most annoying, most disturbing, and most upsetting. There are people who will sulk however much they may try to stop it. The husband in this case sulked unduly. The evidence shows that he and his wife tried together to get him out of that state and to some extent they succeeded, particularly during his leave in January, 1946. Sometimes, when he was spoken to about it, he said: “I am sorry, I will try to do better” and sometimes he did improve. It so happened that the happiest time they spent together, according to the evidence, was that leave in January, 1946. Their life had been a little troubled. He was a regular soldier and had been on service all the time. He had had service in India for some nine or ten years prior to the world war. He was in France for a period and was evacuated from Dunkirk. Later he was in West Africa. There has been some kind of suggestion that his condition might have been caused by or made worse by

his service, but so far as one can see he had it before. At one time, indeed, there was some discussion about it being inherited from his ancestors. I do not know anything about that, but what we all know is that he did have these fits of depression which he and his wife tried to correct. Other matters of importance must be considered. He is a Roman Catholic. She was not, but she wished to marry him and was ready to change her religion and become a Roman Catholic. According to his views, he could not have married her unless she had changed. There were two incidents in regard to church or church going and after September, 1944, she never went to church. That probably hurt his feelings. I have read a good many parts of the transcript of the evidence more than once. I do not find anywhere any complaint by him or any unkind word on his part. Importance is attached on behalf of the wife to the two incidents in regard to the church. It is said that he was domineering or tyrannical, that when she was carrying her first child and was about two months advanced in pregnancy, he insisted on her going to church. I find it difficult to see that it is either tyrannical or domineering if a man asks his wife to go to eight o'clock service in the morning. It may be that if she says: "I do not feel very well," he ought to say: "Stay in bed by all means," especially if she is in the early stages of pregnancy. To do otherwise may show lack of consideration, but I cannot regard it as either tyrannical or overbearing in any sense of those words. As to the incident of September, 1944, when, it is said, he insisted on her going to a confirmation class, this is her account:

"(Q) When your husband said he had arranged for you to go to the confirmation class on Tuesday, what did you say? (A) I was very upset about it, and I said I would far rather not go because I did not feel fit enough. He told me I must go and he wanted me to go. In the end I went, because, if I did not, he would not speak to me. After I had been in there for about half an hour I just fainted under the table and came round screaming. The priest brought me home and told my husband that I was not to go on Thursday unless I felt very much better."

From that time onwards, she never went to church again. It is not suggested that he said she should, but the wife, who, after all, was 27 years old at the time of her marriage and had undertaken to become a Roman Catholic, ceased to attend services at all. I cannot help feeling that that would have some effect on the likelihood of the marriage lasting.

When this petition was launched certain charges were made and particulars were asked for and given. The charges made in support of the charge of cruelty were, first, that the husband was a man of tyrannical disposition and had continually sought to force the wife to submit to his wishes by threat of persistently and ostentatiously ignoring her in private and public and had, in fact, frequently so ignored her for considerable periods, thereby causing her great anguish and injuring her health. I see no evidence that he was either tyrannical or domineering in disposition. Paragraph 8 is:

"That the respondent has persistently neglected the petitioner when she has been ill, he has forced her to undergo physical exertion for which she has been unfit, and, by himself consuming an undue proportion of food available for him and her, has caused her to suffer from undernourishment whereby her health has been injured."

Paragraph 9 is:

"That from the aforesaid date of the marriage to December, 1942, at Leasefield Drive, Meadowfield, aforesaid and at divers other places the respondent, by eating an undue proportion of food available for him and the petitioner, caused her to suffer from undernourishment so that by reason

thereof her legs became swollen and weak and being pregnant she fell on or about June 16, 1943, and injured her spine."

The only support I have seen for that allegation is a statement of hers, I think in answer to a question in cross-examination, that the doctor somewhere had told her that. Then there are allegations as to ignoring her and an allegation that he forced her to cycle one and half miles to church to attend early mass.

A I do not think the evidence supports that. Paragraph 12 is :

"That on a date in September, 1944, near Plymouth in the county of Devon aforesaid, the respondent tried to force the petitioner to walk through a herd of cows in which a bull was running loose, and on her showing that she was afraid to do so he left her to walk home by a detour for half a mile unaided. The petitioner was pregnant and her legs were in a bad condition and she became very exhausted as a result."

B The child was born in April, 1945. I regard this conduct of his as silly, foolish, inconsiderate. When he had seen that she did not want to walk through the field in which there was a bull, he might well have walked round the other way with her. Apparently, he knew from the farmer there was nothing to be afraid of, but she went the other way round. I do not regard it as cruelty.

C I do not think the learned judge at the trial did either. Another allegation in the petition is that he compelled her to walk for the space of an entire afternoon in December, 1944, looking for the fuel office. Again, there was no need for her to go. It was silly of him to take her on that walk, but I do not think it can be put higher than that, even though she was five or six months advanced in pregnancy at the time.

D I come now to the further and better particulars which were delivered in reply to the request of the husband. There are two observations I would make in regard to them. The first is that they were delivered on Dec. 29, 1947—about 18 months after the parties had last lived together—and, secondly, as to the material ones, I appreciate the fact that ORMEROD, J., said he disregarded them. I do not think he was right in disregarding them. The material ones

E are as follows :

"In May, 1946, on the first night of the respondent's leave, he worried and teased the child of the marriage, in spite of the petitioner's protests, thereby causing the said child to cry all night and develop a rash whereby the petitioner was unable to get any sleep that night."

F What happened was that the husband played with the child, he was almost a stranger to his own child, and the child became upset for some reason and cried. I think there was evidence that the wife had asked him not to do it. I cannot regard it as cruelty that nevertheless he continued to play with the child and the child cried. Other particulars were :

G "On an occasion in May or June, 1946, the precise date whereof the petitioner cannot remember, the respondent in the presence of the petitioner, deliberately and sadistically permitted the child of the marriage to fall down a bank, thereby causing the petitioner to suffer great anguish. On another occasion during the said period, the precise date whereof the petitioner cannot remember, the respondent deliberately and sadistically permitted the child of the marriage to pull down the heavy front of a boiler, thereby endangering the life of the said child and causing great distress to the petitioner who was present. These incidents occurred at the petitioner's parents' home at Farnham."

H

It was said that those words were the wife's own words—"deliberately and sadistically permitted the child of the marriage to fall down a bank," and "deliberately and sadistically permitted the child of the marriage to pull down the heavy front of a boiler." Neither of those things happened. How any person can describe those incidents in the way they are described in the

particulars I do not know, but I do not think it is right that they should be disregarded in considering the merits of this case.

In September, 1946, the husband saw a psychiatrist, at his wife's request, and there are two things in the psychiatrist's evidence to which I draw attention. Dr. Mathias was asked :

"(Q) When you did see the husband did you find him an abnormal person or a perfectly ordinary officer ? (A) At that time, in 1946, Major Lauder, in a very frank talk with me, admitted that he had certain moods. I do not think Major Lauder would think of it in terms of divorce or dissolution of any sort. We were discussing it as fairly as we could. I have a note somewhere where he says these moods were certainly not due to any apathy or antipathy to his wife, but that they were things he was trying to get over, and that nothing would make him happier than to be cured of such moods."

The other matter I want to refer to in Dr. Mathias' evidence is two questions asked by counsel for the wife in re-examination :

"(Q) You say he described himself as having moods in which he withdrew into himself—not out of any aversion for his wife ? (A) Yes. (Q) Is that a description consistent with any particular mental state with which you are familiar ? (A) Yes, there are people who are accustomed to becoming withdrawn from realities, shall we say ? In an extreme form they may withdraw completely from reality. There are others of us who withdraw occasionally for a short time."

Counsel explained why he asked those questions. I would not have it thought for one moment that I regard the husband as other than responsible for his actions. It is not set up that he is insane or anything of that kind. He was subject to moods. In considering these incidents one has also to bear in mind the wife's state of health and her position.

Shortly before the husband had gone back to Germany in July, 1946, he had, at his wife's request, found the money for the purchase of land on which a house was to be built for them. They had not had a house of their own before, and both thought it would be better that they should. In due course the building licence was obtained and one of the husband's last acts before going back was to pay for the land and to realise securities to the value of £2,000 for the building of the house. Very soon after he went back to Germany the wife consulted solicitors who recommended her seeing the psychiatrist, Dr. Mathias. He said she was suffering from an anxiety state. He was asked :

"(Q) Did she show any symptoms of a nervous disturbance ? (A) Yes. The diagnosis of anxiety state means that she showed considerable anxiety, or nervousness if you like, a certain amount of emotional disturbance and inability perhaps to think quite clearly about her condition at the time. (Q) What did you think was the proper treatment for her at that time ? (A) The proper treatment would have been to have given her a sedative, a re-assurance, separating her from any trouble that she might have experienced, and, of course, a talk as to the origin of the condition."

The psychiatrist saw her on that one occasion and did not see her again until May, 1948, a short time before the hearing of the petition. He was asked :

"(Q) You did not know there was a case contemplated ? (A) My note at the time is that divorce was contemplated."

[HIS LORDSHIP reviewed the evidence, and continued:] I recognise that in almost every case which involves the consideration of evidence the opinion of the judge of first instance is important, but, if he is shown clearly to have gone astray, it is for the appeal court to say so, although that court always ought to bear in mind that the one who has seen and heard the witnesses is

the best judge of their veracity. In the present case I do not think the view of the judge on the witnesses is of so much importance as it might be in other circumstances, because the husband's moods are admitted and it is on those moods or fits of depression or "sulks" that the learned judge decided the case. I regard the case as rather involving the question what is the true inference to be drawn from all the circumstances as found by the learned judge. In his judgment the learned judge said :

"Having considered carefully, as I have had the opportunity of considering during the last three days, the demeanour of the parties, and, having heard the evidence which has been given in very great detail by both the wife and the husband, I have come to the conclusion that the husband's conduct was of the nature described by the wife. I have come to the conclusion that during the whole of the married life, right up to 1946, the husband was continually in the habit of falling into moods of depression, or tempers, or call them what you will. At any rate, moods when he refused to speak to his wife and when he ignored her, sometimes for days on end, both privately and when other people were there."

There may be a question between the parties as to the word "refused." At least the husband did not speak to his wife for periods. The learned judge then said :

"That is, of course, corroborated to some extent by the correspondence . . . It is quite clear both from the letters and from his evidence that he admits that from time to time he did suffer from these moods, and I am satisfied, having heard the evidence of the wife, that he suffered from them to such an extent as to make her life with him almost intolerable. It is clear, too, I think, on the evidence that he knew that when he ignored her in this way it was upsetting her seriously, and the cumulative effect of this, going on through the years, was, in fact, having a serious effect on her nervous and emotional stability."

They had had an extremely happy leave in January, 1946. The letters show that they were still attached to each other after that time and after the June leave. I am inclined to think that to say her life had become almost intolerable is putting the matter too high. As to the effect on her health, she was of a sensitive disposition and she was not well, and, may be, at some time the silences of her husband did affect her.

In those circumstances, is cruelty proved ? I have referred to the law on the subject. It may well be that a deliberate course of conduct—such as my Lord spoke of as "sending the wife to Coventry"—of a kind which causes injury to health or a reasonable apprehension of danger to health is cruelty. I say nothing as to that, but I am not satisfied that there was such a deliberate course of conduct in this case. That there were moods is admitted, but I think there must be something more than that. I do not think there were any intentional acts by the husband which amounted to cruelty, nor do I think that the wife so regarded them. I regard him as having been inconsiderate at times, but not as having been guilty of cruelty in law as I understand the meaning of that word. I do not feel that in these circumstances a decree *nisi* ought to have been granted against him on the ground of cruelty. I would add that (and I do not claim much experience in this class of case) a husband and wife ought to take each other for better or for worse. There were faults on both sides. I think she could have done more. They were both difficult people. I cannot think that the legislature, in the word "cruelty," intended to include that which is proved in this case. For myself, I would allow this appeal, not because the learned judge did not take great care in his findings of fact, but because, in my view, cruelty in law was not established.

PEARCE, J. : In my opinion, the appeal should be dismissed. I agree with the judgment of the learned President. The trial judge saw the witnesses and observed their demeanour. Cruelty cases, more than any other class of case, depend particularly on a careful estimate of the witnesses, for in a cruelty case the question is whether *this* conduct by *this* man to *this* woman, or *vice versa*, is cruelty. How far a spouse has to depart from the normal standards of kindness and self control that are the basis of married life and how great an effect that departure has to have on the other spouse before it constitutes cruelty is always a question of degree, depending largely on the temperament, circumstances and health of each party. To attempt to decide that question in such a case as the present without seeing the parties or their witnesses would be a hazardous business, and an appellate court does not lightly embark on it. In *Watt (or Thomas) v. Thomas* (2) LORD B THANKERTON sums up the effect of the cases on this point and says that the principles embodied therein may be stated in three propositions which my Lord has read. For reasons which I will give there seems to me here no question of misdirection of himself by the judge and my view on the points dealt with by these three propositions, using their exact language, is as follows:—

(i) I am not satisfied that any advantage enjoyed by the trial judge by reason of his having seen and heard the witnesses could not be sufficient to explain or justify the judge's conclusion. (ii) I take the view that without having seen or heard the witnesses this court is not in a position to come to any satisfactory conclusion on the printed evidence. (iii) I am not satisfied that the learned judge has not taken proper advantage of his having seen and heard the witnesses. Indeed, after reading the whole transcript of the evidence more than once and hearing the detailed and able arguments on both sides, I am satisfied that the learned judge took the fullest advantage of seeing and hearing the witnesses. His judgment confirms this, and his rare interventions show an open mind, a firm grasp of the evidence that had been given, and a correct realisation of the problems before him.

Evidence was given by the wife and confirmed by her mother and other witnesses of the infliction on the wife by the husband of continuous sulking in public and in private, of his ignoring her, and of his refusing to speak to her. These sulks, which the husband very euphemistically described as "moods," were often brought on by any opposition to his will. Sometimes, it was the acts of the wife which brought on the sulks, sometimes it was the acts of other persons (in one instance, the act of a taxi driver's wife, and in another it was even his own act in going out without a mackintosh and getting wet). But whatever the cause, when these moods did come on, it was the wife who suffered. Sometimes she suffered in common with all those around him. Sometimes she was a lonely sufferer and he was natural or even very chatty with others while ignoring her. The husband himself admitted that these sulks produced complete and utter silences for days on end (although the parties differed about their exact length). He admitted that, though they did not always come on after he and she had had a disagreement, they frequently did. He admitted that she hated these sulks, that she was anxious they should not come on, and that they had an effect on her. According to medical and other evidence these sulks had a marked effect on her, as one might expect they would. In July, 1946, just over a month after her husband's last leave, she was under the care of a doctor for an operation due to prolapse trouble and he considered that she was very overstrained mentally and sent her to a psychiatrist. In September, 1946, the psychiatrist found her to be showing considerable anxiety or emotional disturbance, which had mostly disappeared by May of this year. He said in evidence that the husband's conduct, if it was as described by the wife, would have put a considerable strain on a normal healthy woman. On a person of the wife's mentality he said it would have

an even worse effect, and, perhaps, one which she might not be able to withstand for a considerable time. In his opinion, if she had continued to live with her husband, the effect might even have been such that she would not have been able to attend the trial. No medical evidence to counter this was called by the husband. The wife in evidence said (and, indeed, it was obvious) that to avoid these sulks she would try to take the course the husband wished even against her better judgment. On other occasions she did not give in, with a resulting sulk by him. In those instances there seems in him a complete absence of normal kindness and consideration.

The learned judge found that the husband's conduct was of the nature described by the wife, that during the whole married life, right up to 1946, he was continually in the habit of falling into moods, or depression, or tempers, or call them what you will—moods when he refused to speak to his wife and ignored her, sometimes for days on end, both privately and when other people were there. He found that the husband knew that when he ignored her in this way, it upset her seriously, and that in September, 1946, she was in a serious nervous state which was wholly or largely the result of the treatment she had had from the husband, and he gave her a decree on the ground of the husband's cruelty. I am not surprised that he so decided.

The attacks that are made on the judgment are these. It is said that intention must be proved to substantiate a charge of cruelty. It was argued by counsel for the husband, in opening the appeal, that the moods sprang from matters beyond the husband's control and were due to temperament and to hardships suffered in the war; that the moods were not an act of volition, but were negative acts; that, if the husband was taciturn when he was moody, it could not be an act of cruelty on his part not to talk when he did not feel like talking; and that the acts here complained of could not amount to cruelty. The answer to those arguments is to be found in *Squire v. Squire* (9) and the cases therein referred to. In that case the conduct complained of was the consequence of the wife's illness and did not consist of malignant acts done with the intention of injuring the husband, yet the husband was held entitled to a decree on the ground of cruelty. TUCKER, L.J., approved of the *dictum* of SHEARMAN, J., in *Hadden v. Hadden* (10), where he said:

"I do not question he had no intention of being cruel, but his intentional acts amounted to cruelty."

Assuming, in the present case, that the husband had no intention of being cruel, yet his intentional acts amounted, in the view of the trial judge, to cruelty. No medical evidence was called to show that the husband did not know the nature and quality of his acts. Plainly he did know. It was entirely within his power to address civil remarks to his wife. On some occasions he would speak normally to others, but chose not to speak to her. When he had been reprimanded by the wife or her mother or sister he improved for a time, and then, again, he would let his temper get the better of him. This shows that he could control his sulks when he made the effort. In most incidents in cruelty cases, the respondent's worse nature becomes temporarily in control over his better nature, but that does not make his acts any less intentional, and the fact that in the present case the cruelty was an omission, rather than a commission, does not make it any the less cruelty. It was in his power to avoid these omissions by normal civility to his wife, but he did not choose to exercise the necessary control over himself or sink his egotism for that purpose. I fully appreciate that, in weighing the evidence, one would scrutinise more carefully the evidence of sins of omission than that of sins of commission, since they are more liable to be due to inadvertence that was not culpable, but in the present case the evidence clearly points to the sulks being avoidable and intentional and the trial judge has weighed the matter carefully.

No reported case has been shown to us where sulking alone is the cruelty complained of, but cruelty can have many manifestations and few cases are reported. The principle involved is clear. In *Moss v. Moss* (5) a unanimous judgment of the Court of Appeal given by PHILLIMORE, L.J., in the passage that my Lord has read, puts it clearly. In none of the cases approved of in that passage was there any physical violence. Those cases were merely concerned with the impact of the husband's course of conduct on the mind and health of the wife. It would be unfortunate if this court were to refuse its protection on the ground that the injury to the complaining spouse's health was only caused by the subtle weapon of sulking. On the facts in this case, the sulks affected the wife's health and the husband knew that they affected her. The sulks were, as even he admitted, expressly or by implication, when called to task about them, misconduct as a husband and often they were meant to wound and hurt. Whether or not they were meant to wound and hurt, they had that effect and caused injury to health and so they constitute cruelty on the principles laid down.

Counsel for the husband further argued that the wife's case is exaggerated and ought not to be accepted. [His LORDSHIP examined the evidence, and continued:] That criticism was, no doubt, urged on the learned judge and it was for him, after hearing the wife's cross-examination on the point and observing her demeanour, to decide how much (if at all) it reduced the effect of her other evidence. For those reasons, in my opinion, the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors: *Wedlake, Letts & Birds*, agents for *Gidley, Wilcocks & Maddock*, Plymouth (for the husband); *Baylis, Pearce & Co.*, agents for *Stevens & Stevens*, Farnham, Surrey (for the wife).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

YOUNG AND ANOTHER v. SEALEY.

[CHANCERY DIVISION (Romer, J.), November 4, 5, 8, December 2, 1948.]

Trust—Resulting trust—Joint account—Money placed in names of donor and another—Investment in joint names—Gifts not to take effect until death of donor—Whether gifts of testamentary nature not conforming with the Wills Act, 1837.

On Jan. 6, 1927, Miss J. transferred certain balances standing to her credit at the L. bank to a new deposit account at the same bank in the joint names of herself and the defendant, her nephew, and they both signed an authority to the bank (i) to pay the money in the joint account to or to the order of both or any one of them, or to or to the order of the survivor or the executors or administrators of such survivor, and (ii) to accept the indorsement of them or any one of them to cheques, etc., placed to the credit of the joint account. On Jan. 31, 1927, Miss J. and the defendant signed an authority to the S. bank, where Miss J. has two deposit accounts, the effect of which was that both accounts were to be transferred to the joint names of the signatories and that all money then deposited or thereafter to be deposited should "be repayable to either of us or to the written order of either of us, and in the case of death to the survivor of us." Miss J. also from time to time made certain investments in building societies in the joint names of herself and her nephews and nieces, including, on Jan. 11, 1935, £500 fully paid shares in the W. building society in the joint names of herself and the defendant. At no time did the defendant make any withdrawals from the bank accounts or pay anything into them. Miss J., on the other hand, retained possession or control of the pass books and made both withdrawals and deposits. On Mar. 10, 1941, Miss J.

died intestate, and her personal representatives brought this action claiming a declaration that the defendant was a trustee for Miss J.'s estate of the sums remaining to the credit of the joint accounts. It appeared from the evidence that Miss J. was always very fond of the defendant, although he visited her infrequently. The defendant said that Miss J. told him that the sums in the joint account were to be for his benefit, but he knew nothing about the building society investment. He said that he understood from Miss J. that her intention in putting the money in joint account was that her solicitors would know nothing of the transactions and that death duties would not be payable. He was to have anything that was left in the joint accounts at the date of Miss J.'s death, and he did not understand from anything Miss J. said that he had any right to any of the money during Miss J.'s lifetime.

HELD: (i) there being a general intention on Miss J.'s part to benefit the defendant, the defendant had not only a legal, but also a beneficial, title to the moneys and shares, and none the less so because Miss J. (as between herself and the defendant) retained control and dominion over the deposit accounts during her own lifetime.

Beecher v. Major, (1865) (2 Drew. & Sm. 431; 13 L.T. 54), *observations of SIR GEORGE JESSEL, M.R.*, in *Marshal v. Crutwell*, (1875) (L.R. 20 Eq. 330), and *Re Harrison*, (1920) (90 L.J.Ch. 186), *applied*.

(ii) although the only possible view of the transactions, having regard to the evidence, was that the gifts were intended to be postponed until the death of Miss J., and that the gifts, therefore, appeared to be of a testamentary nature not made in conformity with the Wills Act, 1837, it would not be right, having regard to previous English decisions in which the circumstances had been similar, but in which it was not clear that the point had been argued, to defeat the defendant by applying that reasoning.

Re Reid, (1921), (50 Ontario L.R. 595), *considered*.

Owens v. Green, ([1932] I.R. 225), *not applied*.

[AS TO PROPERTY PUT INTO THE NAME OF ANOTHER, see HALSBURY, Hailsham Edn., Vol. 35, pp. 149, 150, paras. 249, 250; and FOR CASES, see DIGEST, Vol. 43, pp. 650-652, Nos. 844-865.]

Cases referred to :

(1) *Fowkes v. Pascoe*, (1875), 10 Ch. App. 343; 44 L.J.Ch. 367; 32 L.T. 545; 20 Digest 462, 1878.

(2) *Beecher v. Major*, (1865), 2 Drew. & Sm. 431; 6 New Rep. 370; 13 L.T. 54; 43 Digest 566, 154.

(3) *Prankerd v. Prankerd*, (1820), 1 Sim. & St. 1; 25 Digest 515, 107.

(4) *Marshal v. Crutwell*, (1875), L.R. 20 Eq. 328; 44 L.J.Ch. 504; 39 J.P. 775; 3 Digest 190; 391.

(5) *Re Harrison*, (1920), 90 L.J.Ch. 186; 27 Digest 165, 1338.

(6) *Owens v. Green*, [1932] I.R. 225; Digest Supp.

(7) *Diver v. McCrea*, [1908] 42 I.L.T. 249.

(8) *Hill v. Hill*, (1904), 5 O.W.R. 2; 25 C.L.T. 41; 8 O.L.R. 710; 44 Digest 237, d.

(9) *Shorthill v. Grannen*, (1920), 47 N.B.R. 463; 55 D.L.R. 416; 25 Digest 536, q.

(10) *McKnight v. Titus*, (1933), 6 M.P.R. 282; Digest Supp.

(11) *Re Reid*, (1921), 64 D.L.R. 598; 50 O.L.R. 595; 25 Digest 517, 124ii.

(12) *Standing v. Bowring*, (1885), 31 Ch.D. 282; 55 L.J.Ch. 218; 54 L.T. 191; 25 Digest 519, 133.

WITNESS ACTION.

The plaintiffs, the personal representatives of Miss Teresa Elizabeth Jarman, claimed that money on deposit in certain banking accounts in the joint names of Miss Jarman and the defendant and certain building society shares also

in those joint names were held by the defendant as trustee for Miss Jarman's estate. ROMER, J., dismissed the action. The facts appear in the judgment.

Russell, K.C., and *Hubert A. Rose* for the plaintiffs.

Sir Andrew Clark, K.C., and *Sir Norman Touche* for the defendant.

Cur. adv. vult.

Dec. 2. ROMER, J., read the following judgment. This is an action by the personal representatives (one of whom, Mr. R. L. Young, has died since the issue of the writ) of Miss Teresa Elizabeth Jarman and its object is to obtain a decision that the defendant is a trustee for Miss Jarman's estate of certain assets to which the defendant has a legal title by survivorship. A

Miss Jarman died intestate on Mar. 10, 1941, aged 85. She had spent much of her life at Taunton, Somerset, and it was there that she died. Her sole next of kin was a sister, Mrs. Mary Ann Sealey, who survived her by a few months and died on Aug. 23, 1941. The plaintiffs were the executors of Mrs. Sealey's will and obtained probate thereof on Dec. 10, 1941. On Feb. 26, 1942, they took out letters of administration to the estate of Miss Jarman. The only other relations that Miss Jarman had were the issue of Mrs. Sealey. This lady had two sons of whom the defendant, now aged 72, is one. It was thought, during the greater part of the hearing before me, that Mrs. Sealey's other son had died many years before Miss Jarman's death, but it eventually transpired that he died in 1939. This son had four children, namely, Mrs. Dora Matilda Reid, Reginald Clifford Delaney Sealey, Mrs. Beatrice Maud Cowan and Wilfred Alexander Sealey. B C

Prior to January, 1927, Miss Jarman had two accounts in her sole name at Fox's Branch, Taunton, of Lloyds Bank, Ltd. On Jan. 6, 1927, she caused the balances standing to her credit on these accounts, which amounted to £3,265 11s. 11d. and £1,053 18s. 11d. respectively, to be carried to a new deposit account which she opened with the same branch in the joint names of herself and the defendant. I will refer to this account hereafter as "the Lloyds account." The first of the deposit books relating to this account is for the period Jan. 6, 1927, to Mar. 19, 1929, and above the names of Miss Jarman and the defendant on the first page appear the words "either to draw." On Jan. 28, 1935, Miss Jarman wrote to the defendant a letter which was, so far as material, in the following terms: D E

"My dear Wilfred . . . I had the enclosed paper from the bank. They are doing this in case anything happened, then there would be no trouble either side. We both have to sign the larger paper. You must sign under mine. Please put your signature on the slip. There is no immediate hurry, when you are writing again send it back to me . . . Kind love to you all from Your affectionate Aunt Teresa." F

The document which Miss Jarman enclosed with this letter was a form of authority to Lloyds Bank, Ltd., in the following terms: G

"Authority 9. For joint credit account (current or deposit). To Lloyds Bank, Ltd. We the undersigned request and authorise you, until any one of us shall give you notice in writing to the contrary: 1. To pay any moneys now or hereafter standing to the credit of any account in our joint names including all interest thereon to, or to the order of, all or any one of us, or to, or to the order of, the survivors or survivor of us or the executors or administrators of such survivor. 2. To accept the endorsement of us or any one of us to any cheques, drafts, orders, bills and notes payable to us and placed to the credit of any such joint account. Dated Feb. 8, 1935. (Signed) Teresa Jarman. Wilfred Jarman Sealey." H

Apart from the relevant deposit books this letter and authority are the only existing documents which throw a light on Miss Jarman's intentions with regard to the Lloyds account.

Apart from her accounts with Lloyds Bank, Miss Jarman also had, with the Somerset & Wilts Savings Bank, Taunton, a deposit account on "ordinary department" and another deposit account on "special investment department." On Jan. 31, 1927, her credit balance on the first of these accounts amounted to £67 1s. 2d. and that on the second of the accounts to £2,294 13s. 11d. On that date, Miss Jarman, and the defendant signed the following declaration, addressed to the Somerset & Wilts Savings Bank, Taunton :

"Declaration as to joint account. No. 382. To the trustees and managers of the Somerset Savings Bank. We the undersigned Teresa Jarman and Wilfred J. Sealey Taunton and Walthamstow do hereby jointly and severally declare and agree that our account in the books of the Somerset Savings Bank, No. A432, shall be a joint account, and that all moneys now or hereafter to be deposited in the said bank to the credit of the said account, shall, on presentation of the passbook, be repayable to either of us or to the written order of either of us, and in the case of death to the survivor of us. And we hereby jointly and severally undertake, to hold the trustees and managers of the said bank harmless ; and indemnified against all claims and demands that may hereafter be made against them or the said savings bank in respect of any payment made against our said account in pursuance of the foregoing authority and instructions. Dated Jan. 31, 1927."

That was signed by the defendant and Miss Jarman, and witnessed. The account referred to in this document as No. A432 was the account which Miss Jarman had on special investment department. It is to be observed that the reference to this account as "our account" was not strictly accurate inasmuch as prior to the signing of the document the account was in the sole name of Miss Jarman. Counsel for the plaintiffs, however, did not seek to make any point on this, and he also conceded, and rightly, that the declaration must be taken to cover both the accounts which Miss Jarman then had, although the account on "ordinary department" was not expressly mentioned.

Apart from the above transactions, Miss Jarman from time to time purchased certain investments in the joint names of herself and one or more of her great nephews and great nieces, and she made one such purchase in the names of herself and the defendant. The dates and particulars of these investments are as follows : (i) on Mar. 25, 1927, £500 fully paid shares of the Equitable Benefit Building Society in the joint names of herself and Mrs. Beatrice Cowan ; (ii) on Oct. 8, 1929, £500 fully paid shares of the Western Counties Permanent Building Society in the joint names of herself and Mrs. Beatrice Cowan ; (iii) on Oct. 8, 1929, £500 fully paid shares of the last mentioned society in the joint names of herself and Wilfred Alexander Sealey ; (iv) on Jan. 1, 1930, £500 fully paid shares of the Woolwich Equitable Building Society in the joint names of herself and Mrs. Dora Reid ; (v) on May 15, 1930, £500 fully paid shares of the last mentioned society in the joint names of herself and Reginald C. D. Sealey, and (vi) on Jan. 11, 1935, £500 fully paid shares of the Western Counties Permanent Benefit Building Society in the joint names of herself and the defendant.

With regard to the Lloyds account, the deposit account books show that from Jan. 6, 1927, Miss Jarman drew freely on the account and made many payments into it. Some of the withdrawals were in favour of her solicitors, Messrs. Alms & Young, who from time to time made investments on her behalf. The defendant at no time made any withdrawals from the account, nor did he pay any money into it. On Nov. 5, 1940, Miss Jarman withdrew £5,000 from the account for the purpose of investing the same through Messrs. Alms & Young and at her death the balance standing to the credit of the account amounted to £575 odd. As to the deposit account of Miss Jarman with the Somerset & Wilts Savings Bank, Taunton (ordinary department), the first deposit book which is available starts with a credit entry dated July 1, 1935 : "Brought

forward from old book £210 10s. 0d." The old book has been lost. The new book is headed "Miss Teresa Jarman and Mr. Wilfred Jarman Sealey," and above the defendant's name is written "Name added Jan. 31, 1927," and a number. This date is inserted in red ink and there is a deletion, also in red ink, of something which it is difficult to decipher but which appears to be a date. The account was comparatively inactive, only a very few sums being shown as paid out and those apparently for the purpose of keeping the credit balance free from odd shillings and pence. The payments in to the account consisted of interest and of dividends on a sum of £500 consolidated stock, which was paid off on July 1, 1940, the proceeds being credited to the account. At the date of Miss Jarman's death there was a credit balance of about £871 (including interest) on this account. Miss Jarman's deposit account with the Somerset & Wilts Savings Bank, Taunton (special investment department) was opened on Feb. 1, 1916, and the deposit book from that date is available and was produced. The book was originally in the name of Miss Jarman alone, but the words "and Mr. Wilfred Jarman Sealey" were added later. The only substantial withdrawals from this account were in 1924, when two sums of £900 and £250 respectively were paid out to Miss Jarman. The sum of £3,624 odd (including interest) stood to the credit of this account at the date of Miss Jarman's death. At no time did the defendant withdraw anything from either of these deposit accounts with the Somerset & Wilts Savings Bank, nor did he ever make any contribution to either account.

The plaintiffs contend that there is a resulting trust in favour of Miss Jarman's estate in relation to the credit balances on the three accounts to which I have referred and also in relation to the £500 shares of the Western Counties Permanent Benefit Building Society which stood in the joint names of Miss Jarman and the defendant. The defendant, on the other hand, claims that Miss Jarman intended that he should be beneficially entitled on her death, if he survived her, to the moneys in the said accounts and to the shares, and that he is, consequently, entitled to retain for his own benefit such moneys and shares free from any trust in favour of Miss Jarman's estate.

It will be convenient now to refer to the oral evidence which was given before me. The first witness called by the plaintiffs was a Mr. Francis Dembry, who is a managing clerk employed by Messrs. Alms & Young, the solicitors who formerly acted for Miss Jarman and who now act for the plaintiffs. Mr. Dembry, who has been with the firm for many years, had known Miss Jarman officially since his early days as an office boy. He described her as being somewhat abnormal in the matter of her clothes, and I gathered that her attachment to the various articles of apparel which she possessed did not diminish by reason merely that, as the years passed by, such articles lost something of their original novelty and freshness. Apart from this mild eccentricity there was nothing abnormal in Miss Jarman's character. She was, however, very secretive with regard to her financial affairs and would not disclose her financial position either to Mr. Young (a partner in the firm) or to anyone else. She liked investing in mortgages, and if a suitable security presented itself the firm would write and give her particulars of it. Mr. Dembry told me that in his experience Miss Jarman was very keen on avoiding payment of income tax. Mrs. Dora Reid, a great niece of Miss Jarman, said in evidence that she used to call her "Aunt." She (Mrs. Reid) lived as a small child with her grandmother, Mrs. Sealey, at Taunton, and Mrs. Sealey brought her up there except during the period 1914 to 1918 when she was in London. Mrs. Reid lived with Mrs. Sealey until she married in 1936, and thereafter she continued to live in Taunton. Throughout all this time Miss Jarman also resided in Taunton, and Mrs. Reid told me that she visited her once or twice every week, and, after her marriage, she visited her grandmother, Mrs. Sealey, every day. Mrs. Sealey was also frequently visited by Miss Jarman. Mrs. Reid said that the defendant did not

visit Miss Jarman often—perhaps once in 2 or 3 years. She further told me that Miss Jarman was miserly, and that she was secretive and did not discuss her financial affairs with anyone or like anyone to know about them. As an instance of Miss Jarman's regard for money, Mrs. Reid said that she (Miss Jarman) owned some property at Portishead jointly with Mrs. Sealey and took care to see that the latter lady was charged with one half of the most trivial expenses incurred in relation to the property. In cross-examination, Mrs. Reid said that when the defendant went to Taunton he usually stayed with his mother, and on one occasion took his wife to stay with her too. She said further that the longest period he spent in Taunton was a week and that on other occasions he only stayed a few days. Mrs. Reid told me further that Mrs. Sealey did not like the defendant's wife.

- A** The defendant said in evidence that he had known Miss Jarman from childhood and that she was always very fond of him and made a great fuss of him, and that this attitude went on right through the whole of her life. They never had any cross words. He said that he was born in Taunton but taken to London as a baby in arms by his parents, and, except during the 1914-1918 war and for a visit to Canada, he has spent his life in London. I gather that he has never been affluent. For some 6 years he was in a small one man business and he also worked as a tailor's cutter. His visit to North Alberta, Canada, lasted for about four and a half years and he returned to England in 1908. He said that while he was there he received a letter from Miss Jarman asking him to return to England, as she did not like his being so far away from her. In the letter she offered to pay his passage home and she did so, and he returned to England. He said that Miss Jarman sent the passage money out to him in Canada, and that he saw her in Taunton after he arrived in England. On Oct. 4, 1914, he married a widow, and a few days later was called up to the Army, he being a member of the National Reserve. He did not see anything of Miss Jarman during the war period. He was demobilised in February, 1919, and tried then to re-establish himself in civil life. He saw Miss Jarman in 1920 or 1921. Either then or on some subsequent occasion he told Miss Jarman that his mother (between whom and his wife relations were very strained) had told him that she would not leave him any money on account of his marriage to a widow and that she regarded his wife as "second-hand goods." Miss Jarman said that his marriage was no business of his mother's and that it was not his mother who had to live with his wife. He said that he first heard about the Lloyds account in a letter which he received from his aunt in 1927. He said that he was in regular correspondence with Miss Jarman after the 1914-1918 war, but it is his custom to destroy letters after answering them and he probably destroyed this letter of 1927 in the same way that he destroyed the others. He had searched for it, but could not find it. He said that in that letter Miss Jarman told him that she had opened joint accounts for his benefit and that she had done it in that manner so that the solicitors should know nothing about it and death duties would not be payable. After that he said he saw his aunt either every year or probably every two years. He never spent any long period at his mother's place because he knew the feeling of his mother towards his wife. He only stayed 2 or 3 days. In the same year as he received the 1927 letter, or the year after, he said he had a conversation with Miss Jarman in which she confirmed what she had said in the letter, namely, that she had opened the joint accounts, which were to be for his benefit, and that the reason she had done it in that way was so that the solicitors should know nothing about it and that death duties should not be payable. His evidence was that, except for this, he had no conversation with Miss Jarman about the joint accounts between receiving the 1927 letter and 1935. The defendant's attention was directed to the joint authority to the Somerset & Wilts Savings Bank, Taunton, dated Jan. 31, 1927. He said that this was enclosed with the

letter of 1927 from his aunt, and that he had signed it and returned it by letter to her. The defendant was then asked about a document of which a copy appears in the agreed correspondence and which is in the following terms: "Lloyds Bank, Feb. 2, 1935, Wilfred Jarman Sealey W. J. Sealey." He said he was under the impression that he signed another document and kept the above as a copy of his signature. He said it was enclosed with the letter which Miss Jarman wrote to him on Jan. 28, 1935, to which I have already referred. This letter, he said, he had discovered in a book, the letter having been used as a book mark. The letter also enclosed the joint authority to Lloyds Bank, Ltd., which was signed by Miss Jarman and the defendant and bears date Feb. 8, 1935. He told me that he distinctly remembers signing that authority. After 1935, he said, he saw his aunt at her home in Taunton every year or perhaps every two years, and that his relations with her continued as they had always been, namely, affectionate. He said that the next time he saw Miss Jarman after receiving her letter of Jan. 28, 1935, she again told him that she intended the sums in the joint accounts to be for his benefit, and that she hoped he would not squander the moneys but invest them. The defendant was asked when he first knew that Miss Jarman had invested money in the Western Counties Permanent Benefit Building Society in their joint names, and he answered that he did not remember that at all nor the circumstances in which the investment was made. Apart from this investment, and the moneys on the joint accounts, the defendant said that the only money he received from his aunt was when, on two occasions, she paid his fare to Taunton from London.

In cross-examination the defendant was challenged as to the book in which he said he had found his aunt's letter of Jan. 28, 1935. He could not give details of the book, but said that it was one of many that he was looking through for salvage. He gave a somewhat confused account of the document in the correspondence and obviously could not remember how it came into being, but he was clear that he found it in the book together with the letter of Jan. 28, 1935. With regard to the 1914-1918 war period, he said that he was in Jersey and later in this country and had no correspondence with Miss Jarman and did not see her, leave being very restricted. During his aunt's last illness when she was in hospital for about 3 months, he did not see her and said that at the Admiralty, where he was employed, they had the utmost difficulty in getting leave. He did, however, succeed in getting leave to attend her funeral. When asked what he understood from Miss Jarman was her intention as to the joint accounts, he again said that she told him that the reason for her doing it in that way was that the solicitors would not know anything and death duties would not be payable. The defendant then gave some evidence which I will set out *verbatim*, because it is the foundation of a contention by the plaintiffs, alternative to the view that Miss Jarman did not intend to pass any beneficial interest to the defendant, which I shall have to consider later.

"(Q) Did you understand from anything that Miss Jarman said to you that you had any right to any of the money during her lifetime? You did not, did you? (A) No. (Q) And you understood, I gather, that the idea of putting the money into the joint names was so that when in the future she died, you would have anything that was left? (A) That I have given in evidence, and I still maintain that that was her object—the reason why she told me she put these sums into these accounts. (Q) But, of course, all you would get would be anything that was left? (A) Yes, I presume so; I never questioned her about them at any time. (Q) Why do you say she did it in that way, instead of leaving it to you by will? Have you any idea? (A) I have already stated . . . (Q) It was to save death duties? (A) . . . that she told me she had done it in that way so that the solicitors would know nothing about it and death duties would not be payable."

Mr. George Spencer, who was formerly employed at Fox's Branch, Lloyds Bank, Ltd., Taunton, but is now retired, was called and said that he knew Miss Jarman quite well and that she came into the bank frequently. He remembers her opening the joint account in the names of herself and the defendant and having conversations with her. He formed certain impressions with regard to this account, but, as he was unable to say that these impressions were founded on anything that she said to him, his evidence did not carry the matter any further. Mr. Dyer, assistant manager of the Equitable Benefit Building Society, gave evidence. He told me that he had been in the employment of the society since 1897, and that he knew Miss Jarman for many years. He remembers her coming to see him in 1927 about making an investment in joint names. She said that she had a young niece named Margaret Sealey who was born years after her brothers and sisters and had, consequently, been left out of somebody's will, and as she (Miss Jarman) had benefited under this will she thought it was up to her to give Margaret £500 to bring her up to the level of her brothers and sisters. She asked whether the society's rules permitted a joint investment so that it would go to the survivor, and Mr. Dyer said they did. A few days later she made an investment of £500 in the names of herself and Margaret Sealey—or rather Beatrice Sealey (now Mrs. Cowan), for Miss Jarman had made a mistake as to this girl's Christian name. Mr. Dyer said that Miss Jarman was very particular about the interest being paid to her. Some time afterwards Miss Jarman came in again and said that she had more money than when she made her will and would like to make a couple more joint investments in the same way that she had done for Beatrice. She said it would save her altering her will and save death duties. She had referred to death duties also at the first conversation. Mr. Dyer said that she did not, in fact, make any more investments with his society. In cross-examination he said that Miss Jarman did refer to her will as stated by him in his evidence (above), and that he was surprised after her death to find that she had died intestate.

Having regard to the very few relevant documents that are available in this case the question whether Miss Jarman did or did not intend to confer a benefit, through the various media which I have mentioned, on the defendant depends primarily on the oral evidence and secondarily on the surrounding circumstances and the probabilities arising therefrom. With regard to the oral evidence, the main evidence is that of the defendant himself. This evidence is not, of course, inadmissible to rebut the presumption of a resulting trust which *prima facie* arises from the joint investments and from the fact that Miss Jarman did not stand *in loco parentis*. The defendant's evidence must, however, be treated with reserve, and would be readily displaced by other evidence not fairly reconcilable with it. My task in arriving at a conclusion whether Miss Jarman intended to benefit the defendant or to constitute him a trustee of the deposits and shares is facilitated by the fact that he impressed me as being a truthful and honest witness. That in certain matters of detail he was somewhat vague and uncertain is true. He is not, however, as young as he was, and to septuagenarians details are apt to be elusive. I am, nevertheless, confident that the substance of what Miss Jarman told him as to her intentions, and which he repeated again and again in the witness box, remains clear in his mind, and that his evidence on the matter should be accepted unless it is opposed by other relevant evidence, including all legitimate circumstances and such inferences as may arise from them.

I know nothing about the other nephew that Miss Jarman had, the defendant's brother. As I have said earlier, it only emerged towards the end of the hearing that his death did not occur until 1939 and that he had not died, as was previously believed, many years before. At all events, there was no evidence before me of any association between himself and Miss Jarman, though she

must, presumably, have been aware of his existence. Apart from this gentleman, the defendant was Miss Jarman's only nephew and (except for her sister) her closest blood relation. In the only available letter that she wrote to him she subscribed herself as "Your affectionate Aunt." The letter is, moreover, obviously a friendly letter and tends to corroborate the defendant's evidence that he and Miss Jarman were on terms of affection. As against this view, it was pointed out that the defendant's visits to her at Taunton were few and irregular and that he did not write to her during the 1914-1918 war and did not go and see her in hospital during her last illness. As to these considerations, I have, however, to bear in mind that the defendant was never affluent and railway tickets to Taunton cost money, that his wife and his mother (who lived there) disliked each other, and that during Miss Jarman's illness he was subject to naval discipline. His admission that he never wrote to his aunt during the 1914-1918 war lends credibility to his evidence as a whole, for he need not have made the admission at all. Moreover, during the war he was in the army, and soldiers are not, perhaps, the most constant of correspondents. Viewing the circumstances as a whole, I find nothing which leads me to believe that the relations which existed over a long period between himself and his aunt were other than as he described them in his evidence. I am satisfied that she regarded him with that degree of affection which is commonly to be found between aunt and nephew in a small family such as theirs.

The next point of relevance is the first investment of building society shares in the joint names of Miss Jarman and her great niece Beatrice. On Jan. 6, 1927, Miss Jarman had opened the Lloyds account in the joint names of herself and the defendant. On Jan. 31, she and the defendant signed the declaration as to joint account with reference to Miss Jarman's deposit accounts with the Somerset & Wilts Savings Bank. On Mar. 25 of the same year, Miss Jarman invested £500 in the purchase of building society shares in the joint names of herself and Beatrice, and Mr. Dyer's evidence shows quite clearly that Beatrice was to take these shares beneficially in the (very probable) event of her surviving Miss Jarman—in other words, the evidence establishes that Miss Jarman had no intention, when effecting this transaction, of constituting Beatrice a trustee. In 1929 and 1930 she made four further investments of shares in the joint names of herself and one or other of her great nephews and nieces, including Beatrice. If, then, the plaintiffs are right, Miss Jarman created, between 1927 and 1930 inclusive, eight legal relationships, under seven of which the co-depositor or co-investor would be a trustee for her estate if he or she survived Miss Jarman, and under the eighth of which the co-investor, in the like event, became beneficially entitled. It cannot, of course, be said to be impossible that any person would carry out such a scheme, but I confess that I myself think that it is highly improbable, and in this I am fortified by the expression of a similar opinion by the Court of Appeal in *Fowkes v. Pascoe* (1). The fact that Miss Jarman intended to pass a beneficial interest to Beatrice under the first joint investment in their names is by no means conclusive as to her intentions regarding the other transactions, for that joint investment was due to a particular reason which was not common to the others, nevertheless it is to be noted that Beatrice would only succeed, if at all, by survivorship, and it was by survivorship alone that the exclusive legal title would pass to the co-depositors or investors in the other cases. The really important point, as it seems to me, is the difficulty of conceiving any sensible reason why Miss Jarman should set up seven different trusts, with five different trustees, for the benefit of her estate. A far more rational conception is that she intended to benefit the other member of the family who was brought into each of these transactions, but in such a way that the beneficial possession was postponed until her death. Mr. Dyer's evidence confirms part of what the defendant told me as to Miss Jarman's motives, as communicated by her to him, in making

the joint deposits, namely, that she was anxious to save death duties. It is intelligible that she should imagine (though erroneously) that she was effecting this object if the co-depositors or co-investors were to inherit beneficially by survivorship, but it is scarcely possible that she could have thought so if the person concerned were to hold the assets in which they were interested as part of her own estate. I would here observe that the other reason of which the defendant spoke—that her solicitors would know nothing about it—fits in with the secretiveness of Miss Jarman's character as described to me by Mr. Dembry.

A The circumstances, accordingly, down to 1930 are, in my view, not opposed to the evidence which the defendant gave as to Miss Jarman's motives, as expressed to him, in making the joint deposits. On Jan. 11, 1935, Miss Jarman made the £500 investment of shares in the joint names of herself and the defendant. I see no reason to distinguish this from the similar transactions which she had effected in 1929 and 1930, and in which she had, in my judgment, a beneficial intention. Finally, on Jan. 28, 1935, she wrote the letter to the defendant which I have already considered, enclosing the joint authority to Lloyds Bank, Ltd., which he signed. The terms of this authority are perfectly in keeping with the intentions of Miss Jarman, as stated by the defendant, and I have no doubt but that she obtained his signature to it, having signed it herself, in furtherance of those intentions. Regarding the matter as a whole it is, in my opinion, both intelligible and clear that Miss Jarman wished to save death duties and at the same time to benefit the members of the family. Her natural secrecy in financial matters deterred her from consulting her solicitors on the matter, so she evolved a plan for herself. Such a plan would have to conform, as it did conform, to her fondness for the possession of money, and the beneficial enjoyment by her relatives must, accordingly, be postponed until her death. With regard to the £3,000 which she invested in building society shares she was content to take the income for her life and ensured that she should get it by causing her name to be entered as first of the joint investors in each case. The deposit accounts, however, stood on a different footing and she wanted to deal with them during her lifetime as she wished. Only what was left at her death was to go to the co-depositor, who was never expected to pay anything into the account and was not, so long as she was alive, to draw anything out for himself. When death should deprive her of any further use of her fortune then the benefits to her sister's issue would crystallise, but they were to remain in suspense until then and, so far as the defendant's interest in the deposit accounts was concerned, it might result in nothing at all.

Such being, as I believe, Miss Jarman's intentions, it would seem at first sight to follow that the defendant has not only a legal, but also a beneficial, title to the moneys and shares which are now in issue, and none the less because Miss Jarman (as between herself and the defendant) retained control and dominion over the deposit accounts during her own lifetime. In *Beecher v. Major* (2) a Mrs. Beecher transferred £1,000 stock into the name of her niece Mary Major, and wrote her a letter stating that she had done so and that she intended it for the niece's benefit. In the letter Mrs. Beecher enclosed a bank power which she stated was to enable her to receive the dividends for her life and directed Mary Major to sign the power and get it witnessed. The niece, accordingly, did so and returned it to Mrs. Beecher. Mrs. Beecher had asked her niece to destroy the letter, which she did. Mrs. Beecher subsequently died, having received the dividends on the stock, but not having otherwise acted under the bank power which, it turned out, instead of being merely a power to receive the dividends, was also a power enabling Mrs. Beecher to sell and transfer the stock. It appeared that Mrs. Beecher had always been very kind to Mary Major, and by her will made before the transfer had given her an annuity of £30. The question before the court was whether Mary Major was entitled to retain the stock for herself. SIR ROBERT KINDERSLEY, V.-C., after

stating that the evidence proved satisfactorily that in her letter Mrs. Beecher had stated that she had transferred the stock into Mary Major's name and that she intended it for her benefit, proceeded (2 Drew & Sm. 436) :

"But it is contended that the fact of Mrs. Beecher having enclosed in her letter a power of attorney to be executed (and which was accordingly executed) by Mary Major, which power of attorney authorised Mrs. Beecher to sell and transfer the stock itself as well as to receive the dividends, is sufficient to prove that Mrs. Beecher intended that Mary Major should be a trustee for her, because it shows that she intended to keep the stock in her own power, and she might have sold it out at any time."

The VICE-CHANCELLOR then referred to and distinguished *Prankerd v. Prankerd* (3), and continued (*ibid.*, 437) :

"Here we have Mrs. Beecher's express declaration of her intention that the transfer was for the benefit of Mary Major. And in the next place, Mrs. Beecher's procuring the power of attorney showed no intention to retain the beneficial ownership ; it was only reserving to herself a power to defeat Mary Major's interest, and it stands on the same footing as if Mrs. Beecher had executed a formal declaration of trust, in Mary Major's favour, with a power of revocation. The reservation of the power of revocation would not have destroyed the trust if the power was not exercised. Under these circumstances I can come to no other conclusion than that the letter clearly proves it was Mrs. Beecher's intention to give a benefit to Mary Major to the extent of the £1,000 stock ; and that Mrs. Beecher made the transfer into her name for the purpose of carrying out that intention ; and that all she did by requiring the power of attorney was to retain a right to receive the dividends during her life, and also a right, if she thought fit, to revoke the gift, which, however, she never did."

The VICE-CHANCELLOR made a declaration accordingly that Mary Major was entitled to the stock.

In *Marshal v. Crutwell* (4) the plaintiff's husband, being in failing health, transferred his banking account from his own name into the joint names of himself and his wife, and directed the bankers to honour cheques drawn either by himself or his wife, and he afterwards paid in considerable sums to this account. All cheques were afterwards drawn by the plaintiff at the direction of her husband, and the proceeds were applied in payment of household and other expenses. The husband never explained to the plaintiff what his intention was in transferring the account, but he was stated by the bank manager to have remarked at the time of the transfer that the balance of the account would belong to the survivor of himself and his wife. The husband died a few months after the transfer, and the plaintiff thereupon claimed to be entitled to the balance. SIR GEORGE JESSEL, M.R., held on the facts that no gift was intended by the husband to his wife and that the transaction was not intended to be a provision for the wife but simply a mode of conveniently managing the husband's affairs. In the course of his judgment the MASTER OF THE ROLLS said (L.R. 20 Eq. 330) :

"Now, in all the cases in which a gift to the wife has been held to have been intended, the husband has retained the dominion over the fund in this sense, that the wife during the lifetime of the husband has had no power independently of him, and the husband has retained the power of revoking the gift."

He then proceeded to point out that in general a man would have no motive in transferring stock into the names of himself and his wife except the motive of benefiting her in case she survived, but that, as already indicated, he did find a contrary motive in the case before him. Two points seem to emerge from this, namely : (i) that a number of cases had been previously decided in favour of surviving wives whose husbands had put a fund into their joint

names but had reserved dominion and control over the fund during their (the husbands') lifetimes, and (ii) that SIR GEORGE JESSEL, M.R., would have decided in favour of the plaintiff if the evidence had shown an intention on the part of the husband that she should take the fund, whatever it might be at his death, beneficially.

In *Re Harrison* (5) the headnote is as follows :

- A "A husband, in 1908, transferred the money standing to a current account at his bank in his own name into the joint names of himself and his wife. He did not inform his wife of the joint account, and always drew cheques on the account himself. He died in November, 1919. The wife never drew any cheque on the account until shortly before his death, when he was in failing health and unable to attend to business. The bank manager then informed her of the joint account, and advised her to draw a cheque, which she did. The husband had also from time to time made deposits in the joint names of himself and his wife, and in August, 1919, consolidated them into one deposit in the joint names. The wife never knew of this deposit until after her husband's death. There was then found among his papers an envelope endorsed with the wife's initials and containing the deposit receipt and a document in which he said : ' I would like this paying away at once if possible as under,' with a list of names with amounts against them."
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- In addition to the facts stated in the headnote it appears from the body of the report that the bank manager stated that the ledgers there contained entries for many years past of deposit receipts in the names of the husband and wife, and that in such entries there was written : " Repayable to either or survivor." The manager said that such words would be written on the verbal instructions of the husband. RUSSELL, J., said that counsel for the parties who were resisting the widow's claim did not dispute that *prima facie* she, as survivor, would be entitled to the credit balances on the current and deposit accounts, but contended that, at all events as regards the deposit account, he could rebut the presumption in her favour by the document which is referred to in the headnote. The learned judge did not, however, accept that view, and remarked that the document did not read so much as a trust of the husband's own property as a request relating to some one else's property. He then observed that the principles applicable to the case were dealt with by SIR GEORGE JESSEL, M.R., in *Marshall v. Crutwell* (4). He distinguished the facts in that case from those in the case before him and said (90 L.J.Ch. 190) :
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- E
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" . . . it is difficult here to find any motive for transferring the account from the husband's name into the joint names, except that the wife should take the money if she survived her husband."

He concluded his judgment by saying (*ibid.*, 191) :

- G " If I am to infer from the surrounding circumstances what the motive of the transaction was, I hold that it was intended by the husband that the moneys standing on current account in the joint names were intended to belong to the survivor. The case for the defendants as regards the deposit account is much more difficult than that as regards the current account; and I can see nothing to displace the wife's claim. I hold, therefore, that the moneys standing to the credit of both accounts belong to the wife."
- H

Having regard to the conclusions at which I have arrived on the facts, I should, in view of the above authorities, have found little difficulty in holding that the defendant is entitled to the funds and shares in question but for a point that was taken by counsel for the plaintiffs and which is founded upon the requirements of the Wills Act, 1837. The argument (which is confined to the credit balances on the Lloyds account and the savings accounts) is that by retaining as against the defendant dominion and control over these accounts

during her lifetime and limiting her benefaction to such credit balances only as might be in existence at her death, she was attempting to do that which can only validly be done by a will executed in conformity with the Wills Act. Counsel says that for the defendant to succeed he must establish either an immediately effective gift by Miss Jarman during her lifetime, or an *inter vivos* settlement in his favour subject to a power of revocation by Miss Jarman, or a *donatio mortis causa*; that the evidence shows that Miss Jarman's bounty was not intended to operate in any of these ways; and that the medium through which it was intended to operate is invalid. The point does not appear to have been taken in any of the reported cases in this country which the industry of counsel brought to light, but it has been discussed in some Irish and Canadian cases. Before referring to them I should say that it is not in dispute that the relevant deposit books and pass books were, at all material times during Miss Jarman's lifetime, in her custody or under her control. A B

In *Owens v. Green* (6), which is a decision of the Supreme Court of the Irish Free State, the headnote is as follows ([1932] I.R. 225):

"A.F., an old man, kept large sums of money on deposit account in a bank in his own name for several years. In March, 1927, he called at the bank and asked the manager of the bank for his deposit receipts. He told the manager that he wished to settle his money, and that he was not able to do so until he saw Father O., but that he would like to do something for P.F. He then gave the manager a number of deposit receipts, which he asked the manager to put in the names of P.F. and himself, requesting the manager to put the money in such a way that he could draw the interest without going to P.F. The manager said that the only way that he could do that was 'by putting it payable to them or either of them.' A sum of £16,917, represented by ten deposit receipts, was then placed on deposit in the joint names of A.F. and P.F., the deposit receipts being left by A.F. with the bank manager. A couple of days later A.F. called at the bank and stated that he wished to take £700 out of the joint account and put it in his own name, which accordingly he did, leaving £16,217 standing in the joint names on nine receipts, the receipts stating that the bank acknowledged the receipt of the amount deposited by A.F. and P.F., and continuing: 'For which we (the bank) promise to be accountable to them or either of them.' A week later A.F. cashed all the deposit receipts with interest, and, having taken the interest, re-deposited the principal sum to the same account, where it remained until May, 1929, when he again cashed the receipts, took the interest and re-deposited the principal. He subsequently withdrew the principal several times, sometimes re-depositing only a portion of the principal in both names, as before, and depositing the remainder in his own name alone. On Sept. 8, 1930, he called at the bank and asked for his receipts, and stated that he was going to settle the money finally. He deposited £5,000 in the names of himself and P.F., receiving one deposit receipt, £3,506 in his own name alone, receiving one deposit receipt, and £10,826 6s. 3d. in a new deposit account, in his own name and that of Father O., receiving four deposit receipts. He told the bank manager that he wished no one to know anything of the moneys deposited except the parties named with him in the receipts, and that the manager could tell them that the moneys were to be their property if anything happened to him, and that the receipts were to be handed to the survivors. On Dec. 15, 1930, A.F. withdrew the sums deposited on Sept. 8, retained the interest, and re-deposited the amounts as before. All these deposit receipts were in the form already stated. A.F. died on Dec. 29, 1930. On Sept. 8, 1930, A.F. had made another deposit, *viz.*, one for £200 in the joint names of Father O. and his brother R.O., the deposit receipt in this case being in favour of them 'or the survivor of them.' R.O. had worked for A.F., and when making this C D E F G H

deposit A.F. asked the bank manager to get from R.O. a receipt acknowledging payment of all his claims up to date, and on getting such a release to deliver the deposit receipt to R.O. This the manager did on the same day. In October, 1930, P.F., was in the bank on business, and told the manager that A.F. had told him (P.F.) that A.F. had left him 'well off in the bank' and asked what the amount was, and the manager told him of the £5,000 deposited in the joint names. Some days later Father O. asked the manager the same question, and the manager told Father O. of the four deposits in his and A.F.'s names. On the day of A.F.'s death P.F. sent for and obtained from the manager of the bank the deposit receipt in which he was named with A.F., and on the same day Father O. also called at the bank and obtained the deposit receipts in which he was named with A.F. P.F. and Father O. each instituted an action against the executor of the will of A.F. claiming a declaration that the money on deposit in the joint names of each plaintiff and A.F. did not form portion of A.F.'s estate, but belonged to each plaintiff beneficially by right of survivorship."

The court held that the actions must be dismissed. In the course of his judgment, KENNEDY, C.J., said (*ibid.*, 237):

"The onus of rebutting the implication of a resulting trust by evidence rests upon the plaintiffs, Patrick Freeley and the Rev. M. J. Owens, who instituted these actions claiming to be beneficially entitled by survivorship to the moneys standing to the accounts in which they were respectively named as joint creditors with Austin Freeley. They may discharge the onus which they have undertaken and rebut the presumption of a resulting trust by proving that it was the intention of Austin Freeley, when putting the moneys to the deposit accounts in the bank, to give to the plaintiffs respectively, then and there and by that act, a right, that is to say an immediate present right to take the moneys with which he associated their respective names by survivorship (should they survive him) for their own respective use and benefit as surviving joint beneficial owners with him. It will not suffice to prove a merely testamentary intention on his part, for a testamentary disposition can be made only by will. It will not suffice to show an incomplete, or a conditional, or a postponed gift, nor can such an attempted gift be made good by means of a fictitious trust. But a gift completed by immediate transfer of legal ownership or by declaration of trust taking immediate effect will, if proved, support an intention to give a voluntary benefit and rebut the presumption of resulting trust. These principles . . . are well established, and we have only to consider their application to the facts before us. I should, however, say a word as to the form of the deposit receipts which is stated to be peculiar to banks of Northern Ireland. The form of these receipts does not, in my opinion, determine the question under consideration. The intention of the depositor must still be ascertained. The use of the particular form may be part of a scheme of convenience in transacting the depositor's business, the other name in the receipt being that of an agent for the actual depositor, such an arrangement, for instance, as existed in the case of *Marshal v. Crutwell* (4). Again, it may be an attempt to give whatever may remain undrawn to credit of the account at the depositor's death as GIBSON, J., appears to have held in the circuit case of *Diver v. McCrea* (7). In such a case, however, the intention is not to make a joint deposit operating as a present gift. It is an attempt to make an ambulatory and postponed gift of such (if any) moneys as shall remain undrawn from the account at the depositor's death, which, in my opinion, is contrary to the established principles inasmuch as it is really testamentary in character and intention, and for that reason I am unable to accept the decision in *Diver v. McCrea* (7) which is, I think, erroneous."

FITZGIBBON, J., delivered a judgment to the like effect. He said (*ibid.* 245) :

“ With the exception of *Diver v. McCrea* (7) . . . I am not aware of any case in which the alleged donor retained throughout his life the complete power of disposition over the property in dispute, and it was held that there had been a complete gift by him in his lifetime.”

He also said (*ibid.*, 251) :

“ In my opinion the plaintiffs have failed to establish any present intention on the part of Austin Freeley to part with his property in, and absolute dominion over, the deposited money during his lifetime, and a disposition, to take effect only upon his death, if he should not have previously disposed of the money, cannot be effected except by a declaration of trust, which is admitted not to have been made by him.”

MURNAGHAN, J., delivered judgment to the same effect.

Having regard to this decision, which has not, so far as I am aware, been adversely criticised, and which in fact adopted and applied earlier Irish decisions, it seems clear that, if the case before me were to be decided in the courts of Eire, it would be decided against the defendant. Similar principles were recognised and applied in the following Canadian cases, namely, *Hill v. Hill* (8), *Shorthill v. Grannen* (9), and *McKnight v. Titus* (10), the last two being decisions of SIR DOUGLAS HAGEN, C.J., of the Supreme Court of New Brunswick. In *Re Reid* (11), however, the Appellate Division of the Supreme Court of Ontario took a different view. The facts of that case are sufficiently set out in the headnote, as follows (50 O.L.R. 595) :

“ R., having made up his mind to give his father a sum of money, to come into his possession after R.’s death, placed the amount on deposit in a bank to the credit of a joint account in his own name and that of his father. The terms on which the joint account was opened were evidenced by a document addressed to the bank and signed by R. and his father, reading : ‘ All moneys deposited or that may be deposited by us and each of us to the credit of this account are our joint property, but they may be withdrawn by cheques made by either of us or the survivor of us.’ It was understood between them that the father was not to draw the money during R.’s lifetime, and that R., if he needed the money for himself, should be at liberty to draw what he required. R. was then ill of the disease of which he died about three weeks later.”

The court held, with one dissentient, that there was a complete gift of the fund to the father. MEREDITH, C.J., Ontario, in the course of his judgment referred to *Standing v. Bowring* (12), in which the plaintiff, a widow, transferred a fund into the joint names of herself and her godson with the express intention that the godson, in the event of his surviving the plaintiff, should have the fund for his own benefit but that she should have the dividends during her life. The Court of Appeal held that there was no resulting trust in favour of the plaintiff, because she intended to confer a benefit on the godson, the intention being (in the words of COTTON, L.J. (31 Ch.D. 287)), “ to give him a beneficial interest in the stock, and that, on her death, as he survived her, the legal right must prevail, and he must take the property for his own benefit.” In applying that decision to the case before him the Chief Justice said that he saw no difference in principle between the retention by the owner of the dividends on the consols and the retention by the son of the right to draw from the fund what, if anything, he might require to use. The Chief Justice rested his judgment in favour of an effective gift by R. to his father on the ground that on the death of the son the legal right to the fund became vested in the father and that there was no ground for enforcing the equitable right which the son’s executors set up, it being clear that the son’s intention was that at his death the fund, or what remained of it, should belong to his father. MACLAREN, J., and MAGEE, J., Justices of Appeal,

agreed with the judgment of the Chief Justice. FERGUSON, J., Justice of Appeal, said in his judgment that it was clear that R. intended that on his death the father should be the absolute owner of the fund. He added (*ibid.*, 607):

“ . . . it seems to me that there was, at the time of and by virtue of the deposit, a complete and perfect gift of a joint title or interest in the money which, by operation of law as well as by expressed intention and agreement, carried with it a right to title by survivorship—to my way of thinking, the title of the defendant and the gift as a gift were complete when and as soon as the deposit was made; from that time on the donee’s title was complete and perfect.”

The learned judge rejected the argument that the effect of the arrangement between R. and his father was to leave the dominion and control of the fund in the donor so that he had power to and might revoke the gift, and that, therefore, the gift was not in any sense a complete and perfect one, and he said (*ibid.*):

“ To my mind, the gift was complete and perfect, and the promise and agreement deposed to should, according to the true intent and meaning of the parties, be viewed as a collateral agreement whereby the donor was not given a right of revocation, but a right and power to defeat in whole or in part the purpose of the gift. The gift of the joint interest was, I think, intended to be effective from the moment of the deposit, so as to carry with it the legal right to title by survivorship; the promise and agreement in reference to drawing were not intended to, and did not, prevent the vesting of a title to the joint interest, as to which there was, I think, a complete and perfect gift *inter vivos*.”

HODGINS, J., Justice of Appeal, dissented. In his view the decision in *Standing v. Bowring* (12) was inapplicable. He said (*ibid.*, 606):

“ With great respect, I think the cases differ radically in this respect, that in *Standing v. Bowring* (12) there was on the evidence a complete gift with the express intention that on the donor’s death the donee should have all the principal, the donor having only the dividends for life—while here there is a retention, not of income, but of the right to use during the lifetime the substance of the gift itself. This dominion over the subject, said to be ‘given’ with the intention that on the death all or what is left shall go to the donee, seems indistinguishable from that incident to a testamentary gift, which does not change the ownership but takes effect only on death.”

HODGINS, J., founded his dissenting view on the principle on which the earlier Ontario case of *Hill v. Hill* (8) had been decided and which was, he thought, applicable to the case which was before him.

In *Hill v. Hill* (8), the plaintiff’s father owned 400 dollars on deposit in a bank to his credit. He procured from the bank a deposit receipt for the amount, payable to himself and the plaintiff, or either, or the survivor. The understanding between the father and son was that the money should remain subject to the father’s control and disposition while living, and that whatever should be left at his death should belong to his son. He retained the receipt intact in his own possession, and it was found amongst his papers at his death. The above facts were deposed to by the plaintiff. ANGLIN, J., in the course of his judgment, said (8 O.L.R. 711):

“ . . . upon the plaintiff’s own evidence, I find myself driven to the conclusion that the purpose of William Hill, deceased, was by this means to make a gift to his son, the plaintiff, in its nature testamentary. As such it could only be made effectually by an instrument duly executed as a will. The father retaining exclusive control and disposing power over the 400 dollars during his lifetime, the rights of the son were intended to arise only upon and after his father’s death. This is, in substance and in fact, a testamentary disposition of the money, and, as such, ineffectual.”

He added that he was unable to regard the receipt as equivalent to a voluntary settlement, reserving to the settlor a life interest with a power of revocation. It appears to me, accordingly, that, if the Irish case of *Owens v. Green* (6) had come before the courts of Ontario, it would have been decided the other way.

The plaintiffs invite me to follow *Owens v. Green* (6) and the Canadian cases which are in line with it. I confess that the reasoning of those cases appeals to me, and, if there had been no English authority relevant to the question, I should have felt inclined to apply that reasoning notwithstanding that, by so doing, I should have defeated Miss Jarman's expressed intentions. I find it difficult to regard Miss Jarman's deposit account transactions as voluntary settlements by her in the defendant's favour coupled with a power of revocation. I find it equally difficult to regard them as operating as immediately effective gifts of anything, seeing that, as between Miss Jarman and the defendant, the defendant was to have no power of withdrawal so long as Miss Jarman was living, while she retained the entire beneficial title to the funds. Further, it is impossible to regard the transactions as *donationes mortis causa*. There only remains the view, therefore, that the gifts were intended to be postponed until Miss Jarman's death and to operate then so as to pass for the first time to the defendant a beneficial right to assets of Miss Jarman as then ascertained. In my judgment, however, it would not be right for me to defeat the defendant by applying this course of reasoning. In the first place, the cases which have come before the courts of this country in which a depositor has put funds in the joint names of himself and another, intending to retain control over the funds and to withdraw from them if he thought proper, but with the further intention that the other party (if surviving) should take beneficially whatever might be left of the funds at the death of the depositor, have all, so far as I am aware, resulted in the surviving beneficiary taking free from any trust. It is true that there is no reported case, so far as I know, in which the point now raised was presented to the court. That there were cases of this type prior to *Marshall v. Crutwell* (4), however, appears from the observations of SIR GEORGE JESSEL, M.R., which he made in that case, and it is impossible to say that the point was not taken in any of them or in any subsequent cases. Secondly, there is the fact that a court whose decisions are entitled to very great respect, namely, the Appellate Division of the Supreme Court of Ontario, had the very point before them but did not accept it. In these circumstances and having regard to the disturbing effect which an acceptance of the argument might well have on titles already acquired, I think it is better that the change in the current of authority which I am invited to make should be made rather by the appellate court than by a court of first instance, assuming that it is to be made at all.

I hold, accordingly, that the defendant is beneficially entitled to the credit balances on the deposit accounts, as well as to the shares, which are in issue in this action. The defendant raised a further point to the effect that Mrs. Sealey, who was entitled to the whole of Miss Jarman's residuary estate as her sole next of kin, admitted the defendant's claim after Miss Jarman's death and made her testamentary dispositions on that basis, and that, accordingly, it is not open to her executors now to withdraw that admission. It appears that, by her will, Mrs. Sealey gave the defendant an annuity and, after the alleged admission, made a codicil revoking it. By a subsequent codicil, however, she restored it, and for this reason, among others, I should have been quite unable to accept the point, had it become material to the decision of the case. The action, in my judgment, fails and must be dismissed.

Action dismissed with costs.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Alms & Young*, Taunton (for the plaintiffs); *G. Houghton & Son* (for the defendant).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

RUSSELL v. DUKE OF NORFOLK AND OTHERS.

[COURT OF APPEAL (Tucker, Asquith and Denning, L.JJ.), December 6, 7, 8, 1948.]

Contract—Implied term—Racehorse trainer—Licence to train—Condition—Discretion of Jockey Club to withdraw licence—Need to hold inquiry before withdrawal—Conduct of inquiry according to rules of natural justice—Libel—Privilege—Qualified privilege—Racehorse trainer “warned off”—Publication in “Racing Calendar.”

By r. 102 of the Rules of Racing of the Jockey Club: “(i) Every trainer of a horse running under these rules must obtain an annual licence from the stewards of the Jockey Club and pay a yearly subscription of one sovereign to the Bentinck Benevolent Fund. (ii) A person whose licence to train has been withdrawn on the ground of misconduct is a disqualified person.” Rule 17 empowered the stewards *inter alia* to grant and withdraw licences at their discretion, to inquire into and deal with any matter relating to racing, to warn off Newmarket Heath, and to authorise publication of their decisions in the RACING CALENDAR.

A trainer paid £1 and was granted a licence to act as a trainer during 1947. A condition of the licence was: “A trainer’s licence may be withdrawn or suspended by the stewards of the Jockey Club in their absolute discretion, and such withdrawal or suspension may be published in the RACING CALENDAR, for any reason which may seem proper to them, and they shall not be bound to state their reasons.” Following an inquiry into the circumstances in which one of the horses trained by him won a race, the stewards of the Jockey Club withdrew the trainer’s licence and published the fact of the withdrawal in the RACING CALENDAR. In an action against the stewards of the Jockey Club and the secretary of Club, who also published the RACING CALENDAR, for a declaration that the trainer’s name was wrongfully placed on the list of disqualified trainers, for an order to delete it, and for a declaration that the decision to withdraw the licence was void as contrary to natural justice, and also for damages for breach of contract and for libel:

HELD: (i) (TUCKER and ASQUITH, L.JJ.) assuming that the application for a licence and the licence itself together constituted a contract to permit the trainer to act as such, the stewards had power under the contract in their unfettered discretion to withdraw the trainer’s licence without any inquiry at all, and it was impossible consistently with an unfettered and absolute discretion to imply a term in the contract that an inquiry, if held, should be in accordance with natural justice, but (DENNING, L.J., *consentiente*) there was, in any case, no evidence that any principle of natural justice had been violated.

(ii) the defendants were protected from liability in respect of the publication in the RACING CALENDAR on the ground that the occasion was privileged, malice having been disclaimed.

Decision of LORD GODDARD, C.J. ([1948] 1 All E.R. 488), affirmed.

[AS TO IMPLIED TERMS OF A CONTRACT, see HALSBURY, Hailsham Edn., Vol. 7, pp. 322-3, para. 451; and FOR CASES, see DIGEST, Vol. 12, pp. 607-616, Nos. 5028-5090.

AS TO QUALIFIED PRIVILEGE, see HALSBURY, Hailsham Edn., Vol. 20, pp. 480-486, paras. 579-592; and FOR CASES, see DIGEST, Vol. 32, pp. 112-116, Nos. 1437-1478.]

Cases referred to:

(1) *Re Nott & Cardiff Corporation*, [1918] 2 K.B. 146; 118 L.T. 487; 82 J.P. 181; 12 Digest 612, 5053.

- (2) *Hamlyn & Co. v. Wood & Co.*, [1891] 2 Q.B. 488; 60 L.J.Q.B. 734; 65 L.T. 286; 12 Digest 610, 5042.
- (3) *Green v. Blake and Others*, [1948] I.R. 242.
- (4) *Chapman v. Ellesmere (Lord)*, [1932] 2 K.B. 431; 101 L.J.K.B. 376; 146 L.T. 538; Digest Supp.
- (5) *Dawkins v. Antrobus*, (1881), 17 Ch.D. 615; 44 L.T. 557; 8 Digest 507, 18.
- (6) *Wood v. Wood*, (1874), L.R. 9 Exch. 190; 43 L.J.Ex. 153; 30 L.T. 815; 8 Digest 510, 29. A
- (7) *Weinberger v. Inglis (No. 2)*, [1919] A.C. 606; *affmg.*, [1918] 1 Ch. 517; 87 L.J.Ch. 345; 118 L.T. 769; 8 Digest 506, 11.
- (8) *Maclean v. Workers' Union*, [1929] 1 Ch. 602; 43 Digest 101, 1046.

APPEAL by the plaintiff from a judgment of LORD GODDARD, C.J., dated Feb. 26, 1948, reported ([1948] 1 All E.R. 488).

On Mar. 6, 1947, the Jockey Club granted the plaintiff a licence to act as a racehorse trainer for one year. The possession of such a licence was necessary for any person training for meetings to which Jockey Club rules applied, which comprised practically all the meetings held. After a race at the Lincoln Spring Meeting in 1947 the winning horse, trained by the plaintiff, was examined on behalf of the Jockey Club. Subsequently, an inquiry was held by the stewards of the Jockey Club which the plaintiff attended, and the stewards withdrew the licence and published the fact of the withdrawal in the RACING CALENDAR. The plaintiff brought an action against the defendants, the stewards (sued on their own behalf and on behalf of all other members of the Jockey Club) and Messrs. Weatherby & Sons (as secretaries of the club and printers and publishers of the RACING CALENDAR) claiming a declaration that his name had been wrongfully placed on the defendants' list of disqualified trainers (as being "warned off Newmarket Heath"), an order that his name should be deleted from the list, and a further declaration that the licence had never been lawfully withdrawn and that the defendants' decision to withdraw it was void as contrary to natural justice. He also claimed for breach of contract and for libel. LORD GODDARD, C.J., ruled that the occasion of the publication of the statement in the RACING CALENDAR was privileged, and, in the admitted absence of malice, there was no case in libel to go to the jury. On the rest of the case he left to the jury only the question whether the inquiry held by the stewards was fair. The jury disagreed. LORD GODDARD then held that there was no case in contract to go to the jury and gave judgment for the defendants. The Court of Appeal now dismissed the plaintiff's appeal. The facts appear in the judgment of TUCKER, L.J. B
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Roberts, K.C., *Geoffrey Howard* and *Dennis Lloyd* for the plaintiff.
Sir Valentine Holmes, K.C., and *Elwes* for the defendants.

TUCKER, L.J.: This is an appeal from a judgment of the LORD CHIEF JUSTICE in favour of the defendants in an action in which the plaintiff, Mr. James Russell, who at all material times had been a trainer of racehorses under a licence issued by the stewards of the Jockey Club, claimed: G

"... a declaration that his name has been wrongfully placed on the list of disqualified trainers (warned off Newmarket Heath), (ii) an order that the defendants do delete the plaintiff's name from the list of persons so disqualified as aforesaid, (iii) a further declaration that the licence of Mar. 6, 1947, was never lawfully withdrawn by the defendants, but that their decision to do so was void as contrary to natural justice, (iv) damages for breach of contract, (v) damages for libel," H

and further or other relief. At the trial the learned judge ruled that there was no case to go to the jury on the issue of libel, and he left to the jury a question whether an inquiry which had been held by the stewards of the Jockey Club was fair. On that question the jury were unable to agree, but the learned judge

entered judgment for the defendants on matters of law which he considered were concluded in favour of the defendants.

A The plaintiff, by an application dated Jan. 31, 1947, applied on a form provided by the Jockey Club for a trainer's licence. The application provides that : "The application on this form can only be made and accepted on the condition that the applicant, in all respects, subjects himself to the Rules of Racing," and then it gives spaces for particulars with regard to the applicant, and continues : "I hereby apply to the stewards of the Jockey Club for a trainer's licence under the Rules of Racing during the year 1947." At the top left hand corner there are the words "Annual fee £1." In response to that application the plaintiff received a licence (No. 333) headed "Rules of Racing. Trainer's Licence," giving his name and address, and showing that he is "hereby licensed under the Rules of Racing, and, subject to the conditions appearing on the back hereof, to train horses to run under the Rules of Racing during the year 1947." On the back of that form there are conditions as follows :

C "1. Subject to the Rules of Racing for the time being, and the conditions specified below, this licence shall be in force until Dec. 31, 1947. 2. Every application for a new licence should be made on or before Mar. 1, 1948, and on the form which can be obtained at the registry office. Applications made after that date will not be considered, unless in very exceptional circumstances. 3. A trainer's licence may be withdrawn or suspended by the stewards of the Jockey Club in their absolute discretion, and such withdrawal or suspension may be published in the RACING CALENDAR, for any reason which may seem proper to them, and they shall not be bound to state their reasons."

E Pursuant to that licence the plaintiff had in training on Mar. 26, 1947, a horse called Boston Boro which was owned by a Mr. Hardy. That horse ran in the Lincoln Spring Meeting in a race called the John o' Gaunt Plate. After winning that race, on the instructions of the stewards of the meeting, the horse was taken on one side and specimen swabs were taken of saliva and sweat for the purpose of analysis to ascertain whether or not the horse had been "doped." In due course the stewards of the Jockey Club received the report of the analysts to the Jockey Club on those swabs, and they caused a letter to be written on Apr. 11 by Messrs. Weatherby to the plaintiff in these terms :

F "The stewards of the Lincoln Spring Meeting have referred to the stewards of the Jockey Club the report made by the Jockey Club analysts on the samples of saliva and sweat taken from Boston Boro trained by you, after the John o' Gaunt Plate at Lincoln on Mar. 26. The stewards of the Jockey Club will consider the report at the Jockey Club Office at Newmarket at 12 noon on Apr. 15. I am instructed to request you to attend at that time and place. Please telegraph me that you have received this letter."

G The plaintiff attended, together with Mr. Hardy, the owner of the horse, before the stewards of the Jockey Club on Apr. 15. He took with him a statement which he had written out before and he handed it to the stewards in the course of the hearing. It starts :

H "My Lords, with reference to your inquiry into the running of Boston Boro in the John o' Gaunt Plate at Lincoln and the subsequent report by the stewards at that meeting, following is exactly what happened that day."

He gives an account of the movements of the horse from 8.30 that morning until the time of the race, and then he goes on :

"Dope would be worse than useless used on Boston Boro. He is a very

free running horse, if anything too keen. He is a hard puller and runs until he is beat. He has never failed in any race to do his best."

He goes on to say that in 1945 the horse was examined by Mr. Beaumont, a veterinary surgeon, and was reported as having heart trouble. He was, therefore, a horse who should not be overstrained because of his heart. Then the plaintiff says that his bet on the horse in the John o' Gaunt Plate was £5 each way, and he won £37 10s., and adds :

"Would any trainer consider drugging a horse for this amount ? I was not in contact with the horse from 8.30 a.m. until I put the saddle on him for the race, and I would certainly never consider asking a stable lad to do any horse drugging."

It is clear from that letter that the plaintiff was well aware of the nature of the matter which was being inquired into and necessitated his attendance on Apr. 15, and that he would be called on to give an explanation with regard to his care and management of the horse and so forth.

The inquiry was conducted by the three stewards of the Jockey Club in office that year, Lord Willoughby de Broke, Lord Rosebery and the Duke of Norfolk. Their finding was expressed in these terms by Lord Willoughby de Broke :

"Mr. Russell, the stewards have given extremely careful thought to this case and also to the statements to them which you have made both verbally and in writing. The stewards must accept the report, which was submitted to them by their analysts, that both samples of sweat and saliva that were taken from your horse, Boston Boro, at Lincoln on Mar. 26 gave positive reactions for alkaloids. You are the trainer of the horse, and the stewards hold you responsible. They, therefore, have no option but to withdraw your licence as a trainer on the ground of negligence amounting to grave misconduct, and the horse Boston Boro will be disqualified from running again under the Rules of Racing. That is all."

Accordingly, the plaintiff was treated as a disqualified person within the Rules of Racing, r. 102, para. (ii), of which provides : "A person whose licence to train has been withdrawn on the ground of misconduct is a disqualified person." The stewards had withdrawn this licence, and they had intimated that it was withdrawn on the grounds of misconduct. The result was that the plaintiff became a disqualified person, and under r. 178 (d) the following consequences ensued :

"A disqualified person, so long as his disqualification lasts, shall not : (1) act as steward or official at any recognised meeting ; (2) act as authorised agent under these rules ; (3) enter, run, train, or ride a horse in any race at any recognised meeting, or ride in trials ; (4) enter any racecourse, stand or enclosure ; (5) except with permission of the stewards of the Jockey Club be employed in any racing stable."

In due course the defendants caused to be published in the RACING CALENDAR the following notice :

"The stewards of the Lincoln Spring Meeting referred to the stewards of the Jockey Club the report which they had received from the Jockey Club's analyst on an examination ordered to be made of Boston Boro after running in the John o' Gaunt Plate on Wednesday, Mar. 26. The stewards of the Jockey Club interviewed Mr. R. Hardy, the owner, and J. Russell, the trainer, on Apr. 15, and were satisfied that a drug had been administered to the horse for the purpose of the race in question. They disqualified Boston Boro from running again under their rules and withdrew Russell's licence to train."

Before considering the issues raised in this case, it is necessary to refer to

one or two other of the Rules of Racing subject to which this licence had been issued. The relevant rules are, I think, as follows. Rule 17, which is the all-important rule in the present case, is as follows :

A "The stewards of the Jockey Club have power, at their discretion, to grant, and to withdraw, licences to officials, trainers, jockeys and race-courses . . . to make inquiry into, and deal with, any matters relating to racing, and to warn any person off Newmarket Heath ; and to authorise the publication in the RACING CALENDAR of their decisions respecting any of the above matters, and of the decisions and reports of stewards of meetings."

Rule 25 provides :

B "The clerk of the course shall have in his possession, for the information of the stewards, a list of persons warned off Newmarket Heath, and of suspended jockeys, and also a copy of the latest monthly forfeit list, and he shall not allow any horse which, or the owner or nominator of which, is in the forfeit list to start for any race."

C Rule 102 I have already referred to. Rule 176 deals with corrupt practices and disqualification of persons. One of the corrupt practices deals with the administration, for the purpose of affecting the speed of a horse, of "drugs or stimulants, internally, by hypodermic or other methods." It deals with conspiracy and any corrupt or fraudulent practice in relation to racing, and it provides : "Every person so offending shall be warned off Newmarket Heath and other places where these rules are in force." Rule 178 provides :
D "When a person is warned off Newmarket Heath, and so long as his exclusion continues, he is a disqualified person." Then follow r. 178 (a), (b), (c), and r. 178 (d) which I have already read dealing with the position of a disqualified person.

E The case for the plaintiff at the trial was that the application for and grant of his licence formed a contract between himself and the Jockey Club and he said in para. 5 of the statement of claim :

F "It was in the premises an implied condition of the said contract between the parties and a duty owing to the plaintiff by the three first-named defendants as stewards of the said club that they should not on the grounds of misconduct purport to disqualify the plaintiff as a trainer during the period covered by the said licence or to warn him off Newmarket Heath on such ground unless they had first fairly investigated and adjudicated upon any complaint made against the plaintiff on that behalf and/or that if they conducted an investigation or made an adjudication such investigation and adjudication as they might conduct should be in accordance with the principles of natural justice."

G It was said on behalf of the plaintiff that the plaintiff had his licence withdrawn, and he had been found guilty of misconduct and become a disqualified person without an inquiry having been conducted in accordance with the principles of natural justice.

H The first question that had to be decided, accordingly, was whether or not, assuming that there was a contract between the plaintiff and the defendants, it was a term or condition of that contract that he could not have his licence withdrawn or could not be disqualified on the ground of misconduct without an inquiry of that nature. LORD GODDARD, C.J., dealing with that contention said ([1948] 1 All E.R. 491) :

"I can find no contract here under which the stewards were under any duty to the plaintiff to hold an inquiry. It is said that they did hold an inquiry, and, therefore, that they must hold it honestly, fairly, and in accordance with natural justice. That seems to me to be a fallacy. If

there was no contractual duty to hold an inquiry, how can there be a breach of contract in withdrawing the licence, however the inquiry was conducted? It is admitted that the licence might have been withdrawn without any inquiry."

As I understood the case when originally presented by counsel for the plaintiff, he conceded that the stewards were at liberty under the Rules of Racing to do what they did in their discretion without holding any inquiry at all, but he said that, if they did hold an inquiry, then, as a result of this implied term in the contract, the inquiry which they held must be conducted in accordance with the principles of natural justice. Reading the judgment of the LORD CHIEF JUSTICE, it would appear to me that he had formed the same view with regard to counsel's argument in the court below as that which I formed when I heard the appeal opened, but, in his reply, counsel did present the case rather differently. The argument, as I understand it, is that, at any rate, with regard to the finding of misconduct, the Rules of Racing do postulate the necessity for an inquiry. I think he was disposed to concede that, if the stewards had merely withdrawn the licence for some unspecified reason, they could have done so under r. 17 without holding an inquiry, but, says counsel, an inquiry which accords with the principles of natural justice is a condition precedent to his being found guilty under r. 102 of misconduct, he thereby becoming a disqualified person and his licence being withdrawn.

That requires a consideration of the rules. The view I have formed is that it is clear that under r. 17 the stewards in their absolute discretion and by reason of the terms of the licence which was granted, which I, like the LORD CHIEF JUSTICE, am assuming for the purpose of this judgment constituted a contract (although I have some doubt whether it constituted a contract or whether it was not merely a licence issued on conditions binding both parties), had power to withdraw the plaintiff's licence without any inquiry at all. Furthermore, I think it is clear from r. 17 that equally, acting in their unfettered and absolute discretion, they could have warned the plaintiff off Newmarket Heath, and so far as one can see from the rules, the consequences of being warned off Newmarket Heath and of becoming a disqualified person are very much the same. At any rate, r. 178 provides that every person warned off Newmarket Heath is a disqualified person so long as his exclusion continues. So the result seems to be much the same. At any rate, if the stewards warn a man off he becomes a disqualified person in the same way as if he is convicted under r. 102 of misconduct. Therefore, it appears to me that much of the discussion in this matter is rather academic. The stewards clearly had power without any inquiry at all both to withdraw the licence and to warn off, but had it not been for r. 178, which provides that any person warned off becomes a disqualified person, I should have thought that there was a great deal to be said for the argument of counsel for the plaintiff that r. 102 does postulate an inquiry. Counsel for the defendants said that the power to deal with a person guilty of misconduct, a person who is subject to the rules by contract, is to be derived from r. 17. When one reads r. 17, which I have already quoted, it becomes clear that the power is derived from the words: "and deal with any matters relating to racing," but those words follow the words: "to make inquiry into," and, therefore, the power to find a person guilty of misconduct under r. 102 is derived from the words in r. 17 which give the stewards power to make inquiry into and deal with any matters relating to racing. I should have been disposed to the view that, so far as it is dealing with matters not otherwise expressly dealt with in the rules, that rule, read together with r. 102, would require and postulate an inquiry, but as I have said, it is a rather academic matter. I think, so far as the withdrawal of the licence and the warning off Newmarket Heath are concerned, that it is impossible to imply into the contract between the parties the term which the

plaintiff would seek to import. In my view, it is a term which is contradictory of the existence of an unfettered and absolute discretion because it would impose a very considerable fetter on the exercise of the discretion, if, although in their unfettered discretion the stewards can warn off or withdraw licences, none the less if they choose to make an inquiry they bind themselves to conduct the inquiry in a particular way and manner. I find myself in complete agreement with the views expressed by the LORD CHIEF JUSTICE on that part of the case, where, after referring to the judgment of PICKFORD, L.J., in *Re Nott and Cardiff Corporation* (1), and the judgment of LORD ESHER in *Hamlyn v. Wood* (2), he says (*ibid.*, p. 491):

"It seems to me that in this case it would be impossible to say that the parties must have intended the term which is alleged here, because that would prevent the stewards from exercising the absolute discretion which the express term in the licence gives to them."

Somewhat similar language was used by BLACK, J., in an Irish case which has been brought to our attention, *Green v. Blake* (3). In the course of his judgment, dealing with one part of the case with regard to which he formed the view that no inquiry was necessary, BLACK, J., said this, and I should like, with respect, to adopt his language ([1948] I.R. 267):

"If, then, the rules entitled the stewards to publish the facts of the warning off without conducting any investigation at all, it could hardly be said that they failed to observe the rules, because, having conducted a purely supererogatory investigation, they did so without due regard to the essentials of justice. If they were not obliged to investigate at all, they could not be obliged to conduct an investigation with due regard to the essentials of justice."

So, with regard to the withdrawal of the licence, that was a thing which the stewards were entitled to do without any inquiry, and they would have equally been entitled to warn the plaintiff off Newmarket Heath which would have resulted in his becoming a disqualified person. So much with regard to the case as founded in contract.

The plaintiff also sues in libel. On that issue the learned judge entered judgment for the defendants on the ground that the occasion was privileged, and that there was no evidence of malice to go to the jury. It is to be emphasised that from the first in this case counsel on behalf of the plaintiff had disclaimed alleging express malice, and he also, before the end of the trial, made it clear that he was not impeaching the honesty or *bona fides* of the stewards in their conduct of the inquiry. The learned LORD CHIEF JUSTICE held that the occasion was privileged, and that in the absence of malice that concluded the matter on the authority of *Chapman v. Ellesmere* (4): see *per* LORD HANWORTH, M.R. ([1932] 2 K.B. 450), and *per* ROMER, L.J. ([1932] 2 K.B. 473). In my view, those words apply in every respect to the present case. The stewards having come to their decision, it was clearly their duty to communicate it to the racing public who had a corresponding interest in receiving the information. The plaintiff had assented by his contract to the RACING CALENDAR as the medium for the publication of the decision, and the publication is confined to matters which the stewards could indubitably have dealt with under their discretion without any inquiry at all. The notice merely stated that the licence had been withdrawn. That was a matter which, to my mind, is clearly covered by the language used by ROMER, L.J., and, in the absence of malice and any contractual provision in the rules requiring an inquiry before such a decision could be arrived at and published, the occasion is clearly privileged.

Counsel for the plaintiff says that the plaintiff only consented contractually to the publication of the decision of the stewards; that part of the decision

of the stewards, namely, that the plaintiff had his licence withdrawn on the ground of negligence amounting to grave misconduct was omitted; and, accordingly, that there never was any consent by his client to the publication of the so-called decision. In my view, what was published in the RACING CALENDAR can properly be described as the decision of the stewards. They were not bound to publish the reasons why they arrived at that decision, and I think they might possibly have been open to criticism if they had. That is the view which I have formed with regard to that publication, but the matter does not rest there, because I think that this point is really covered by *Chapman v. Lord Ellesmere* (4), where the same question was raised. In the course of his judgment SLESSER, L.J. ([1932] 2 K.B. 463) points out that *Sir Patrick Hastings* had sought

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" . . . to avoid the consequence of the apparent consent to publication in the RACING CALENDAR is as follows: he says that the plaintiff has only consented to the publication of the decision of the stewards, which I have quoted but repeat, that they 'considered the plaintiff as trainer directly responsible for the care of the horse'; that is to say, to a finding that he was under a duty to see that the horse was not drugged, which duty he failed to perform. *Sir Patrick* points out that the jury, having found that the statement in the RACING CALENDAR meant that the plaintiff was a party to the actual drugging of 'Don Pat,' it is a statement, as the jury have construed it, which is not the publication of the decision of the stewards, in that the stewards, to put it briefly, held that the plaintiff was negligent in not preventing the drugging of the horse, whereas the publication alleged that he had actually drugged it."

The argument there relied on by *Sir Patrick Hastings* seems to me identical with the argument of counsel for the plaintiff in the present case, namely, that the stewards had not incorporated in their publication in the RACING CALENDAR their finding that the plaintiff had been negligent. In *Chapman v. Lord Ellesmere* (4) the court none the less held that the occasion was privileged and LORD HANWORTH, M.R., deprecated the court being required to consider again and again the precise language used in a matter of this kind. Therefore, in my view, the learned LORD CHIEF JUSTICE was correct when he ruled that the occasion was privileged, and that in the absence of malice there was no case to go to the jury on the issue of libel.

I have expressed my views with regard to the issues in this case as they present themselves to me, but, if I am wrong in the conclusions which I have reached, and, if it was part of the contract between the parties that there should be an inquiry conducted according to the principles of natural justice and that such an inquiry was a condition precedent to the right of the stewards either to withdraw the licence or to find the plaintiff guilty of misconduct and disqualify him and such inquiry is necessary to support the plea of privilege, then, in my view, there was no evidence here that the inquiry conducted by the stewards was not in accordance with what is called the principles of natural justice. The LORD CHIEF JUSTICE, no doubt as a precaution and pressed by counsel so to do, left that question to the jury in the form to which I have referred, but here again I derive considerable assistance from the language which was used by BLACK, J., in *Green v. Blake* (3) to which I have referred, where he is dealing with this matter and the function of the jury in this connection. He says ([1948] I.R. 242):

"Moreover, I think he never had those materials even at the last moment when the jury answered his questions other than that of malice. What materials did the judge require? In my opinion he required to know the truth about what took place at and in connection with the investigation and having found that out, it was for him to say whether that did or did not amount to a disregard of the essentials of justice. How was he to find

out what took place? In my opinion he had to find that out from the jury; for it was a pure question of fact and of the credibility of the witnesses. I should deem it most unsafe to ask a jury to say whether the facts they had found did or did not amount to a disregard of the essentials of natural justice. I do not think the term is suitable for laymen to decide about."

A I am inclined to the view that this question—whether or not an inquiry has been conducted in accordance with the principles of natural justice is really one of law for the judge rather than for the jury. No doubt it is for the jury to find the facts, as BLACK, J., indicated, but, when once the facts are found, I am disposed to the view that it is really a matter of law for the court. However that may be, in my view on the admitted facts of this case, whether
B it be a matter of law or whether it be a matter of fact, there is only one possible answer, namely, that it has not been established that this inquiry was not in accordance with the principles of natural justice.

When the matter is narrowed down, it comes to this. The following are the matters complained of as showing that the inquiry did not accord with the principles of natural justice. It is said that the plaintiff had no sufficient
C information before he attended the inquiry as to the nature of the charge made against him; that he had not been supplied before the hearing with a copy of the analysts' report; that at the inquiry, although this matter might have been remedied if he had been shown a copy of the report and been given an opportunity to have an adjournment so that he could deal with it, only part of the report was read out; and, finally, that he was not given sufficient

D opportunity to present his case or call his witnesses. In dealing with this matter, I think it is essential to appreciate the precise nature of the inquiry. The evidence shows that in view of the danger of doping it is essential that the person in charge of a horse should have it carefully guarded and watched for two or three hours before the race, and, therefore, it may well be the view of those in racing circles that, if it be shown that a horse is doped, the person
E in charge of it, or the person who should have been in charge of it, two or three hours before the race must be held responsible, whatever his personal conduct in the matter may have been. It seems to me that, having got the analyst's certificate, the stewards have to consider, first, whether the horse has been doped, and, if it has, it may well be that unfortunate consequences may follow to the trainer, however personally blameless he may be in the matter.

F It is, however, right and proper that he should be given an opportunity of attending the inquiry and giving his explanation. It does not seem to me that at the outset there is necessarily any particular charge made against the trainer. The horse is said to have been doped. The stewards have evidence which satisfies them that there is a *prima facie* case of doping. They require the trainer and the owner to attend the inquiry and to give an explanation. If in

G the course of that explanation it is made manifest that there has been negligence or misconduct, a specific charge then emerges, and that is exactly what happened in the present case. The plaintiff's explanation showed on the face of it that the horse had been left unattended for something like 20 minutes during the vital period, and on that explanation given by the plaintiff himself it is not surprising that he should have been found to have been guilty of
H negligence. I only make those observations to indicate what, in my view, was the nature of the inquiry. I think it is a mistake to regard all these matters as if they were prosecutions with a prosecutor and a defendant. It was an inquiry in the course of which it emerged that there were matters for which the stewards held the trainer responsible.

As to the specific complaints that were made, it is clear from the letter I have already read, and from the evidence, that the plaintiff, who has been in racing circles for 40 years, knew perfectly well what was the nature of the

matter that was going to be inquired into. Complaint is made that only part of the analyst's certificate was read to him. It is clear that that is so, but I find it impossible to say that the mere fact that they omitted that part which dealt with the particular drug, *viz.*, whether it was morphine or heroin, is sufficient for any tribunal to say that this inquiry was not conducted according to the principles of natural justice, and was, therefore, void. The only other matter complained of is that it was not until after the stewards had conferred together and come to a decision as to the course which they proposed to take that the plaintiff was, in terms, asked whether he had any further evidence to offer. Throughout this inquiry he was, at every stage, it seems to me, given an opportunity of presenting his case and of asking any questions which he desired to ask. It is true that he was not in terms asked: "Have you got any witnesses? Do you want an adjournment?" A layman at an inquiry of this kind is, of course, at a grave disadvantage compared with a trained advocate, but that is a necessary result of these domestic tribunals which proceed in a somewhat informal manner. Counsel for the plaintiff, in the course of his forceful argument on this point, again and again said: "What would be said of local justices who acted in this way?" With all due respect, the position is totally different. This matter is not to be judged by the standards applicable to local justices. Domestic tribunals of this kind are entitled to act in a way which would not be permissible on the part of local justices sitting as a court of law. The conclusion I have reached on this aspect of the case is that there was no material on which a jury could have arrived at a conclusion that this inquiry was conducted in a way contrary to the principles of natural justice. If, as I think is the better view, it really was a matter of law for the decision of the judge, I should unhesitatingly hold that there was nothing here which was contrary to the principles of natural justice as laid down in the various authorities which have been brought to our notice. There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth. Accordingly, I do not derive much assistance from the definitions of natural justice which have been from time to time used, but, whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case. I think from first to last the plaintiff did have such an opportunity. The fact that the tribunal for all I know—I am not suggesting it is so—may have arrived at a totally erroneous conclusion, the fact that they may have attached quite a mistaken value to the certificate of the analyst, is altogether beside the point. The mere fact that at the trial it was, as I think it was, necessary to get the plaintiff's case on its legs to call an expert witness to controvert the meaning of this certificate in itself seems to me to show that his real complaint goes to the weight of evidence and the value to be attached to this analyst's certificate. That was a matter for the tribunal to deal with. They may have dealt with it erroneously and in a mistaken manner, but it is not for this court to intervene in a matter of that kind. Accordingly, even if it is a necessary condition, either under the heading of contract or to support the plea of privilege, that there should have been a properly conducted inquiry, then I find in this case there was such an inquiry. For these reasons I think this appeal fails.

ASQUITH, L.J.: I agree and like my Lord I am inclined to the view, reading the rules as a whole, that where what is involved is the proposed withdrawal of a licence for misconduct, an inquiry, and an inquiry which conforms to the principles of natural justice, is a necessary pre-condition, but it is unnecessary to decide the point because I agree with my Lord that there is no evidence in the present case that any principle of natural justice was

violated. That is a conclusion which, if right, disposes automatically of all issues in this case, except one, in favour of the defendants. That one is the contention of the plaintiff that the announcement in the RACING CALENDAR did not accurately record the decision of the stewards. The actual decision, it is argued, was in substance that the plaintiff was not guilty personally of administering the drug, but merely guilty of negligence in not preventing its administration. It is said that the announcement actually published, by omitting reference to negligence, conveyed the contrary implication, that is, that the plaintiff was himself a party or privy to the administration of the drug. The plaintiff, the argument continues, by r. 17, had consented to the publication in the RACING CALENDAR of an accurate version of any decision, but had not consented to the publication of an inaccurate one. It seems to me that in substance this is exactly the argument that was put forward in *Chapman v. Lord Ellesmere* (4), and against which this court ruled in a decision that is binding on us. In that case, as in this case, words which said or clearly implied that negligence and not deliberate misdoing had been proved were omitted from the decision as published, yet the publication was held sufficient to embody the actual "decision," and to have been consented to as such by the plaintiff. I agree that the appeal should be dismissed.

DENNING, L.J. : The first question is whether, under the Rules of Racing, it was incumbent on the stewards of the Jockey Club to hold an inquiry before withdrawing the plaintiff's licence to train on the ground of misconduct. I do not think that the rules postulate an inquiry when the stewards merely withdraw a licence without inflicting any penalty. Condition 3 of the licence gives them an absolute discretion on that matter. In such a case they need hold no inquiry and need give no reasons. It is sufficient that they should act honestly and in good faith, but when they are exercising the far more serious power of withdrawing a licence under r. 102 on the ground of misconduct, they must, in my opinion, give the trainer an opportunity of defending himself. Rule 102 creates the offence of "misconduct" in a trainer, and prescribes the penalty, which is the withdrawal of his licence and disqualification. This penalty of disqualification is the most severe penalty that the stewards can inflict. It is the same penalty as that which is imposed on persons guilty of corrupt practices. It disqualifies the trainer from taking any part in racing and thus takes away his livelihood. Common justice requires that before any man is found guilty of an offence carrying such consequences, there should be an inquiry at which he has the opportunity of being heard. It might, perhaps, be possible for the stewards to stipulate expressly for power to condemn a man unheard, but I should doubt it. It may be that such a stipulation would be contrary to public policy : see the judgment of BRETT, L.J., in *Dawkins v. Antrobus* (5) (17 Ch.D. 630), the judgment of KELLY, C.B., in *Wood v. Wood* (6) (L.R. 9 Exch. 196) and of LORD BIRKENHEAD, L.C., in *Weinberger v. Inglis* (7) ([1919] A.C. 616). It is very different from a mere dismissal of a servant or withdrawal of a licence or even expulsion from a club, which MAUGHAM, J., had in mind in *MacLean v. Workers Union* (8) ([1919] A.C. 623). The Jockey Club has a monopoly in an important field of human activity. It has great powers with corresponding responsibilities. Howsoever that may be, I find no stipulation here enabling the stewards to act under r. 102 without an inquiry. Nor, indeed, do the stewards themselves suggest they have such a power, or would wish to exercise it, if they had. Lord Willoughby de Broke was asked by counsel for the plaintiff : "You realise the extreme importance of seeing that a trainer does not have his licence withdrawn for misconduct, except after carefully inquiry," and he answered : "Most certainly." It has been argued that the stewards need have no inquiry at all, and that, therefore, it does not matter if they hold one which is not a proper one. I do not agree with that. I think there must be an inquiry at which the person concerned has an oppor-

tunity of being heard. The stewards should not act on information against him without giving him an opportunity of answering it. If an inquiry has been held in accordance with these essentials of justice, there is no reason why the result of the inquiry should not be published to all concerned with racing, and, indeed, it is in the interests of all that it should be. If the publication in the RACING CALENDAR is no wider than the occasion warrants, it is privileged. This might be the case even if the rules did not contain any provision on the matter, but any doubt is removed by the fact that the rules, to which the plaintiff has assented, empower the stewards to publish the decision in the RACING CALENDAR. That is, in effect, a consent by the plaintiff to this mode of publication, though consent cannot create a privilege where none would otherwise exist. If, however, the inquiry was not held in accordance with the essentials of justice, the privilege would be defeated, not on the ground of malice, for there might be none, but because the very foundation of the privilege is that there has been a proper inquiry. This result may be reached by saying the plaintiff has only consented to publication on the basis that there has been a proper inquiry, but I prefer simply to say that the defence of privilege in a case of this kind requires that an inquiry should be held in accordance with the essentials of justice.

Both the issues in this case, therefore—the issue whether the plaintiff was properly disqualified and the issue of privilege—depend on whether the inquiry was held in accordance with the essentials of justice. That, in my opinion, is a conclusion of law. It depends, of course, on what are the primary facts. If there is a difference about those, it must be decided by the tribunal of fact, in this case, the jury, but once the primary facts are found, the conclusion is a conclusion of law. It would be no easy matter for a jury to distinguish between the question whether there was a proper inquiry, and the question whether the decision of the stewards was right or wrong, whereas a judge is able to put aside the correctness of the decision as irrelevant. On this question, I am entirely in agreement that there is only one conclusion possible on the evidence, namely, that the inquiry was in accordance with principles of natural justice.

There remains only the question whether the privilege was defeated because the notice in the RACING CALENDAR omitted the finding that the plaintiff was guilty of negligence amounting to grave misconduct. Such an omission does not, in my opinion, defeat the privilege. A complaint as to the wording of the notice might go to malice, but would not itself defeat the privilege. Malice is not suggested here and the privilege holds good. I agree the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors: *W. R. Bennett & Co.* (for the plaintiff); *Charles Russell & Co.* (for the defendants).

[*Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.*]

Affirmed. H.L. [1950] 2 All E.R. 261.

INLAND REVENUE COMMISSIONERS *v.* ELECTRIC AND MUSICAL INDUSTRIES, LTD.

[COURT OF APPEAL (Tucker, Cohen and Asquith, L.J.J.), November 22, 23, 24, December 13, 1948.]

Excess Profits Tax—"Income received from investment"—*Fees from licences to perform gramophone records in public collected and distributed to members by company limited by guarantee—Finance (No. 2) Act, 1939 (c. 109), sched. VII, pt. I, para. 6 (1).*

To protect themselves against infringement of their copyright entitling them to the exclusive right of the performance in public of their records, groups of gramophone record manufacturers incorporated a company limited by guarantee and not having a share capital, with power under its memorandum of association to exercise and enforce on behalf of its

A members all rights and remedies of the members by virtue of the Copyright Act, 1911; to grant, on behalf of its members individually, licences for public performance of records, and to recover royalties, fees and other moneys, and damages for infringement; to obtain from the proprietors of the copyright such authorities as might be necessary or expedient for enabling the company to acquire the legal estate in the copyright, and to enforce the rights and remedies in its own name; to regulate the manner in which, the period for which, and the conditions under which the proprietors should authorise the company to exercise their rights and remedies; and to distribute the net moneys so received by the company among the members in accordance with the rules for the time being in force. By its articles of association members were bound to assign their interest in the copyrights to the company in certain circumstances, and until such assignment each member granted to the company sole power to grant licences on its behalf for public performances; all moneys received by the company were to become its property; and the company was authorised, before recommending any distribution among its members, to set aside a reserve fund.

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HELD: on the true interpretation of the memorandum and articles the company was bound to distribute the moneys which it received among the members, not as profits, but by virtue of the proprietary interests of the members in the copyright, and so was rather acting as an agent for its members than carrying on an independent business, and, accordingly, the amounts received by members did not constitute "income from an investment" within the meaning of para. 6 (1) of pt. I of sched. VII to the Finance (No. 2) Act, 1939, but fell to be included in the computation of the members' profits for the purposes of excess profits tax.

Decision of SINGLETON, J. ([1948] 2 All E.R. 514), affirmed.

[FOR THE FINANCE (No. 2) ACT, 1939, sched. VII, pt. I, para. 6 (1), see HALSBURY'S STATUTES, Vol. 32, p. 1220.]

E Case referred to:

(1) *Gramophone Co., Ltd. v. Stephen Cawardine & Co.*, [1934] Ch. 450; 103 L.J.Ch. 248; 150 L.T. 396; Digest Supp.

(2) *Gas Lighting Improvement Co. Ltd. v. Inland Revenue Comrs.*, [1923] A.C. 723; 129 L.T. 481; 12 Tax Cas. 503.

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APPEAL by the taxpayers from an order of SINGLETON, J., dated July 6, 1948, and reported [1948] 2 All E.R. 514, on a Case stated by the Special Commissioners of Income Tax. The Special Commissioners held that money received by the taxpayers from a company limited by guarantee, incorporated to protect their copyright interests in respect of the performance in public of their gramophone records, was income from an investment within the meaning of the Finance (No. 2) Act, 1939, sched. VII, pt. I, para. 6 (1), and, therefore, was to be excluded from their profits for the purposes of excess profits tax. SINGLETON, J., reversed the decision of the Special Commissioners, and the Court of Appeal now dismissed the further appeal. The facts appear in the judgment.

Grant, K.C., and *Tribe* for the taxpayers.

Cyril King, K.C., *J. H. Stamp* and *R. P. Hills* for the Crown.

Cur. adv. vult.

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Dec. 13. COHEN, L.J., read the following judgment of the court. This is an appeal from an order of SINGLETON, J., made on July 6, 1948, whereby he reversed the decision of the Special Commissioners who had allowed the appeal of the taxpayers, Electric and Musical Industries, Ltd., against an assessment to excess profits tax in a sum of £17,265 17s. 1d. part of the profits of the Gramophone Co., Ltd. The assessment was not made on the Gramophone Co., but on Electric and Musical Industries, Ltd., by reason of the provisions

of the Finance Act, 1940, s. 28, and sched. V, dealing with the assessment of excess profits tax on inter-connected companies. Nothing, however, turns on the provisions of the Act of 1940.

The facts are conveniently stated by SINGLETON, J., as follows ([1948] 2 All E.R. 515) :

"The Gramophone Co., Ltd., which was a subsidiary company of Electric and Musical Industries, Ltd., throughout the accounting period, manufactures gramophone records, and in 1933 obtained judgment in the High Court in *Gramophone Co., Ltd. v. Stephen Cawardine & Co.* (1) establishing that manufacturers of gramophone records have such a copyright under s. 19 of the Copyright Act, 1911, as entitles them to the exclusive right of performance in public of records made by them, so that they are entitled to restrain the use of those records for public performances. In due course manufacturers of gramophone records took measures to protect themselves against infringement of their copyright by the use of records for public performances without licence, and the manufacturers—there are two groups of them, the Electric and Musical Industries group and the Decca group—formed a committee to co-ordinate the arrangements for granting licences for public performances of their gramophone records. The business increased, and became very remunerative as the figures in this case show. It was decided later that other means should be taken to look after the copyright interests of the gramophone record makers, and to provide for the collection of fees for the granting of licences. Accordingly, on May 12, 1934, Phonographic Performances, Ltd., was incorporated as a company limited by guarantee, and not having a share capital. Since that time matters of the kind I have mentioned have been in the hands of the Phonographic Co., and in the accounting period July 1, 1943, to June 30, 1944, the sum of £17,265 17s. 1d. was paid over by the Phonographic Co. to the Gramophone Co. in respect of what I may describe as their share of a balance remaining due, after expenses had been paid. The question is whether that sum of £17,265 17s. 1d. received by the Gramophone Co. constitutes income from an investment in the hands of the Gramophone Co., and has thus to be excluded from its profits for the purposes of excess profits tax."

Counsel for the taxpayers seeks to support the finding of the Special Commissioners that the sum in question was income from an investment on the following grounds. (i) He says that the commissioners were right in the conclusions which they have reached. (ii) He says that, whether we think they are right or not, they have not erred in law, and, their finding being one of fact, we must not interfere. We are unable to agree with the second contention. The only finding of fact by the commissioners is to be found in para. 6 of the Stated Case, which may be summarised as follows :

"No legal assignment of the right to grant licences was made by the Gramophone Co. to the Phonographic Co. The licence granted by the Gramophone Co. to the Phonographic Co. covered every known make of record and the Phonographic Co. was in possession of the copyright."

In the light of their decision in para. 9 of the Case, this can, we think, only mean that on the true construction of the relevant documents and in the event (which happened) of no legal assignment being executed, the beneficial ownership of the copyright was vested in the Phonographic Co. Be that as it may, it is, we think, quite plain that the proper determination of the question before us depends mainly on the construction of the memorandum and articles of association of the Phonographic Co., and that the question is, therefore, a mixed question of fact and law. If the commissioners correctly interpreted the memorandum and articles, and if, on that correct interpretation, there

was evidence on which they could find that the interest of the Gramophone Co. in the Phonographic Co. was an investment, and if the sum in question was received by virtue of that interest, the finding was, no doubt, one of fact by which we should be bound, but did the commissioners correctly interpret the memorandum and articles?

Their findings are set out in para. 9 of the Case as follows:

- A “The question we have to decide is whether the sum of £17,265 17s. 1d. received by the Gramophone Co., Ltd., in respect of the year ended May 31, 1944, was income from an investment or whether it constituted income arising to that company in the course of its trade as manufacturers of gramophone records. In our opinion, for the Crown to succeed in this appeal, it is necessary to establish that the Phonographic Co. was throughout acting as an agent for its members, including the Gramophone Co., Ltd., in granting licences and collecting payments. The circumstances of the case, and, in particular, cl. 3 (D) (1) and (2) of the memorandum and arts. 9 and 46 of the articles, in our opinion, negative the existence of an agency. It is true that no legal assignment was granted by the Gramophone Co., Ltd., to the Phonographic Co. in respect of the granting of licences. In our view there was an equitable assignment by the Gramophone Co., Ltd. of the whole of its beneficial interest in the copyright as regards public performances of records. Thereafter its interest, in this respect, was confined to membership of the Phonographic Co. and the obtaining of its share of the profits available for distribution. We regard the receipt of the sum of £17,265 17s. 1d. in the nature of a dividend from an investment. The Phonographic Co., Ltd., in one respect, acts as an agent of the Gramophone Co., Ltd., in making payments to publishers under the agreement dated Mar. 1, 1940. These payments are made out of the share of the respondent company group before the net amount receivable is arrived at. We do not consider that the manner in which these payments were made affects the conclusion at which we have arrived. The Phonographic Co. also made payments to artistes, who performed the recording, under the terms of the specimen letter. These payments were not made as agent of the Gramophone Co., Ltd. In our opinion, in the particular circumstances of this case, the fact that the Phonographic Co. was a company limited by guarantee is not material. We hold that the said sum of £17,265 17s. 1d. was income received from an investment held by the Gramophone Co., Ltd. and that the appeal succeeds.”
- B
- C
- D
- E
- F

If the construction they had there placed on the articles was correct, we should be inclined to agree that their ultimate conclusion follows, but we are unable to agree with their construction of the memorandum and articles.

- G We must first refer to cl. 3 (A) to (E) inclusive of the memorandum, which are in the following terms:

- H “(A) To exercise and enforce on behalf of members of the company, being manufacturers of gramophone records, perforated rolls and other contrivances by means of which sounds may be mechanically reproduced (all of which contrivances are hereinafter included in the term ‘record’) and/or the owners of or being otherwise entitled to the benefit of or interest in the copyrights in such records (hereinafter called ‘the proprietors’) all rights and remedies of the proprietors by virtue of the Copyright Act, 1911, or otherwise in respect of the public performance of records. (B) In the exercise or enforcement of such rights and remedies to grant licences and to make and from time to time to rescind, alter or vary any arrangements and agreements with respect to the public performance of such records in any and every respect whatsoever, and to collect and receive and give effectual discharges for all royalties, fees and other moneys pay-

able under any such licences, agreements or arrangements or otherwise in respect of such public performances by all necessary actions or other proceedings, and to recover such royalties, fees and other moneys, and to restrain and recover damages for the infringement by means of such public performances as aforesaid of the copyrights of such records or any other rights of the proprietors or of the company on their behalf in respect of such records, and to release, compromise or refer to arbitration any such proceedings or actions or any other disputes or differences in relation to the premises. (C) To obtain from the proprietors such assignments, assurances, powers of attorney, or other authorities or instruments as may be deemed necessary or expedient for enabling the company to acquire the legal estate in the copyrights of such records, and to exercise and enforce in its own name or otherwise all such rights and remedies as aforesaid, and to execute and do all such assurances, agreements and other instruments and acts as may be deemed necessary or expedient for the purpose of the exercise or enforcement by the company of such rights and remedies as aforesaid. (D) To make and from time to time alter or vary any rules for regulating (i) the manner in which the period or periods for which, and the conditions under which the proprietors shall authorise the company to exercise and enforce the rights and remedies aforesaid of the proprietors in respect of such records as aforesaid; (ii) the method and proportions by and in which and the times at which the net moneys received by the company in respect of the public performance of any such records as aforesaid shall be divided and apportioned among the members of the company; (iii) the administration of the property or business of the company and any matters incidental thereto. (E) To distribute the net moneys received by the company in the exercise of the foregoing powers after making provision thereout for the expenses and liabilities of the company incurred in such exercise or in otherwise carrying out the purposes and operations of the company, and for any contributions or payments for any of the purposes specified in the next following sub-clause hereof, amongst the members of the company entitled thereto in accordance with the rules for the time being in force with respect to the distribution thereof."

Sub-clause (A) by its terms plainly contemplates that the ownership of the copyright in the records should remain in the members and that the rights in respect thereof should be enforced by the company on behalf of its members. Sub-clause (B) leads to a similar conclusion since the Phonographic Co. is to recover damages for infringement on behalf of the members. Sub-clause (C), it is true, visualises the possibility of an assignment of the legal estate in the copyright to the Phonographic Co., but, if the matter rested on the memorandum alone, this provision would, in our opinion, plainly be merely machinery to enable the Phonographic Co. to carry out in its own name what it was to do for its members. In other words, *vis-a-vis* outsiders they were to be entitled to act as principals. Sub-clause (D) again seems to contemplate the members remaining the owners of the copyright, for it provides for the making and regulating the manner in which, the period or periods for which, and the conditions under which the proprietors should authorise the company to exercise rights and remedies of the proprietors. Sub-clause (E) also seems to us to be more consistent with the idea that the Phonographic Co. should be agent for its members than the idea that it was itself to become the beneficial owner of the copyright. It is also to be observed that this sub-clause contemplates, not the division of profits, but a division of net moneys received by the company in the exercise of certain powers. We shall refer further to this distinction when we are dealing with the articles.

Counsel for the taxpayers was inclined to admit that, if the matter had

rested on the memorandum alone, he would have been in a difficulty, but he said that the articles made it clear that the Phonographic Co. was to become the beneficial owner of the copyright at any rate for the period during which the proprietors remain members of the Phonographic Co. He based his case in the main on arts. 6, 7 and 9 which are in the following terms :

A "6. Every member who is the proprietor of the whole or any part of
the performing rights in any record may, on or at any time after his
election, and shall, if and when requested by the directors in writing so
to do, assign to the company in the form prescribed by the company his
interest, whether present or future, in such performing rights, and until
B such assignment and so far as such assignment may not extend, every
member, by virtue of his application for membership, and his election
as a member by the directors, grants to the company for and during the
period of his membership, but subject to the provisions of arts. 10 and
11, the sole power and authority—(A) To authorise or permit or forbid
the public performance of all or any records the performing right in which
is or shall during his membership be or become vested in him ; (B) To
grant licences on his behalf for the public performance of all or any of
C such records. 7. Every member, by virtue of his application for member-
ship and his election as a member by the directors, authorises the com-
pany for and during the period of his membership in their or his name,
but at their sole charge and expense—(A) To collect fees and subscriptions
and all moneys, whether for the performance of any of the records the
performing rights in which are vested in or controlled by the company
D or by way of damages or compensation for unauthorised performances
thereof ; (B) To institute and prosecute proceedings against all persons
infringing the performing rights, and to defend or oppose any proceedings
taken against any member in respect of such records, and to compound,
compromise, refer to arbitration or submit to judgment in any such pro-
ceedings, and generally to represent the member in all matters concerning
E the performing rights vested in or controlled by the company ; and
(C) To protect generally his interests in the said records . . . 9. All
moneys received by the company in respect of the exercise of the rights,
licence or authority granted by the member shall be the property of the
company, and shall be by them dealt with in accordance with the rules
for the time being in force."

F Now, art. 6 seems to us to link with cl. 3 (C) of the memorandum and is
prima facie more consistent with agency than with an assignment of the
beneficial interest in the copyright to the Phonographic Co., for in the absence
of an assignment the authority conferred on the Phonographic Co. is to grant
licences on behalf of the members. Article 7 seems to us to be consistent with
either view of the matter, but it is to be observed that under sub-cl. (C) the
G duty of the Phonographic Co. is to protect generally the members' interests
in the records. Counsel for the taxpayers, however, says that the matter is
concluded in his favour by art. 9 which, he says, provides in plain terms for
all moneys received by the Phonographic Co. becoming the property of the
Phonographic Co. His argument is that, reading this article with arts. 6 and 7,
the effect is that there is an equitable assignment to the Phonographic Co.
H of the beneficial interest in the copyright for the whole period during which
the member remains a member of the Phonographic Co. This view, he says,
is endorsed by the provisions of art. 46 which authorises the directors of the
Phonographic Co., before recommending any distribution among the members
of the Phonographic Co., to set aside a reserve fund to meet contingencies,
or for future distribution, or for the repairing, improving, and maintaining
any of the property or premises of the Phonographic Co., and for such other
purposes as the directors should in their absolute discretion think fit.

It is quite true that as a matter of law there is no special form required to constitute an equitable assignment. Whether or not what has been done in any particular transaction amounts to an equitable assignment is a matter of inference from the facts and documents concerned and the question is whether the requisite intention can properly be inferred from the memorandum and articles of the Phonographic Co. plus the fact of membership. We, therefore, return to the construction of the memorandum and articles. First of all, it has to be remembered that the governing document is the memorandum of association, and that, while the articles can be used to explain an ambiguity in the memorandum, they cannot override the memorandum. We are unable to find any real ambiguity in the memorandum, nor do we think that, properly read, there is any real inconsistency between the articles and the memorandum. In our opinion, having regard to the terms of the memorandum, the real meaning of art. 9 is that while the legal ownership of the moneys received by the Phonographic Co. in respect of rights, licences or authority granted by the member is to be in the Phonographic Co., the Phonographic Co. is bound by the very contract under which they acquire their title to the moneys to distribute them among the members, not as profits, but by virtue of the proprietary interests of the members in the copyright. In other words, the articles coupled with the contract of membership arising from the application for membership and the acceptance thereof constitute an arrangement between each member and the Phonographic Co., and also between the members *inter se*, under which the members agree to pool the proceeds of exploitation of the copyright on the terms recorded in the articles, and art. 9 is mere machinery to enable the Phonographic Co. to give effect to the pooling agreement. We do not think that this conclusion is in any way vitiated by the fact that the Phonographic Co. is given power to create a reserve by art. 46 and to apply, if it thinks fit, all or part of that reserve for its own purposes. That provision seems to us to be merely a necessary provision for the protection of the agent from loss, or, at most, a provision giving the agent certain remuneration for discharging his duties as such.

Some support for this view is, we think, to be derived from the fact that the constitution of the Phonographic Co. is not that of a profit-earning company. In this connection we were referred to the Companies Act, 1929, s. 123, which draws a distinction between a profit and loss account and an income and expenditure account, the former applicable to a company trading for profit and the latter applicable to a company not trading for profit. Now, there are no provisions in the memorandum or articles of association of the Phonographic Co. providing for a distribution of profits, and arts. 65 and 68 are plainly drawn up on the basis that the Phonographic Co. will lay before the general meeting an income and expenditure account and not a profit and loss account. We were also impressed by the point to which counsel for the Crown called our attention which would arise if the Phonographic Co. were, for instance, to undertake under cl. 3 (G) of its memorandum some other business than the exploitation of its members' copyright and were to make a profit from that business. There appears to be nothing in the articles enabling the Phonographic Co. to make special regulations for the distribution of that profit, and it seems to us quite plain that that profit would be distributable among the members equally. This, as counsel for the Crown pointed out, seems to emphasise the distinction between a dividend out of profits arising from carrying on a business and a distribution among the members as proprietors of the net moneys arising from the exploitation of their copyright. If this be, as we think it is, the true view, it is plain that the commissioners have erred in law in construing the articles. We would add that we think it was also the view tentatively expressed by SINGLETON, J., in his judgment where he said ([1948] 2 All E.R. 522) :

"I regard the case as nearer to an agency case than an income from investment case . . . It seems to me to be something in the nature of a mixture. It is difficult to put into words what I mean, but it really is an arrangement made by the different members, and in particular by the Gramophone Co., for the convenience, I think, of their business. It is largely a matter of agency, but if you resolve it down to the end it does appear to me more in the nature of a business deal, as counsel for the Crown put it."

On this construction, the income in question was plainly not income from an investment, and, accordingly, we must dismiss the appeal.

Appeal dismissed with costs.

Solicitors: *Broad & Son* (for the taxpayers); *Solicitor of Inland Revenue* (for the Crown).

[*Reported by C. N. BEATTIE, Esq., Barrister-at-Law.*]

OLLEY v. MARLBOROUGH COURT, LTD.

[COURT OF APPEAL (Bucknill, Singleton and Denning, L.JJ.), December 2, 3, 1948.]

Negligence—Bailee—Hotel—Residential hotel—Theft of resident's clothing from room—Key left on board in office during absence—No proper system of control—Innkeepers Liability Act, 1863 (c. 41), ss. 1, 3.

The plaintiff was a guest at the defendant's hotel. On Nov. 7, 1945, she left the hotel for some four hours, locking the door of her room and leaving the key on the rack in the reception office. On her return to the hotel, she found that the key was missing and various articles had been stolen from her room. A notice limiting liability under the Innkeepers Liability Act, 1863, was displayed in the reception office, and the defendants contended that they received the plaintiff into the hotel subject to the terms contained in a notice exhibited in her bedroom, cl. 1 of which stated: "The proprietors will not hold themselves responsible for articles lost or stolen unless handed to the manageress for safe custody. Valuables should be deposited for safe custody in a sealed package and a receipt obtained." In an action by the plaintiff for negligence the defendants also pleaded contributory negligence and claimed the protection of the Innkeepers Liability Act, 1863, whereby their liability was limited to £30.

HELD: (i) the defendants were negligent in that no watch was being kept to see that no stranger came in who was minded to steal. Accordingly, it was unnecessary to decide whether the premises were a common inn since, if the defendants were negligent in the conduct of the establishment, they would lose the protection of the Innkeepers Liability Act, 1863.

(ii) the plaintiff was not guilty of contributory negligence, being entitled to expect that a reasonable watch would be kept on the hall to prevent undesirable strangers from coming into the hotel.

(iii) the terms of the notice in the bedroom were not incorporated in the contract between the defendants and the plaintiff, since the plaintiff had not seen it until after she had been accepted as a guest, and, even if it had been incorporated in the contract, its terms were not sufficiently clear to exempt the defendants from liability for negligence.

Decision of OLIVER, J. ([1948] 1 All E.R. 955), affirmed.

[AS TO DEFINITIONS OF AN INN, see HALSBURY, Hailsham Edn., Vol. 18, pp. 136-140, para. 197; and FOR CASES, see DIGEST, Vol. 29, pp. 2-4, Nos. 1-21.]

Cases referred to:

(1) *Scarborough v. Cosgrove*, [1905] 2 K.B. 805; 74 L.J.K.B. 892; 93 L.T. 530; 3 Digest 83, 187.

- (2) *Rutter v. Palmer*, [1922] 2 K.B. 87; 91 L.J.K.B. 657; 127 L.T. 419; Digest Supp.
- (3) *Chapelton v. Barry Urban District Council*, [1940] 1 All E.R. 356; [1940] 1 K.B. 532; 109 L.J.K.B. 213; 162 L.T. 169; 104 J.P. 165; 2nd Digest Supp.

APPEAL by the defendants, the proprietors of a residential hotel, from a decision of OLIVER, J., dated May 5, 1948, and reported ([1948] 1 All E.R. 955), holding them liable in damages to the plaintiff, a resident in the hotel, for articles stolen from her room. The Court of Appeal dismissed the appeal. The facts appear in the judgments of BUCKNILL, and SINGLETON, L.JJ. A

Berryman, K.C., *Quass* and *Foot* for the defendants.

Glyn-Jones, K.C., and *G. G. Baker* for the plaintiff.

BUCKNILL, L.J. : This is an appeal from a judgment of OLIVER, J., given on May 5, 1948, in favour of the plaintiff for a sum of £329 2s. 0d. The plaintiff, Violet Ellen Olley, a married woman, was a guest for reward in the Marlborough Court Hotel, belonging to the defendants. She was there from May, 1945, until February, 1947. At about 11 a.m. on Nov. 7, 1945, she went out of her bedroom, closed the door (which had a self-locking lock), took the key (a Yale key with a little disc attached bearing the number of the key and the number of the room), went down to the hall, entered the reception office, and put the key on the appropriate hook for that particular key on the key board in the office. She was out until about 3.30 p.m. When she came back she found that the key was missing from the key board. With the aid of a pass key she entered her room and she found that various articles belonging to her were missing—furs, a hatbox, some jewellery valued at £50, and minor articles of personal clothing. B C D

The plaintiff has framed her case against the defendants in negligence. She alleges that they failed to guard or supervise the key board and that they permitted a person unknown to enter the hotel and to leave the same with her property. The plaintiff also pleads the breach of a contract between herself and the defendants containing an implied term that the defendants would take proper care for the safety of her property in her bedroom and would keep her bedroom key in their custody and control and adequately guard it when on the key board. The defendants, after denying any negligence and any term as alleged, set up the defence that they received the plaintiff into the hotel and that she became a guest there subject to the terms contained in a written notice which was exhibited in her bedroom, by which terms they were protected. Further, they set up a plea of contributory negligence—that the plaintiff was negligent in depositing the key on the key board instead of taking it with her when she left the hotel. Further, or in the alternative, they say that they duly complied with s. 3 of the Innkeepers Liability Act, 1863, and, under s. 1 of that statute, are not liable to a greater amount than £30. Those were the issues on which the case was tried. OLIVER, J., came to certain conclusions of fact of which, I think, the most important is that the defendants were negligent and that their negligence caused the loss. He said ([1948] 1 All E.R. 956): E F G

“In the case of a hotel of this nature it is clearly a bad system to have a rack of keys within easy access by anyone coming into the premises.” H

He found that the plaintiff was not guilty of negligence. He found that the hotel was not a common law inn, and he found that, although the plaintiff had notice of the terms relied on in the defence, they did not absolve the defendants from liability. In this court the argument has been based on the findings whether there was negligence, whether the plaintiff was guilty of contributory negligence, whether this was a common law inn, and the exact effect of the terms of the notice.

On the main point, whether the defendants were negligent, a plan has been produced which shows the general lay-out of the ground floor of the hotel. The main entrance is reached through the usual swing doors. Anyone who has entered the hall can either go up the stairs into the lounge, or into the cloakroom on the left, or they can go on until they come to the reception office where, normally, an arriving guest would be received. The reception office is bounded by the usual counter in the shape of an "L" and at one end of the counter

A there is a small gate or flap which can be raised to enable anybody to walk into the reception office. At the back of the reception office there is a letter rack 9ft. long stretching to the wall at the further end of the office. At right-angles to the rack and on that far wall there is the key board and a little in front of the key board and rather to the right of it as you stand facing the board, there is an enclosed office where we were told the accounts were mainly done.

B In a conspicuous place is framed a notice under the Innkeepers Liability Act, 1863. I am a little surprised to see it placed in such a prominent position on the plan if, as is now alleged, this is not a common law inn at all. One can get into the reception office from the back, by means of three swing doors, and I suppose that entrance is used by the staff. There was no evidence given of the use of the key board. The plaintiff used it. She was not invited, expressly,

C to put her key on the board, but the fact that the board bore a hook with the number of her key underneath it, and the fact that the board was in the reception office, seem to me to be an implied invitation to guests to use the key board if they were so minded.

About 3 p.m. on the day in question, a Colonel Creaer, who was a guest in the hotel, was sitting in the lounge talking to a fellow guest and he saw a young

D man come in through the front door and go straight forward towards the office. He went into the office, came out of it and went along to the lift which is to the right of the reception office. In going along that passage he would pass the foot of the main staircase going up to the bedrooms. It appears that at the foot of the staircase there is a bust of the Duke of Marlborough and the porter who was on duty, instead of attending to what I should have thought was his

E obvious duty to see who was coming in by the main door, was busily engaged cleaning the bust with his back to the passage and so was not able to see this young man go by. It was remarkable that the porter was not called as a witness. In fact the defendants did not call any evidence. What the porter did after he had finished cleaning the bust, one does not know. After about a quarter

F of an hour Colonel Creaer saw the young man come down (he, apparently, had gone up in the lift, which was self-acting) with a suitcase in his hand. Colonel Creaer thought it was rather peculiar that he had come down with a suitcase as he had nothing in his hands when he went up. Then the young man went out. The only evidence of what happened on that afternoon was

G the evidence of the manageress, Miss Robbie, who was called by the plaintiff. She said that it was the practice to have one receptionist on duty and that when she, Miss Robbie, went away, the receptionist was sitting in the front office. She was a Miss Alexander, a lady described as in her sixties who was thinking of retiring. She did retire later on because it was thought that someone a little younger might be more efficient. What Miss Alexander was doing at the time when this young man came in and went out does not appear, for she was not called as a witness. In those circumstances, the learned judge had no

H difficulty in finding that these goods were stolen by this young man who entered and departed without being noticed by anybody of the defendants' staff.

In those circumstances was there negligence on the part of the defendants? The learned judge has found negligence on the ground that the keys were within easy access of anyone coming into the premises. Speaking for myself, I do not quite agree with that ground, because, if Miss Alexander had been on duty in the reception office, she could not have failed to see this young man come in and she could hardly have failed to ask him what he was doing taking a key off

the board. She would know that he was not a guest in the house, because the evidence is that a very large proportion of the people staying in this hotel were residents. It was a residential hotel. It may be that occasionally somebody got a bed there for the night. The porter also, if he had been on duty in the hall, would have seen the young man going up and his suspicions would have been aroused if he had seen him come down with a suitcase in his hand. The negligence, in my opinion, is not that the key board was in a dangerous place, but that at the material time there was absolutely no watch being kept over the open door to see that no stranger who was minded to steal entered. I think that, without any doubt, the plaintiff has made out her case that the defendants, through their agents, were negligent. The points made by the defendants were: (i) That a key board was placed in the office merely for the convenience of residents and it might equally well have been put in the hall at the bottom of the stairs. I cannot agree with that. The position of the key board seems to me to indicate that it had been placed in as safe a position as it could conveniently be put. It is true that it was put there for the convenience of the residents, but it is far better that a bedroom should be locked up when its occupant goes out, and I should have thought that hotels would much prefer that a guest should leave his key in a safe place in the hotel rather than take it out and, perhaps, lose it, with all the serious results which might result. (ii) It is said that the receptionist and the hotel porter were about. I do not think that the evidence bears that out. I do not think they were about in any such position as enabled them to see what was going on. (iii) It was said that the system had worked for three years and there had been no incident of this kind before. That often happens. People often take risks and nothing untoward happens for a long time. Then, perhaps, they get rather too careless and something does happen. I do not think the fact that a system has worked for three years proves that there was no negligence on this particular occasion.

With regard to the question of contributory negligence, it was said that, if the system was bad, the plaintiff had adopted it. There again, I do not think, myself, that the position of the key board was such as to make it negligent, in itself, to put the key there. The plaintiff was entitled to expect that a reasonable watch would be kept on the hall to prevent undesirable strangers from coming into the hotel. I entirely agree with the learned judge's finding on that point.

Then one comes to the interesting question of the notice under the Innkeepers Liability Act, 1863. I do not think that the plaintiff ever read the notice. I do not think she was ever certain that it was there, but it was admitted that it was there. The notice, so far as the Innkeepers Liability Act, 1863, is concerned, must state (see ss. 1 and 3 of the Act) that the innkeeper is not liable to make good to any guest any loss of or injury to property brought to his inn, not being a horse or other live animal, or any gear appertaining thereto, or any carriage, to a greater amount than £30, except:

"(1) Where such goods or property shall have been stolen, lost, or injured through the wilful act, default, or neglect of such innkeeper or any servant in his employ; (2) Where such goods or property shall have been deposited expressly for safe custody with such innkeeper: Provided always, that in the case of such deposit it shall be lawful for such innkeeper, if he thinks fit, to require, as a condition of his liability, that such goods or property shall be deposited in a box or other receptacle, fastened and sealed by, the person depositing the same."

Anybody reading that notice would clearly come to the conclusion that, if the guest's property were stolen through the neglect of the innkeeper, the innkeeper would be liable to a greater amount than £30. Up in the bedroom behind the door, but in a position where it could be seen, there was another notice, the material clause (cl. 1) of which was as follows:

"The proprietors will not hold themselves responsible for articles lost or stolen unless handed to the manageress for safe custody. Valuables should be deposited for safe custody in a sealed package and a receipt obtained."

Then there are 14 other reminders as to what the guests are expected to do. It seems to me that, if a very careful person had read that cl. 1 after reading the notice in the hall, he would clearly have come to the conclusion that cl. 1

- A was never intended to exempt the proprietors from liability in respect of loss or theft caused by the neglect of the proprietors. I do not propose to refer to the various cases which have been cited. *Scarborough and Wife v. Cosgrove* (1) lays it down clearly that the duty of a boarding house keeper with reference to property brought by a guest into his house is no more than to take reasonable care for the safety of that property. It is said that unless one reads into cl. 1
- B of the notice in the bedroom something to the effect that, "the proprietors will not hold themselves responsible for articles lost or stolen through the neglect of the proprietors unless handed to the manageress for safe custody," the notice is otiose, because it is only stating what is the common law position. The answer to that is two-fold. First, I think that anybody reading that notice would be entitled to couple it with the notice in the hall under the Innkeepers
- C Liability Act, 1863, and, secondly, I think that, if one reads the notice as is suggested, namely, by reading in the words "through the neglect of the proprietors," it would be extremely difficult to know what was the position with reference to property handed to the manageress for safe custody. Would it mean that, if the property were handed to the manageress for safe custody, the proprietors would be liable only on proof of negligence by the guest? I
- D think the guest would be in an impossible position. How could he prove what was the cause of the loss of the property which he had handed to the manageress? I do not think that that is the right interpretation of cl. 1. I think that clause is merely a general statement on the lines of the notice in the hall, namely, that the defendants are not to be responsible for articles lost or stolen unless there has been negligence on the part of the defendants causing the loss.
- E That being so, the notice in the bedroom has no bearing on the present case, because the loss here was caused by the neglect of the defendants' agents. Therefore, I do not think it is necessary to discuss the interesting question who made the contract with the owners of the hotel, the plaintiff or her husband.

- As regards the question whether this was or was not a common law inn, the learned judge has not given any reasons for his decision that it was not a common
- F law inn, but it appears from HALSBURY'S LAWS OF ENGLAND (Hailsham ed., pp. 136-140, para. 197) that the question whether any particular house be a common law inn is one of fact. That being so, I myself should be very slow to disturb the learned judge's finding that this was not a common law inn at the time when the plaintiff went to stay there. At p. 138 there appears this passage:

- G "A house used as a private hotel, that is to say, for the reception of persons who desire to go and live there, appears not to be an inn."

I think on the whole that the evidence does establish that this was a private hotel, much more like a private hotel than a common law inn. For these reasons, in my judgment, this appeal should be dismissed.

- H SINGLETON, L.J. [after stating the facts]: In those circumstances I do not consider that any good purpose would be served by embarking on a diligent inquiry whether at the material time the defendants carried on a common inn, or a guest house, or a boarding house. If their establishment was a common inn and if they were negligent in the conduct of it, they would lose the protection of the Innkeepers Liability Act, 1863, s. 1. If it was not a common inn, but something less than that, they are responsible, as I read the authorities, for negligence. A number of authorities from *Scarborough and*

Wife v. Cosgrove (1) onwards would seem to show the measure of their responsibility. This court had to deal with the question in *Scarborough and Wife v. Cosgrove* (1), and LORD COLLINS, M.R., said that there was a duty on the part of the boarding house keeper to take reasonable care for the safety of property brought by a guest into his house. If he fails to do so he is guilty of negligence. ROMER, L.J., put the matter a little differently, though the result was the same. I think it is right to read a few lines of his judgment because it seems to me apposite to this case. The learned LORD JUSTICE said ([1905] 2 K.B. 815): A

"Seeing that the landlord carries on his business of a boarding-house keeper for reward, I think he is bound to carry on that business with reasonable care, having regard to the nature and normal conduct of the business as known to the guest, or as represented to the guest by him; and if by reason of a breach of that duty on his part the luggage is lost I can see no reason why he should not be held liable for the loss to the guest." B

I observe that the LORD JUSTICE put it in this way: "I think he is bound to carry on that business with reasonable care." So, it seems to me that, if this were a boarding house, the defendants were bound to carry on their business with reasonable care, which would include reasonable care of a part of the hotel in which they had by implication invited guests to leave keys of bedrooms. C

Therefore, as I have said, I do not think it desirable to examine in detail the question whether this was a common inn or a boarding house. In either event the defendants are responsible for negligence, subject to this further and more difficult question. Counsel for the defendants raised a question of the true effect of a document exhibited in the bedroom occupied by the plaintiff and her husband. That document was inside some sort of cupboard which hid the washstand in the bedroom. It began thus: D

"The proprietors will not hold themselves responsible for articles lost or stolen unless handed to the manageress for safe custody. Valuables should be deposited for safe custody in a sealed packet and a receipt obtained."

I agree with what my Lord said, that the terms of the beginning of that notice are more like something embraced in a notice under the Innkeepers Liability Act, 1863, than anything else. Counsel for the defendants submitted that the words that I have read should be read into the contract between the plaintiff and the defendants, and that, if they were so read, they must be regarded as freeing the defendants from their own negligence. He cited a number of authorities in support of that proposition, the most useful of which, perhaps, was a case in the Court of Appeal in 1922, *Rutter v. Palmer* (2), where SCRUTTON, L.J., dealing with a somewhat similar question, said ([1922] 2 K.B. 92): E

"In construing an exemption clause certain general rules may be applied: First the defendant is not exempted from liability for the negligence of his servants unless adequate words are used; secondly, the liability of the defendant apart from the exempting words must be ascertained; then the particular clause in question must be considered; and if the only liability of the party pleading the exemption is a liability for negligence, the clause will more readily operate to exempt him." F G

Counsel for the defendants submitted that, on the finding of the judge, the defendants were the keepers of a guest house and their only liability was for negligence, and, therefore, the effect of the words at the beginning of the notice, implied in the contract as they should be, must be to exclude the defendants from liability for negligence. I confess that I feel some difficulty about those words of SCRUTTON, L.J., "secondly, the liability of the defendant apart from the exempting words must be ascertained . . ." If one has to look back and ascertain what the defendants were in 1945 and construe the contract with that in mind, well and good. It might be necessary to consider more seriously H

whether they were keepers of a common inn or merely boarding house keepers, but I find it a little difficult to ascertain what the true contractual basis would be if they were keepers of a boarding house when, clearly, from the notice they exhibited in the entrance hall of the hotel, they regarded themselves as keepers of a common inn. So, too, might the plaintiff be expected to regard them, having regard to what they exhibited in the hotel. Therefore, it is not easy to see the basis of the contract. I am more attracted, I confess, in considering this matter by the earlier words of SCRUTTON, L.J.: "First, the defendant is not exempted from liability for the negligence of his servants unless adequate words are used." If the defendants, who would *prima facie* be liable for their own negligence, seek to exempt themselves by words of some kind, they must show (i) that those words form part of the contract between the parties and (ii) that they are so clear that they must be understood by the parties in the circumstances as absolving the defendants from the results of their own negligence. On both those points it seems to me that the defendants' argument fails. It is clear when the plaintiff and her husband went to the hotel they had not seen the notice. Apparently, by the custom of the hotel, they were asked to pay a week in advance, and when they went to the bedroom for the first time they had not seen the notice and the words at the head of the notice could not be part of the contract between the parties. When did they become so? It might be said that it was at the end of the first week when the second payment was made, the notice then having been seen by the plaintiff, although she said she did not read it. But there ought to be some certainty in a matter of this kind, and there is none. I do not attach great importance to the point made by counsel for the plaintiff as to the husband in all probability being the payer, the contracting party. If he was, I am inclined to think he would have contracted in this regard on behalf of his wife. I do think, however, there is more importance in his further submission that when this contract was entered into, it was, not a contract for a fixed period subject to renewal, but a contract for an indeterminate period to which an end could be put by notice, and an end was put to it by notice at the time this loss took place. Indeed, the conditions, so far as one knows, remained the same. I do not think it is open to the defendants to place reliance on that clause or, at least, I do not think they are exempted from their liability for negligence by the words at the beginning of that notice. I agree with what my Lord said on the subject and I attach even more importance to the fact that this was no part of the contract at the time when the parties first went into the bedroom and there is no evidence to show that there was ever any alteration in the terms of that contract. I agree with the submission which counsel for the plaintiff made, that it is for the defendants to show that these words form part of the contract and that they have only one clear meaning. I think they are ambiguous in more ways than one. That is all I need say upon that side of the case.

There is one further matter. It was submitted on behalf of the defendants that the plaintiff herself must have been guilty of negligence if the defendants were guilty of negligence. I do not so regard the position. The plaintiff, in leaving her key on the key rack, was entitled to expect that the defendants would perform their duty and their part of the contract and carry on their business reasonably having regard to the circumstances as ROMER, L.J., said in *Scarborough and Wife v. Cosgrove* (1). In leaving her key on the key rack she was doing that which the defendants, by inference at least, asked her to do. I see no evidence of any contributory negligence on her part, and I am in agreement that this appeal should be dismissed.

DENNING, L.J.: I agree. When the plaintiff put the key of her room on the hook in the reception office, she put it in charge of the defendants. It gave access to her room, and it was their duty to take reasonable care to see that it was not taken by any unauthorised person. It was so taken and con-

sequences followed which might reasonably have been foreseen—a thief used it to get into the room and steal. At common law the defendants are liable for that loss unless they prove that they took reasonable care of the key. They have not proved it. They did not call either the receptionist or the porter to explain how the key came to be taken.

The only other point is whether the defendants are protected by the notice which they put in the plaintiff's bedroom providing :

“ The proprietors will not hold themselves responsible for articles lost or stolen unless handed to the manageress for safe custody.”

The first question is whether that notice formed part of the contract. People who rely on a contract to exempt themselves from their common law liability must prove that contract strictly. Not only must the terms of the contract be clearly proved, but also the intention to create legal relations—the intention to be legally bound—must also be clearly proved. The best way of proving it is by a written document signed by the party to be bound. Another way is by handing him, before or at the time of the contract, a written notice specifying certain terms and making it clear to him that the contract is in those terms. A prominent public notice which is plain for him to see when he makes the contract would, no doubt, have the same effect, but nothing short of one of these three ways will suffice. It has been held that mere notices put on receipts for money do not make a contract : see *Chapellon v. Barry U.D.C.* (3). So, also, in my opinion, notices put up in bedrooms do not of themselves make a contract. As a rule, the guest does not see them until after he has been accepted as a guest. The hotel company, no doubt, hope that the guest will be held bound by them, but the hope is vain unless they clearly show that he agreed to be bound by them, which is rarely the case.

Assuming, however, that the plaintiff did agree to be bound by the terms of this notice, there remains the question whether on its true interpretation it exempted the defendants from liability for their own negligence. It is said, and, indeed, with some support from the authorities, that this depends on whether the hotel was a common inn with the liability at common law of an insurer, or a private hotel with liability only for negligence. I confess that I do not think it should depend on that question. It should depend on the words of the contract. To exempt a person from liability for negligence, the exemption should be clear on the face of the contract. It should not depend on what view the courts may ultimately take on the question of common inn or private hotel. In cases where the establishment is clearly a common inn or, indeed, where it is uncertain whether it is a common inn or a private hotel, I am of opinion that a notice in these terms would not exempt the defendants from liability for negligence but only from any liability as insurers. Indeed, even if it were clearly not a common inn, but only a private hotel, I should be of the same opinion. Ample content can be given to the notice by construing it as a warning that the hotel proprietor is not liable in the absence of negligence. As such it serves a useful purpose. It is a warning to the guest that he must do his part to take care of his things himself, and, if need be, insure them. It is unnecessary to go further and to construe the notice as a contractual exemption of the defendants from their common law liability for negligence. I agree that the appeal should be dismissed.

Appeal dismissed with costs. No order on the cross appeal.

Solicitors : *Gardiner & Co.* (for the plaintiff) ; *Hair & Co.* (for the defendants).

[*Reported by C. N. BEATTIE, Esq., Barrister-at-Law.*]

SWANSON v. FORTON AND ANOTHER.

[COURT OF APPEAL (Lord Greene, M.R., Somervell and Evershed, L.J.J.), November 18, 19, 22, December 10, 1948.]

Lease — Assignment — Withholding of consent — Reasonableness — Prevention of creation of statutory tenancy.

By an agreement dated Oct. 14, 1937, the landlord let to the tenant, a dwelling-house to which the Rent Restrictions Acts applied, the tenant covenanting not to sub-let or assign the lease without the landlord's previous consent "such consent not to be unreasonably withheld in the case of a respectable and responsible sub-tenant or assignee." The tenant was not residing in the premises, and, contrary to the terms of the agreement, had, since 1944, sub-let the premises, furnished, to Mrs. M. In July, 1945, the parties entered into a second tenancy agreement whereby the landlord waived the breach and granted a further term expiring on Aug. 31, 1947. This second agreement also included a covenant as to assignment. The tenant, having terminated the furnished tenancy, applied to the landlord for a licence to assign, and on Aug. 19, 1947, twelve days before the expiration of the tenancy, without waiting for the licence, he assigned the premises to one H.E. to hold for the remainder of the term then vested in the tenant. The landlord thereupon commenced proceedings, claiming a declaration that the assignment was void and that her refusal to consent to the assignment was not unreasonable, and claiming possession and damages.

HELD : the refusal of the landlord to consent to the assignment of the lease in order to prevent a statutory tenancy arising at the termination of the contractual tenancy was not unreasonable, and, therefore, the landlord was entitled to damages for breach of covenant.

Lee v. K. Carter, Ltd. ([1948] 2 All E.R. 690), *applied*.

Bates v. Donaldson ([1896] 2 Q.B. 241; 74 L.T. 751), *distinguished*.

Observations of EVERSLED, J., in Re Swanson's Agreement ([1946] 2 All E.R. 631; 176 L.T. 27), *not approved*.

[AS TO UNREASONABLE WITHHOLDING OF CONSENT TO ASSIGN, see HALSBURY, Hailsham Edn., Vol. 20, pp. 349-352, paras. 421, 422; and FOR CASES, see DIGEST, Vol. 31, pp. 382-385, Nos. 5279-5304.]

Cases referred to :

- (1) *Re Swanson's Agreement*, [1946] 2 All E.R. 628; [1947] L.J.R. 169; 176 L.T. 25; 2nd Digest Supp.
- (2) *Bates v. Donaldson*, [1896] 2 Q.B. 241; 65 L.J.Q.B. 578; 74 L.T. 751; 60 J.P. 596; 31 Digest 383, 5284.
- (3) *Re Gibbs & Houlder Brothers & Co., Ltd.'s Lease*, [1925] Ch. 575; 94 L.J.Ch. 312; 133 L.T. 322; *affmg.*, [1925] Ch. 198; 31 Digest 383, 5286.
- (4) *Tredegar v. Harwood*, [1929] A.C. 72; 97 L.J.Ch. 392; 139 L.T. 642; Digest Supp.
- (5) *Lee v. K. Carter, Ltd.*, [1948] 2 All E.R. 690.

APPEAL by the landlord from a decision of ROXBURGH, J., dated May 11, 1948, in an action by the landlord claiming possession of premises which the tenant had purported to assign without having obtained the landlord's consent. The learned judge held that the withholding of consent by the landlord was unreasonable and dismissed the action. The Court of Appeal now allowed the appeal. The facts appear in the judgment of LORD GREENE, M.R.

S. H. Noakes for the landlord.

Mulhigan for the tenant.

Cur. adv. vult.

Dec. 10. The following judgments were read.

LORD GREENE, M.R. : The landlord, who was plaintiff in the action, is the owner of a dwelling-house known as No. 3, Greenhalgh Walk, Hampstead Garden Suburb. This house she let to the tenant by a tenancy agreement dated Oct. 14, 1937. The term was for three years, from Oct. 1, 1937, and thereafter from month to month until determined by notice. The rent was £120 a year. Clause 2 (f) of the agreement contained an undertaking by the tenant not to assign, underlet, or part with possession of the premises or any part thereof without the landlord's previous consent in writing :

" . . . such consent not to be unreasonably withheld in the case of a respectable and responsible sub-tenant or assignee."

On July 20, 1945, the parties entered into a second tenancy agreement. It recited the last mentioned undertaking and that, contrary to the terms thereof, the tenant had, since Oct. 1, 1944, continued to sub-let the premises, furnished, to Gertrude Marcuse without first obtaining the landlord's consent. It then recited an agreement by the parties that, in consideration of the landlord's waiving the breach and granting a further term, the tenant should, during the continuation of the sub-letting, pay an additional rent of £40 per annum as from Oct. 1, 1944. It was further agreed (i) that the term created by the first agreement should be deemed to have expired on Oct. 1, 1944; (ii) that the landlord let the premises to the tenant from Oct. 1, 1944, until Aug. 31, 1947, or until the end of the emergency mentioned in the Emergency Powers (Defence) Act, 1939, and for six months thereafter, whichever period should be the shorter, at a rent payable in advance of £160; and (iii) that the agreement should be read as if the terms and conditions contained in the first agreement were included therein, so far as not inconsistent. This last mentioned clause imported into the second agreement the undertaking by the tenant as to sub-letting or assignment.

On Aug. 19, 1947, when the tenancy had (as is now admitted) only twelve days more to run, the tenant, without having obtained the consent of the landlord, by deed assigned the premises to a sub-tenant, Horace Edelman, to hold during the continuance of the term then vested in the tenant. No sum was expressed to be payable, but the assignee gave the usual covenant to pay the rent (which, however, had been paid in advance) and observe the agreements and conditions contained in the tenancy agreement and to indemnify the tenant in respect thereof. Application had been made to the landlord's solicitors on July 29, 1947, for a licence to assign to the sub-tenant. A question was raised whether the tenancy had already come to an end so that the tenant, if in occupation, would have become a statutory tenant under the Rent Restrictions Acts, and, as such, had no assignable interest. It is common ground, however, that this was not the case, with the result that the contractual tenancy would continue until Aug. 31, 1947. The tenant did not await the result of his application for the landlord's licence to assign, and on Aug. 12, that is, seven days before the assignment was executed, the landlord's solicitors were informed on the telephone by the sub-tenant that the tenant was proposing to make the assignment without waiting for a licence. On Aug. 19, 1947, the tenant's solicitors informed the landlord's solicitors that he would assign during the then coming week without waiting any longer for the licence. The landlord had not then, and has not since, given her consent to the assignment and claims that she has not unreasonably withheld it. It appears that before the assignment to the sub-tenant, Mrs. Marcuse's tenancy was brought to an end and the sub-tenant went into occupation before the tenant's contractual tenancy came to an end.

On Oct. 2, 1947, the landlord issued her writ against the tenant and sub-tenant. In her statement of claim she alleged that the assignment was in breach of the tenancy agreements, that the tenant had failed to deliver up possession on Aug. 31, 1947, and that the sub-tenant remained in wrongful

occupation of the premises. She claimed a declaration that the assignment was void and of no effect and not binding on her and that her refusal of consent to the assignment was not unreasonable, and she claimed possession of the premises and damages. Before the commencement of the proceedings, no such notice was served by the landlord as is mentioned in the Law of Property Act, 1925, s. 146 (1), and the learned judge ruled that the action, in so far as it claimed forfeiture on the ground of breach of covenant, was incompetent by reason of non-compliance with s. 146 (1). Against this ruling there is no appeal, with the result that the tenancy was not determined by any effective election to forfeit before the expiration of the contractual term. On this basis, the assignment to the sub-tenant was admittedly effective to vest the residue of the term in him, notwithstanding the alleged breach of the undertaking not to assign, with the result that, on the expiration of the contractual term, the sub-tenant was in occupation, and, therefore, entitled to claim the benefit of the Rent Restrictions Acts. Effect was given to this in the judgment of ROXBURGH, J., by dismissing the action against the sub-tenant. Against this part of the order there is no appeal, and the only matter that remains is the landlord's claim against the tenant for a declaration that her refusal or withholding of consent was not unreasonable and for damages for breach of the undertaking not to assign. These claims ROXBURGH, J., dismissed, holding for the reasons (with which he agreed) given by EVERSHED, J., in *Re Swanson's Agreement* (1) that the withholding of consent was unreasonable. Against this part of the judgment the landlord appeals. It was agreed by counsel for the parties that, in the event of our holding that the withholding of consent was not unreasonable, we should assess the damages. It was not disputed that the sub-tenant was a respectable and responsible assignee. The landlord, however, asserts, and the tenant denies, that the withholding of consent to the assignment was not unreasonable in the circumstances and for the reasons which I will now proceed to explain. It will be borne in mind that the burden of proving unreasonableness was on the tenant.

The house was a dwelling-house which fell within the Rent Restrictions Acts, and, if no assignment had taken place and if the tenant had determined the sub-tenancy of Mrs. Marcuse and gone himself into occupation before the contractual tenancy came to an end on Aug. 31, 1947, he would have been entitled to remain on in the house as a "statutory tenant." On the other hand, if Mrs. Marcuse had remained in occupation, no statutory tenancy would have come into existence, and the landlord would have been entitled to possession on the termination of the contractual tenancy, the reason being that Mrs. Marcuse was not entitled to the protection of the Acts as her tenancy was a furnished one. At the date of the assignment the tenant had, for a considerable time, ceased to live in the house. On some date before July 20, 1945, he had granted the furnished tenancy to Mrs. Marcuse and she was still in occupation under that tenancy at or shortly before the date of the assignment. On that date, according to the deed of assignment, the tenant was living near Ipswich. From these facts and the fact of the assignment itself, which was made when the contractual tenancy had only twelve days to run, the only reasonable inference to be drawn was that the tenant had no intention of resuming occupation of the house so as himself to be able to claim the protection of the Acts when the contractual tenancy came to an end, and from that fact, coupled with the fact that the rent was payable in advance and had been paid down to the end of the term; the only reasonable inference to be drawn was that the assignment was made for the sole purpose of enabling the assignee to claim the protection of the Acts which the tenant could not himself have claimed since he had no intention of returning to occupy the house. I should have said that that inference was the only reasonable one to draw on the admitted facts even if counsel for the tenant had not refrained from disputing

it. The tenant did not give evidence at the trial. This was, no doubt, because ROXBURGH, J., dismissed the action without calling on counsel for the tenant. We asked counsel whether, assuming we thought there was a case for him to answer, he wished to call any evidence, and he informed us that he did not.

This, therefore, was the position, as between the landlord and the tenant, when the application for consent to the assignment was made. Unless an effective assignment of the remaining days of the term could be made, the landlord would be entitled to recover possession of the house on the expiration of the term in accordance with the terms of the tenancy agreement. She was anxious to do so in order to be in a position to let it to a tenant of her choice. She had a long waiting list of persons anxious to take one of her houses (of which she owned a number) and she wanted to be fair to them. She, apparently, had no intention at the time of selling the house with vacant possession on the termination of the tenancy. On the other hand, if the tenant could obtain the consent of the landlord to an assignment, he would be in a position to introduce a tenant of his own choice, not merely for the residue of the contractual term, but also for the duration of the statutory tenancy which would automatically come into existence in favour of the assignee as the tenant in occupation on the termination of the contractual tenancy.

Apart from authority and construing the undertaking in its natural meaning in relation to the facts which I have stated, I should have had no hesitation in saying that the landlord was not acting unreasonably in withholding her consent to the assignment. Under the contract the tenant had only twelve days of the term to assign. What he was attempting to do was not merely to assign the twelve days, but to put his assignee in a position to obtain what he himself could not obtain, namely, an extension of the right to occupy lasting beyond the expiration of the contractual term. If he himself had, contrary to his intention, returned to occupy the house so as to become a statutory tenant, he could not have assigned his statutory tenancy. By taking advantage of the fact that the contractual tenancy had twelve days to run, he attempted to do what for all practical purposes (but not, of course, in law) is the same thing.

One suggestion I may dispose of at the outset. It was that, in some way, the withholding of consent to assign would, in the circumstances, be a violation of the spirit of the Rent Restrictions Acts. There is nothing in the Acts which restricts a lessor's right under the tenancy to withhold his consent. The lessee can only put his assignee into a position to become a statutory tenant if he can lawfully do so. Whether he can or cannot lawfully do so depends on the unreasonableness or the reasonableness of the lessor's refusal. To say that it is unreasonable for the lessor to refuse his consent because it would prevent the lessee doing something which he can only do if the refusal is unreasonable is to beg the question. The main argument on behalf of the tenant is based on the judgment of this court in *Bates v. Donaldson* (2). In that case the views of A. L. SMITH, L.J., were expressed in a way more restrictive of the lessor's rights than those of KAY, L.J. LORD ESHER, M.R., agreed with both. A. L. SMITH, L.J., said ([1896] 2 Q.B. 247):

"It is not, in my opinion, the true reading of this clause that the permission can be withheld in order to enable the lessor to regain possession of the premises before the termination of the term. It was in my judgment inserted *alio intuitu* altogether, and in order to protect the lessor from having his premises used or occupied in an undesirable way or by an undesirable tenant or assignee, and not in order to enable the lessor to, if possible, coerce a tenant to surrender the lease so that the lessor might obtain possession of the premises, which was the reason why in the present case the assent was withheld."

The facts in that case were very different from those in the present case. The object of the lessor in withholding consent was to recover possession before the end of the term, and it was on this ground that he lost the case. In *Re Gibbs & Houlder Bros. & Co., Ltd.'s Lease* (3), TOMLIN, J., following what he took to be the view of A. L. SMITH, L.J., held ([1925] 1 Ch. 209) that the only circumstances relevant to consider on the question of reasonableness were matters affecting "the personality of the lessee or the nature of the user or occupation of the premises." There, the lessor's object was to avoid the loss of a good tenant of adjoining premises which he owned because it was apprehended that, if the assignment was allowed, the assignee, who was in fact the tenant of the adjoining premises, would give up his tenancy of them and move into the premises proposed to be assigned to him. This decision was affirmed by this court, but it was subjected to criticism in the House of Lords in the later case of *Tredegar v. Harwood* (4) on the ground that it involved adding glosses to the plain words of the covenant. As a decision, however, it is, just as *Bates v. Donaldson* (2) itself, binding on this court. It was, however, carried a step further by some observations of EVERSLED, J., in *Re Swanson's Agreement* (1) which were approved by ROXBURGH, J., in the present case. Those observations were, in fact, made *obiter*, as the decision was based on other grounds, the case being one in which EVERSLED, J., held that the contractual tenancy had come to an end so that no assignment was possible. I shall return to this case presently. After the judgment of ROXBURGH, J., in the present case, namely, on July 22, 1948, *Lee v. K. Carter, Ltd.* (5) was decided by this court. There, the lessee was a limited company, and, being such, was not capable of becoming a statutory tenant. Towards the end of the tenancy, the company asked the landlord for his consent to an assignment to one of its directors, and, on the landlord refusing it, nevertheless made the assignment. The object of the landlord in refusing his consent was to prevent a statutory tenancy arising at the termination of the contractual tenancy, and it was held that his refusal was not unreasonable. The court examined the decisions in *Re Gibbs & Houlder Bros. & Co., Ltd.'s Lease* (3) and *Tredegar v. Harwood* (4) and the *dicta* of EVERSLED, J., in *Re Swanson's Agreement* (1). TUCKER, L.J., after pointing out ([1948] 2 All E.R. 695) that those *dicta* were *obiter* and that, assuming the contractual tenancy there to have been subsisting, the proposed assignee was a person who, if he had remained tenant, would have become a statutory tenant at the termination of the agreement, explained the *dicta* of EVERSLED, J., as being based on the view that the landlord's real objection to the assignment was :

" . . . that he would have been thereby deprived of his opportunity of getting possession of the premises before the expiration of the lease, and therefore, the case would have been almost identical with *Bates v. Donaldson* (2) . . ."

and if the *dicta* went beyond that and were inconsistent with the view taken by himself in the then instant case he would differ from them.

In *Re Swanson's Agreement* (1) the tenant was actually in occupation at the time of the assignment and all that he had to do was to remain in occupation until the lease came to an end for a statutory tenancy to come into existence. The present case is quite different, for its basis, in fact, is that the tenant was not in occupation, was residing elsewhere, and had no intention of returning to the house. The only way, therefore, as I have pointed out, that a statutory tenancy could be brought into existence was by the device of an assignment. The present case is, however, different from *Lee v. K. Carter, Ltd.* (5) in that the tenant there was a limited company whereas here the tenant is an individual, but on the facts I do not think that this makes any difference. In the present case, on the facts, as in law, the only method of bringing a statutory tenancy into existence was by the device of an assign-

ment, and it does not matter that in *Lee's* case (5) the reason why, in the absence of an assignment, no statutory tenancy could arise was one of law, whereas in the present case the position is that on the inference which the landlord was entitled to make no statutory tenancy was, in the absence of an assignment, going to arise in fact. In his judgment in *Re Swanson's Agreement* (1) EVERSLED, J., had used the following words ([1946] 2 All E.R. 631):

"... it is, I think, plain from the terms of the judgment of TOMLIN, J., and of the judgment of the Court of Appeal that by 'user or occupation' is meant the manner in which the premises are used or occupied—for example, for purposes which might cause offence even although they did not involve any breach of covenant . . ."

If I may respectfully say so, this appears to me to be adding yet another gloss on the plain language of the undertaking and to go farther even than TOMLIN, J., had gone and farther than *Bates v. Donaldson* (2). I find in the judgment of TUCKER, L.J., in *Lee's* case (5), two passages of great assistance. The first is as follows ([1948] 2 All E.R. 694):

"Once again it is necessary, I think, to emphasise that that language must be considered in the light of the facts of the particular case with which the learned judge was dealing. I do not think for one moment that TOMLIN, J., was purporting to lay down some principle of universal application which would cover every conceivable case, and it is clear that he had not in his mind any such situation as that which has arisen in this case, *viz.*, the results which might follow at the end of a lease from the acceptance of a particular assignee for the termination of that lease."

The second is where, speaking of the case before him, he said (*ibid.*, 695):

"It is true that the consequences would not show themselves until the expiration of three months from the date of the assignment, and counsel for the tenants is right when he says that the contractual relationship would be the same had the landlord consented to the assignment, but none the less it was a contractual relationship pregnant with future possibilities, or more than possibilities, which would not have resulted from the previous existing contractual relationship between the landlord and the tenants."

These words appear to me to apply *mutatis mutandis* to the circumstances of the present case and I must respectfully disagree with the opinion expressed by EVERSLED, J., in the passage quoted. I see no reason for limiting the matters to be considered in regard to reasonableness to matters which will arise during the currency of the lease. It is the effect of the assignment as leading inevitably to the extension of the right of occupation beyond the expiration of the contractual term that is here objected to. The assignment would lead, in the words of TUCKER, L.J., to "a contractual relationship pregnant with future possibilities." I can see no reason, and I find no authority which leads me, to think that in these circumstances the landlord's refusal was unreasonable. Apart from *Lee's* case (5), there is no case binding on this court in which the delayed effect of an assignment on the position of the parties after the termination of the lease has been considered. Nothing that I have said must be taken as applying to a case of what in the argument was sometimes referred to as "normal assignment." If that phraseology be adopted, the whole basis of fact in the present case is that the assignment proposed was an "abnormal" one in that it was an assignment of the tail end of the term by the lessee, not for the purpose of conferring the right to occupy for the few remaining days of the term, but in order to enable the assignee to occupy thereafter under the Rent Restrictions Acts. In my opinion, therefore, the withholding of consent by the landlord was not unreasonable.

The only remaining question is one of damages. It was admitted in evidence at the trial that the landlord had suffered and would suffer no pecuniary damages from the assignment. The sub-tenant is respectable and responsible and no rent higher than the standard rent (with any permissible additions) could have been obtained from another tenant. The landlord had no intention of selling the house. In the circumstances I do not see how she can claim more than nominal damages. I would award her 40s. for this. The appeal is accordingly allowed. The landlord will have a declaration that her withholding of consent was not unreasonable and judgment for 40s. damages.

SOMERVELL, L.J. : I agree.

EVERSHED, L.J. (read by SOMERVELL, L.J.): I agree. It is plain, since the judgment of this court in *Lee v. K. Carter, Ltd.* (5) that in the earlier case of *Swanson's Agreement* (1), I used language in reference to the decision of TOMLIN, J., in *Re Gibbs & Houlder Bros. & Co. Ltd.'s Lease* (3) which went further than was justified by the judgment of TOMLIN, J., and, particularly, by his formula "user or occupation." It could not be suggested to be right that a landlord may always reasonably refuse his consent to an assignment (or an underlease) merely because his chances of dominion over his property at the end of the lease might thereby be enhanced or the chances of a continued right of personal occupation after the end of the term might be thereby diminished, for otherwise a landlord would, in effect, be justified in refusing his consent at any time to any assignment or any underletting of "rent restricted" premises. The facts of the present case are, however, wholly exceptional. For reasons fully stated by LORD GREENE, M.R., it is in this case obvious that the assignment of the "fag-end" of the term was intended to relate, in its effect, not really at all to the contractual term, but only to the period after the end of the term. Save in relation to what should follow after the term expired, the last twelve days of the term were without significance to assignor or assignee. In these circumstances, I think the present case is in essence the same as that of *Lee v. K. Carter, Ltd.* (5) and that a similar conclusion should follow.

LORD GREENE, M.R. : The appeal will be allowed and a declaration in the form I have mentioned will be made. There will be judgment for 40s. damages, and in the matter of costs, we shall give the landlord the costs of the appeal, but, having regard to the fact that in the court below there were two defendants, against one of whom the landlord failed, we think the proper order will be to give her one-half of her costs in the court below and no more.

Appeal allowed. Judgment for the plaintiff for a declaration and 40s. damages with costs in the Court of Appeal and half the costs in the court below.

Solicitors: *Barfield & Barfield* (for the landlord); *F. Bernard Smith* (for the tenant).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

Distinguished. W. v. W. [1952]
1 All E.R. 858.

L. v. L.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Pearce, J.), November 29, 30, 1948.]

H Nullity—Approbation of unconsummated marriage—Artificial insemination of wife with husband's seed—Birth of child—Estoppel—Public policy—Bastardisation of child by nullity decree.

The parties were married in 1942, and, although neither the wife nor the husband were incapable, the marriage was never consummated owing to the husband's psychological attitude in sexual matters. The wife was anxious to bear a child, and in December, 1947, she was artificially inseminated from the husband's seed. On Jan. 27, 1948, the parties

ceased to live together. Unknown to herself, the wife was then pregnant as the result of the artificial insemination, and in September, 1948, she gave birth to a child. In a suit by the wife for a decree of nullity, it appeared from the evidence that the wife's dominant motive in conceiving the child was the hope that the advent of a child might help her and her husband to have normal intercourse.

HELD: (i) the wife was not estopped as against the husband by her conduct because he was not misled by it into thinking that she acquiesced in an abnormal marriage, nor had he as a result of it altered his position for the worse.

(ii) the conception of the child in the circumstances did not constitute approbation of an abnormal marriage, and there was no authority for saying that public policy bound the court to hold that by her conduct the wife had approbated towards the world at large. On the contrary, the fact that a decree would bastardise the child was no ground for refusing the decree, which would, therefore, be granted on the ground of incapacity.

Dicta of LORD SELBORNE, L.C., in *G. v. M.* (1885) (10 App. Cas. 186; 53 L.T. 399) and *Dredge v. Dredge* ([1947] 1 All E.R. 29), *applied*.

[AS TO GROUNDS FOR DECREE OF NULLITY, see HALSBURY, Hailsham Edn., Vol. 10, pp. 639-645, paras. 934-945; and FOR CASES, see DIGEST, Vol. 27, pp. 265-272, Nos. 2328-2407].

Cases referred to:

- (1) *Clarke (otherwise Talbott) v. Clarke*, [1943] 2 All E.R. 540; 112 L.J.P. 41; 168 L.T. 62; 2nd Digest Supp.
- (2) *G. v. M.*, (1885), 10 App. Cas. 171; 53 L.T. 398; 27 Digest 351, 3339.
- (3) *Dredge v. Dredge (otherwise Harrison)*, [1947] 1 All E.R. 29; 2nd Digest Supp.

PETITION for a decree of nullity by a wife on the ground of the husband's incapacity or, alternatively, wilful refusal to consummate the marriage. By his answer the husband did not deny that the marriage had not been consummated, but he denied incapacity and wilful refusal.

The husband had not succeeded in consummating the marriage, but the wife had borne a child as a result of having been artificially inseminated with the husband's seed. PEARCE, J., held that the conduct of the wife and the birth of a child in these circumstances did not debar the wife from being given a decree, notwithstanding that the child, in consequence of such a decree, would be bastardised, and he granted the relief asked.

J. Stirling for the wife.

R. Hughes for the husband.

PEARCE, J.: The parties were married in 1942 and the wife is now 31, and the husband 37, years of age. The medical examination shows that the wife has no impediment. The husband is, apparently, capable, but that proves nothing since the trouble here is psychological. For the first three years the husband made no attempt at intercourse. The wife suggested it, but the husband evaded it, saying that he was too tired or too busy or that it was difficult to have children during the war. The husband found it difficult to talk about sex. In June, 1945, the wife made him face the question, and he said that he supposed it was fear of failure that made him avoid intercourse. At the wife's insistence they tried, and he was unable to have sexual intercourse. He made many subsequent abortive attempts, but he was never able to consummate the marriage. In the autumn of 1945, the wife, who was, as might be expected, run down in health and suffering from nervous trouble, consulted a doctor. The doctor found no impediment in her. He impressed

the seriousness of the position on the husband, and tried to persuade him to have psycho-therapy. The husband was unwilling to have this and wished to try physical methods of cure. His reluctance to try psycho-therapy probably sprang from the same trouble that caused his inability to consummate the marriage, since, undoubtedly, he wished to be cured. By the end of 1945, the wife knew from the doctor that she had grounds for a decree of nullity.

- A In 1946 another doctor took over the husband from the first doctor, but no doctor has effected any improvement in him. The wife was anxious to have a child and discussed artificial insemination with her husband. At the end of 1946, she tried, under the guidance of an expert in such matters, to inseminate herself artificially with the husband's seed, but she had no success. From April to September, 1947, the husband had to be abroad while the wife remained
- B at home. From September to December, 1947, she continued her attempts to inseminate herself artificially from the husband. There were further ineffective attempts to consummate the marriage, and the wife was urging the husband to undergo psychological treatment.

- In December, 1947, he at last agreed to pay a visit to a psychologist. The psychologist advised a course of treatment, but it would be long, and, in the
- C husband's view, almost impossible for him. As an attempted short cut, the psychologist put forward suggestive treatment by Dr. Leahy, and this treatment the husband was prepared to have. On Dec. 1, 1947, the wife had artificial insemination by an expert from the husband's seed. On Dec. 30 she had another such insemination. Between those two dates the husband had started a course of treatment by Dr. Leahy, and by Jan. 27, 1948, when the parties ceased
- D to live together, he had paid him nine or ten visits. Dr. Leahy's treatment was intended to eradicate from the husband the sense of failure caused by his repeated inability to consummate. Although the psychologist suspected that there might be a deep-seated neurosis, Dr. Leahy was not concerned with the question whether there was. Such a neurosis would take a long time to eradicate, and Dr. Leahy was trying a short cut. The first moment to which he attributed
- E any medical significance was the moment after the husband had failed a few times. As the husband told Dr. Leahy that he had little sexual desire and had never been sexually strong, and as the husband had slept with his wife for three years and during all that time had evaded any sexual intercourse, it seems clear that there was some far more deep-rooted trouble than a mere sense of failure induced by the lack of success of his efforts when he did make them.
- F It is hardly surprising that Dr. Leahy's treatment did not make the efforts to consummate any more effective than they had been in the past, but the treatment had an unfortunate result. It consisted largely in instilling confidence in the husband by giving him a card on which was written the information that, after reading the card, his arm would become rigid and thereafter he would feel desire. Twice he tried to consummate the marriage with that help. They
- G were in bed, he read the card, his arm did become rigid and he did thereafter feel desire. Unfortunately, the desire was not sufficiently strong or long-lived to achieve its purpose. These attempts differed only from the earlier ones in that they were rough and crude and devoid of love-making, and appeared to the wife to be just the attempted satisfaction of a physical need. In most nullity cases there comes a moment when the most forbearing wife becomes
- H sickened by the role, so unnatural to a sensitive woman, of trying to stimulate an impotent spouse sufficiently to enable him to achieve penetration. After five years of patient and constant effort by the wife, that moment was probably not very far off. Having heard her evidence, I have no doubt that that moment came when the husband added to his impotence the artificiality and crudity induced by Dr. Leahy's treatment. Those experiences, on top of a difficult and trying five years, made the wife decide that she should leave her husband. At the end of January, 1948, she left, determined to end the marriage, and

since then they have lived apart and no persuasion has been able to get the wife to go back to him.

It was unhappy that the break in her endurance should have occurred at that moment, since, unknown to herself, she was pregnant by the artificial insemination, and there was just a chance—though, in my view, a slim one—that the birth of a child might have overcome the husband's psychological trouble or have resigned the wife to an unnatural marriage. In September, 1948, she gave birth to a boy. I have seen the wife and she was a perfectly honest witness. She seemed to me to be a woman who had tried nobly to make a success of the marriage under conditions which inflicted on her a degree of strain and humiliation which few women can endure indefinitely without serious injury to health, and to return to which for further attempts after the break would probably be intolerable for a sensitive woman. In my view, this marriage has broken down hopelessly, and she could never endure to go back to her husband. Dr. Leahy claims that success was in sight, and says that his treatment succeeds in 50 per cent. of cases, though I gather that the patients who, unlike this husband, were strongly sexed were the better subjects. After considering his evidence and the other evidence, I feel sure that success was not in sight, and that the only hope for any normal sex life of the husband would be some far more thorough course than Dr. Leahy's treatment, and, probably, with some other wife.

On those facts is it my duty to grant or withhold a decree? I find it a difficult case to decide, and there is little guidance to be had from authority. The husband has not chosen to give evidence, but his counsel says that I ought to refuse a decree on the ground of want of sincerity. He did not plead it, and, in my view, it should be pleaded, but there seems doubt whether it must be pleaded and, in my view, the husband ought not to be excluded from raising that argument. The husband says that the birth of the child should make me refuse a decree—that, because there was a voluntary act by the wife that led to this conception, the court should consider the marriage as approbated, not only in the interest of the parties, but also of the public, and he calls public policy in aid. He also relies on the prospect of a cure of the husband's condition. The last point I disregard, because from one's experience of such cases and from the evidence before me I see no hope of repairing this marriage. It would be shutting one's eyes to realities to expect this marriage, with its background of failure and neurosis, to become an effective marriage.

The birth of the child, however, is a far more serious matter. It is important to see how this came about. The wife admitted two motives in conceiving the child—a woman's desire for a child, and (the dominant factor) the hope that the birth of a child would help her and her husband to establish a normal sex relationship. Does the birth of a child so conceived deprive her of the relief to which otherwise she has a clear right? In *Clarke v. Clarke* (1) a decree of nullity was granted although a child had been born 13 years before and for three years the husband had been living in adultery. PILCHER, J., there held that there was no want of sincerity. So far as that case helps at all, it is in the wife's favour, since, in addition to the birth of the child, there was adultery by the husband and his object in getting a decree was to re-marry. In this case the wife has no desire to re-marry, and she left home because the sex side of marriage made it intolerable to her and for no other reason. As counsel for the husband rightly points out, however, the birth of the child in *Clarke v. Clarke* (1) was due to an accidental freak of *fecundatio ab extra* during an attempt to consummate, while here the conception was a deliberate act by the husband and wife. I do not feel that much help can be obtained from *Clarke v. Clarke* (1).

The leading case on this point is *G. v. M.* (2). In that case LORD SELBORNE, L.C., said (10 App. Cas. 186):

" . . . there may be conduct on the part of the person seeking this remedy

which ought to estop that person from having it ; as, for instance, any act from which the inference ought to be drawn that during the antecedent time the party has, with a knowledge of the facts and of the law, approbated the marriage which he or she afterwards seeks to get rid of, or has taken advantages and derived benefits from the matrimonial relation which it would be unfair and inequitable to permit him or her, after having received them, to treat as if no such relation had ever existed. Well now, that explanation can be referred to known principles of equitable, and, I may say, of general jurisprudence. The circumstances which may justify it are various, and in cases of this kind many sorts of conduct might exist, taking pecuniary benefits for example, living for a long time together in the same house or family with the status and character of husband and wife, after knowledge of everything which it is material to know. I do not at all mean to say that there may not be other circumstances which would produce the same effect ; but it appears to me that, in order to justify any such doctrine as that which has been insisted upon at the Bar, there must be a foundation of substantial justice, depending upon the acts and conduct of the party sought to be barred. Further than that I do not think it necessary for the purpose of this case to go. Of course, when facts are in dispute, motive may be all important ; but that is not the case here."

In the ordinary meaning of the word "sincerity" the wife was sincere. She was set on making this a normal marriage, and when she found it intolerable she started these proceedings. She has not been actuated by any indirect or improper motive, but from LORD SELBORNE'S opinion I understand that this, though not irrelevant, is not the test. The question is whether one ought to draw inferences from her conduct and acts which would make it inequitable now to give her a decree. Conduct and acts, however, include the contemporaneous expression of her intentions, since conduct or acts may differ according to the words by which they are accompanied. In judging her acts and conduct I must regard the understanding between her and her husband at the time. It would be unreal to infer from her acts a meaning which the husband always knew they did not bear.

If estoppel be the test, then I do not think there is an estoppel as against her husband. An estoppel would arise if, on the faith of representations by word or conduct, she had induced her husband to alter his position for the worse. Here she has not misled her husband to do anything on the faith of her acquiescence in an abnormal marriage. Her letters and conduct show no such acquiescence. They show rather a determination to bring her marriage to a normal relationship. In one letter she says : "The only security for marriage is the reality of marriage. This must be striven for at any price." I think that no-one could read her letters as meaning that, if she is given a child by artificial insemination or adoption, she will acquiesce in an impotent marriage. So one essential of estoppel is absent. The second essential of estoppel is that the husband should have altered his position for the worse. It has not been proved that the husband has done so. Her persistence with the marriage for over five years was in his interest. The birth of the child may have made him liable to pay for the child's education, but it has not been shown that he will have to do so. Against that he has the privilege of having had a child by the woman he loved, and, apparently, still loves, which is no small privilege to a man. It is difficult to weigh up such things, but I doubt if he will be the loser in the long run by the fact of her having produced a child.

So far as approbation of the marriage is concerned, it must be a question of degree. What acts done, with what intention, constitute approbation? Her letters and her evidence show that she never intended to approbate an abnormal marriage. Until the end she made it clear that she desired and intended to have a normal marriage. I do not regard the conception of the child, serious

as it is, when done with the dominant intention of producing normality in their sex relations, to be approbation of an abnormal marriage. I see no authority for saying that public policy makes it my duty to hold that she is estopped or has approbated towards the world at large. *Dredge v. Dredge* (3) shows the contrary. There it was held that the fact that a decree would bastardise a child born many years before was no ground for refusing a decree in a belated petition based on wilful refusal. LORD WATSON in *G. v. M.* (2) (10 App. Cas. 198) used the words "public policy", but only, I think, in connection with the rights between the spouses in the sense that to allow one spouse to act with glaring inequity as against the other is contrary to public policy.

If I am right, the question of discretion does not arise, and it is irrelevant to weigh the public and private advantages of granting or refusing a decree. If I am wrong, I should, in the exercise of my discretion, grant a decree for these reasons. I see no hope of happiness by keeping these two people married. I am told by his counsel that the husband might divorce the wife for desertion when the time arrives, but there is no certainty of this. If I grant a decree it seems possible that the wife, who appears to be affectionate and likely to be a good wife, may marry again, and even the husband might marry again and conquer his inhibitions and enjoy normal married happiness. The future holds better augury for the child, I think, if I grant the decree than if he is brought up by an embittered mother who may be tied for life to a marriage that has never been a real marriage, and which, only through the unnatural aid of science, has produced the fruit of a real marriage. That the child should be made illegitimate is most regrettable, but the stigmas of birth are of less effect than they were, and sons are not now judged by the errors of their parents. The few who know of the illegitimacy will probably also know the facts, and in them there is nothing that reflects any dishonour on either parent or on the child. For those reasons I order a decree *nisi* on the ground of incapacity, with costs.

Order accordingly.

Solicitors: *Withers & Co.* (for the wife); *Marsden, Burnett & Davy*, agents for *Faithfull, Gardner & Stanier*, Winchester (for the husband).

[Reported by R. HENDRY WHITE, ESQ., Barrister-at-Law.]

ed. H.L. [1950] 1 All E.R. 728.

BOISSEVAIN v. WEIL.

[COURT OF APPEAL (Tucker, Asquith and Denning, L.JJ.), December 10, 13, 1948.]

Currency Control—Loan in foreign currency—Promise to repay in sterling—Parties resident in foreign country in military occupation of enemy—Defence (Finance) Regulations, 1939 (S.R. & O., 1939, No. 950), reg. 2 (1).

By reg. 2 (1) of the Defence (Finance) Regulations, 1939 (as amended) it is provided: "Except with permission granted by or on behalf of the Treasury, no person other than an authorised dealer shall buy or borrow any foreign currency or any gold from, or lend or sell any foreign currency or any gold to, any person not being an authorised dealer." Section 3 (1) of the Emergency Powers (Defence) Act, 1939, provides: "Unless the contrary intention appears therefrom, any provisions contained in, or having effect under, any Defence Regulation shall—. . . (b) in so far as they impose prohibitions, restrictions or obligations on persons, apply . . . to all persons in the United Kingdom and all persons on board any British ship or aircraft, not being a Dominion ship or aircraft, and to all other persons being British subjects except persons in any of the following countries or territories, that is to say—(i) a Dominion, (ii) India, Burma and Southern Rhodesia, (iii) any country or territory to which any provisions of this Act can be extended by Order in Council, and (iv) any other country or territory, being a country or territory under His Majesty's protection or suzerainty . . ."

While, owing to war conditions, the parties were involuntarily resident in Monaco, which was in the military occupation of the enemy, the plaintiff, a Dutch subject, lent to the defendant, a British subject, a sum of money in French currency. The defendant drew cheques in blank for the full amount on an English bank, wrote a letter addressed to the bank informing it of the circumstances, and instructing it, on presentation or as soon as the law permitted, to honour the cheque in sterling. She also signed a document acknowledging the debt, certifying that she had posted the letter to the bank, and undertaking, in case the plaintiff failed to obtain payment on presentation of the cheque, to repay the sum borrowed in cash not later than one month after the declaration of an armistice, with additional provisions in the event of her death before payment was made. In an action by the plaintiff for the recovery of the amount lent,

HELD : (i) the transaction was prohibited by the Defence (Finance) Regulations, 1939, reg. 2 (1) which, having regard to the Emergency Powers (Defence) Act, 1939, s. 3 (1), had extra-territorial force and applied to any British subject, wherever he might be, other than in one of the excepted territories, who bought or borrowed foreign currency.

(ii) the proper law of the contract was English law, and, since it was illegal by that law, it could not be enforced either by action for money lent or on the cheques or by an action for money had and received.

Observations of LORD WRIGHT in Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd. ([1942] 2 All E.R. 136; [1943] A.C. 63; 167 L.T. 110), and *LORD ATKINSON in Dynamit Act. v. Rio Tinto Co.* ([1918] A.C. 299; 118 L.T. 194), distinguished.

Decision of CROOM-JOHNSON, J. ([1948] 1 All E.R. 893), reversed.

[FOR THE DEFENCE (FINANCE) REGULATIONS, 1939, reg. 2 (1), see HALSBURY'S STATUTES, Vol. 33, p. 703 and FOR THE EMERGENCY POWERS (DEFENCE) ACT, 1939, s. 3 (1), see HALSBURY'S STATUTES, Vol. 32, p. 933.]

E Cases referred to :

(1) *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd.*, [1942] 2 All E.R. 122; [1943] A.C. 32; 111 L.J.K.B. 433; 167 L.T. 101; 2nd Digest Supp.

(2) *Dynamit Act. v. Rio Tinto Co.*, [1918] A.C. 292; 87 L.J.K.B. 549; 118 L.T. 191; 11 Digest 405, 749.

F (3) *Santos v. Illidge*, (1860), 8 C.B.N.S. 861; 29 L.J.C.P. 348; 3 L.T. 155; 11 Digest 404, 744.

APPEAL by the defendant from a decision of CROOM-JOHNSON, J., dated Apr. 23, 1948, in an action by a Dutch subject against a British subject for £6,000, money lent while the parties were resident in Monaco at a time when that principality was in the military occupation of the enemy. CROOM-JOHNSON, J., held that the contract was enforceable in this country, but the Court of Appeal now reversed this decision.

Salmon, K.C., and *Stenham* for the defendant.

Sir David Maxwell Fyfe, K.C., and *B. M. Goodman* for the plaintiff.

TUCKER, L.J. : This is an appeal from a decision of CROOM-JOHNSON, J., by which he gave judgment for the plaintiff for the sum of £6,000 and costs. The action was brought by the plaintiff, who is a Dutch subject, against the defendant, who is a British subject, and the claim, as shown in the statement of claim endorsed on the writ, is as follows :

"The plaintiff's claim against the defendant is for the sum of £6,000 money lent by the plaintiff to the defendant at her request which is still due and unpaid, and interest thereon from June 9, 1945, at 5 per cent. per annum."

The claim for interest is for agreed interest. There are particulars with regard to the dates on which three sums of £2,000 were lent : June 10, 1944, June 15, 1944, and July 8, 1944. By an amendment made subsequently the statement of claim goes on :

" On each of the said dates the plaintiff lent to the defendant 320,000 francs, which the defendant agreed to repay to the plaintiff in sterling at the agreed rate of 160 francs to the pound."

The transactions took place in 1944, when the plaintiff and the defendant were both in Monaco. The plaintiff, in evidence said :

" (Q) What was the official rate [of exchange] at the time ? (A) Well, we did not know if there was an official rate, but the last rate known was 176. (Q) Having arranged the rate, did you on each occasion advance to her 320,000 francs ? (A) Yes. (Q) How were the francs paid ? (A) in cash. (Q) Notes ? (A) Notes. (Q) Bank of France notes ? (A) Bank of France notes. (Q) That is 320,000 each time ? (A) Yes. (Q) The number of francs you paid her is the one thing that is not mentioned in the documents ? (A) No, because it was expressly understood that she was to pay me back out of her capital in England, as she had none other at her disposal. (Q) CROOM-JOHNSON, J. : And in English currency ? (A) Yes, my Lord. (Q) She was to pay in sterling in England ? (A) Oh, yes."

That is the contract sued on. Certain documents were entered into for the purpose of carrying out the transaction, but I do not think it necessary to read them in their entirety. One of them varied slightly on each occasion, but I am looking at one dated July 8, 1944, in respect of the last of these transactions, in which the defendant writes :

" I, the undersigned, Mrs. Dora Weil, nee Lewis . . . certify having addressed my letter . . . to the manager of the National Provincial Bank, Ltd., Baker Street branch, . . . London, and having given my cheque No. PC/632599 for the sum of £2,000 sterling on the said bank to — with a view to the repayment of the said sum of £2,000 sterling to him or his assigns, which sum he has kindly lent me without interest for the purpose of meeting my personal expenses and the payment of doctors' fees. In thus lending me the sum of £2,000 — has genuinely helped me in a very difficult situation and has rendered me a great service. If, for any reason, — or his assigns is or are unable to obtain payment of the said sum of £2,000 sterling on presentation of my said letter [the letter, dated July 8, 1944, to the manager of the National Provincial Bank, Ltd., Baker Street, London] I undertake to pay to him or them directly and in cash, not later than one month after the declaration of an armistice in the present war between Great Britain and Germany, and even earlier if my account at the National Provincial Bank, Ltd. has been released prior to the said armistice. After the lapse of the said period of one month the said sum of £2,000 sterling shall bear interest at the rate of 5 per cent. per annum payable annually."

There follows a provision for the event of her dying before the presentation of the letter and an irrevocable acknowledgment by her of the said sum as a debt. The next document is a certification of the defendant's signature by the police at Monaco, and, on July 8, 1944, there is the letter addressed by her to the manager of the National Provincial Bank, Ltd., Baker Street, London, informing him that she had that day drawn a certain cheque on that bank to the order of — :

" . . . who lent me this money for my living expenses and doctors' bills during the time of financial restrictions in Europe and who thus . . . rendered me a great service. Will you please honour this cheque on presentation or as soon as the law permits its payment, said cheque having priority over all other payments. These instructions are irrevocable."

The defendant also drew a cheque for that amount with the name of the payee left in blank, and those documents were handed to the plaintiff. Similar documents had been given to him with regard to the other transactions. The evidence showed that the defendant had not got an account at that particular bank and, in fact, there did not appear to be any merits attaching to her or her defence in connection with these transactions.

A A number of defences were raised at the trial. It was contended that the transaction was prohibited by the Trading with the Enemy Act, 1939, and it was also contended that the transaction was illegal according to the law of Monaco. The learned judge dealt fully with both those defences, and they have been expressly abandoned by counsel for the defendant on this appeal. He confined his appeal to two points: He relies on two of the Defence (Finance) Regulations, 1939, and he says that this transaction is prohibited under one B or both of those regulations. The first is reg. 2, but, before reading it in its present form, I will read it in the form in which it was before the amendment which was made on Aug. 5, 1940. It then read as follows:

C "Except with permission granted by or on behalf of the Treasury, no person other than an authorised dealer shall in the United Kingdom buy or borrow any foreign currency or any gold from, or lend or sell any foreign currency or any gold to, any person not being an authorised dealer."

By an amendment of Aug. 15, 1940, the words "in the United Kingdom" are omitted, and the regulation now reads:

D "Except with permission granted by or on behalf of the Treasury, no person other than an authorised dealer shall buy or borrow any foreign currency or any gold from, or lend or sell any foreign currency or any gold to, any person not being an authorised dealer."

By s. 3 of the Emergency Powers (Defence) Act, 1939, it is provided, so far as is material:

E "(1) Unless the contrary intention appears therefrom, any provisions contained in, or having effect under, any Defence Regulation shall . . . (b) in so far as they impose prohibitions, restrictions or obligations to all persons in the United Kingdom and all persons on board any British ship or aircraft, not being a Dominion ship or aircraft, and to all other persons being British subjects except persons in any of the following F countries or territories, that is to say, (i) a Dominion, (ii) India, Burma and Southern Rhodesia, (iii) any country or territory to which any provisions of this Act can be extended by Order in Council, and (iv) any other country or territory . . . under His Majesty's protection or suzerainty."

So, unless the contrary intention appears, these regulations apply to all British subjects wherever they may be except in those specified territories. The G result of reg. 2 appears to me to be that, as it was originally worded, it must be construed as follows: "Except with permission granted by or on behalf of the Treasury, no British subject wherever he may be, except in one of the excepted territories, shall in the United Kingdom buy or borrow any foreign currency . . ." that is to say, it would prohibit a British subject in America from buying or borrowing foreign currency in the United Kingdom, which, of H course, he could do through an agent or by instructions by mail or otherwise. Then comes the amendment of Aug. 15, 1940, in which the words "in the United Kingdom" are omitted. Having regard to s. 3 of the Emergency Powers (Defence) Act, 1939, the result appears to be that the regulation now applies to any British subject, wherever he may be, other than in one of the excepted territories, who buys or borrows foreign currency anywhere.

Is there a contrary intention to be found in the regulation? I am unable to find any indication of any intention to the contrary. The whole object

of the regulation appears to me to be to protect sterling and to be expressly aimed at, or expressly to include, transactions carried out in foreign countries by British subjects as well as transactions carried out by British subjects in the United Kingdom. I am, therefore, unable to accept the first and widest submission of counsel for the plaintiff, namely, that, on the proper construction, this regulation has no extra-territorial effect, but, counsel advanced the second argument that, even if it has got extra-territorial force, it should not be applied to transactions in enemy occupied territory between two persons both of whom, for the purposes of trading with the enemy, are to be regarded as enemies. He says it would be absurd to suppose that transactions in a foreign currency in an occupied country between two persons who are involuntarily detained there should come within the scope of this regulation, and he fortifies that argument by pointing out that the regulation contemplates obtaining consent from the Treasury and that it only applies to persons other than authorised dealers. Counsel, therefore, submits that the regulation should only be construed as applying to territories in which it is possible to obtain a consent of the Treasury, or in which it is reasonable to contemplate the existence of, or access to, an authorised dealer.

There are several answers to that submission. One is that in its terms the regulation is wide enough to cover all foreign countries, and that, if it had been intended to exclude countries in foreign occupation, or countries which were included under the Trading with the Enemy Act, 1939, it would have been easy so to do. There is a further difficulty, namely, that the mere fact that a person may be in an enemy occupied country does not necessarily preclude the possibility of some communication through some channels with the Treasury in this country. It is to be noted that the Trading with the Enemy Act, 1939, as pointed out to us by counsel for the defendant, in the proviso to s. 1, enacts :

“ Provided that a person shall not be deemed to have traded with the enemy by reason only that he has (i) done anything under an authority given generally or specially by, or by any person authorised in that behalf by, a Secretary of State, the Treasury or the Board of Trade . . . ”

As pointed out by DENNING, L.J., it appears from the correspondence that, at any rate in 1942, the defendant was able to be in communication with her solicitors in this country. With regard to the position of Monaco, the evidence given before the learned judge as to the nature and extent of the enemy occupation is not very specific. It appeared that it was in the military occupation of the enemy, but the civil administration appeared to be functioning normally and the mere fact that Monaco was brought within the scope of the Trading with the Enemy Act, 1939, by S.R. & O., 1940, No. 1467, made on Aug. 13, 1940, would not, in my view, by itself, be sufficient to take it out of reg. 2. I feel unable to attach this limited construction to reg. 2 and to read into it an exception applying either to foreign enemy occupied countries or countries which are treated as enemy countries for the purpose of the Trading with the Enemy Act, 1939.

Those were the two main arguments advanced by counsel for the plaintiff for contending that this regulation did not apply, but he also used the *ad absurdum* contention and said that, if the regulation were to be construed literally, it would apply to a British subject permanently resident in America, who, for a few days, had occasion to borrow some dollars from a friend. With regard to that, it is sufficient to say—without expressing a concluded opinion on the matter—that I am by no means satisfied that a transaction of that kind would come within the language of “ buying or borrowing foreign currency.” The transaction with which we are concerned is one of the kind with which these regulations were designed to deal, that is to say, a transaction in which a British subject borrows francs and undertakes to repay in sterling.

That is, I think, clearly a buying or borrowing of foreign currency within the meaning of the regulation and is the kind of transaction aimed at. Whether or not the suggested transaction—which, in my view, is clearly not one at which the regulation is aimed, might come within this language, it is not necessary to decide. I am not impressed by the *argumentum ad absurdum*.

A Finally, counsel for the plaintiff contended in the alternative that, if this transaction is hit by reg. 2, none the less the plaintiff ought to be entitled to recover on the principle of unjust enrichment, and he referred to the speech of LORD WRIGHT in the *Fibrosa* case (1) relying on the observations made by LORD WRIGHT, where, in dealing with the doctrine of unjust enrichment, he said ([1942] 2 All E.R. 136) :

B “The gist of the action is a debt or obligation implied or more accurately imposed by law, in much the same way as the law enforces as a debt the obligation to pay a statutory or customary impost.”

C It must be remembered that in that case LORD WRIGHT was dealing with a contract which was lawful when made, but the performance of which had become impossible and the consideration for which had, accordingly, failed. It is said that the transaction in the present case comes within the language which was there used and that it should be applied in the present circumstances. D It is to be observed that in the present action there is no claim based on fraud or tort, or any alternative claim grounded on any implied obligation imposed by law or otherwise, and if, as I think, this transaction was one forbidden by reg. 2 and binding on a British subject abroad, it would, as counsel for the defendant forcibly says, be a curious result if we were compelled to say that E the law imposed an obligation which had been expressly prohibited by a statutory enactment to which this court is bound to give effect. I think the whole notion of a debt or obligation imposed by law, as contemplated by LORD WRIGHT in the *Fibrosa* case (1), is alien to a transaction of the kind with which we are dealing, where the regulation, which has the force of law, has, in terms, prohibited the particular transaction. For those reasons, I think the alternative contention of counsel for the plaintiff fails.

F In this connection it is to be observed that, when one is considering the law applicable to a transaction of this kind, and whether or not in these circumstances the plaintiff could enforce his claim in an alternative manner by claiming repayment in Monaco of the francs that had been lent and by invoking the law of Monaco as applicable to the transaction, it is necessary to consider what the view of the courts of this country would be with regard to a claim so framed. In that connection, our attention has been drawn by counsel for the defendant to the language used by LORD ATKINSON in *Dynamit Actien-Gesellschaft v. Rio Tinto Co., Ltd.* (2). LORD ATKINSON, referring to *Santos v. Illidge* (3), said ([1918] A.C. 299) :

G “There the action was brought against a British subject by a native of Brazil to recover damages for the non-delivery to the plaintiff in Brazil of certain slaves living in Brazil and owned by the defendant, and there sold by him to the plaintiff by contract made in Brazil. The contract was to be performed in Brazil, and might be lawfully performed there. The question for decision was whether, having regard to the time when, the mode in which, and the purposes for which the slaves were acquired by the defendant, the holding and sale of them by him was not made unlawful by the provisions of a certain English statute, binding on defendant as an English subject, namely [the Slave Trade Act, 1843]. The Court of Exchequer Chamber decided that on the proper construction of s. 5 of that statute the defendant was not prohibited from holding and selling these slaves in Brazil, and accordingly the plaintiff succeeded ; but the whole case proceeded on the basis that had these things been prohibited by this statute the contract could not have been enforced against

the defendant in an English court, despite the fact that it was made in Brazil and was to be performed in Brazil, and was there lawful."

I think the present case is *a fortiori* to that referred to there, because here not only is the contract prohibited by the law of this country, but its performance is to take place in this country. I do not think that in any shape or form the courts of this country will lend themselves to the enforcement, directly or indirectly, of the contract which was proved in the present case.

For these reasons, I think this appeal succeeds. I should add that I have not found it necessary to refer to the argument of counsel for the defendant with regard to reg. 3c. It is sufficient for me to say that I think there is a great deal to be said for the contention of counsel for the plaintiff that 3c is not applicable to the present case. The language in 3c relied on is this :

"Subject to any exemptions which may be granted by order of the Treasury, no person shall, except with permission granted by or on behalf of the Treasury (a) . . . acknowledge any debt . . . in favour of a person who is resident outside the sterling area."

The argument is that this present action is founded on a contract creating a debt and not on an acknowledgment of some pre-existing debt, but, it is unnecessary to express a concluded view with regard to that regulation because I think that reg. 2 is the one that is fatal to the plaintiff's claim.

ASQUITH, L.J. : I agree.

DENNING, L.J. : The regulations here in question were made during the war for the protection of our purchasing power. All the foreign assets of the people resident in this country were mobilised to form a pool which was used for purchases abroad. There were big demands on this pool for essential purchases, such as payments for necessary imports, and the country could not afford to allow it to be used for any other than essential purposes. The country could not, therefore, permit British subjects unrestricted freedom to deal in foreign exchange or to buy goods or services from foreign countries, for that would give foreigners sterling credits and increase the demands on the pool. These regulations, 2 and 3c, by statute apply to British subjects in foreign countries unless the contrary intention appears from the regulations themselves. I can find no such contrary intention. If the regulations were not to apply to British subjects in foreign countries, it would mean that any British subject who went on a visit to the United States could freely buy dollars and give sterling cheques in exchange—or promise to repay in sterling in London—and thus create a drain on sterling for non-essential purposes. The sterling credits could be used by Americans for their purposes here instead of bringing goods or dollars here which would strengthen the pool. Again, if the regulations were not to apply to British subjects in enemy occupied territories, it would mean that any British subject in the south of France during the war could freely buy francs and create in exchange sterling credits which might be transferred to the enemy and used against this country in the war, or transferred to a neutral country and increase the pressure on sterling. I cannot agree, therefore, with either of the suggested limitations as to the scope of regs. 2 and 3c. The principal argument against their application here was the *argumentum ad absurdum*. It is said that it is unthinkable that a British subject long resident in, say, the United States, should not be able to buy or borrow dollars and pay for them with a cheque on his New York bank in dollars, or that a British prisoner of war should not be able to borrow foreign currency on which to live during his escape through enemy occupied territory. Those cases are, however, very different from the present case, because they do not involve the creation of any sterling credit. The proper law of the contracts in those cases is not English law. According to private international law, when a British subject who is residing in the United States

borrowed dollars from an American the question whether the contract to repay is valid, that is whether it creates legal obligations or not, depends on the proper law of the contract, and that depends not so much on the place where it is made or on the intention of the parties as on the place with which it has the most substantial connection: see WESTLAKE'S PRIVATE INTERNATIONAL LAW, 7th ed., p. 302, and PROFESSOR CHESHIRE'S recent book on INTERNATIONAL CONTRACTS

A pp. 12-15, 30-33. If, in the case put, he promises to repay in dollars in the United States, the proper law of the contract is the law of the United States, and its validity in no way depends on what the British Defence Regulations may say. If, however, he promises to repay in sterling in the United Kingdom, the proper law of the contract is the law of this country, and its validity depends on whether it is made illegal by the Defence Regulations. If it is illegal by the law of B England, it is, or should be, invalid everywhere. In construing the Defence Regulations, it must be assumed that, in so far as they have extra-territorial effect on the validity of contract, they apply only to contracts of which the proper law is the law of England, for those are the only contracts whose validity they can affect, and not to contracts of which the proper law is the law of some other country the validity of which they do not affect.

C I need hardly say that a British subject cannot contract out of the Defence Regulations. If, for instance, when on a visit to the United States, he makes a contract to borrow dollars and to repay in sterling in the United Kingdom, the proper law of the contract is the law of England, and he cannot escape the effect of that law by stipulating in the contract that it is governed by the law of the United States. If, however, a British subject resident in the United D States makes a contract to borrow dollars and to repay there in dollars, the proper law of the contract is the law of the United States, and, if it is valid in the United States, it is, or should be, valid everywhere. Nevertheless, although it is valid and would be enforced in the United States, it is quite another matter to say that it would be enforced in this country. The validity of the contract is one thing and the enforcement of it is another. Then the public policy of the *lex E fori* may come into play. An English court, while recognising that the contract was valid, would yet have to face the fact that a British subject is not allowed to make a payment to any person resident outside the sterling area without the consent of the Treasury. So, also, cases might occur where English law clearly prohibited a British subject from entering into a foreign contract which was valid by its proper law, in which case, of course, it would not be enforced F by the English courts. I need not, however, go into these matters in detail. Suffice to say that the regulations do not affect innocent transactions such as those instanced in argument, because when the contract is valid by its proper law and the only question is payment, the Treasury would, no doubt, in any proper case grant the necessary permission to make payment. In my opinion, therefore, the *argumentum ad absurdum* is not valid, because, on the view of G the regulations which I have expressed, there is nothing unreasonable in them. In the present case, the proper law of the contract is English law. Having regard to the nationality and domicile of the defendant, to the detailed arrangements for the repayment of the loan in London, and to the circumstances which gave rise to the transaction, there can be no doubt that England was the country with which the transaction was most essentially connected, and that, therefore, English law was H the proper law. The only connection with Monaco was that it happened to have been effected there. It is illegal by English law, and cannot be enforced either directly by an action on the loan or the cheques, or indirectly by an action for money had and received. I agree that this appeal should be allowed.

Appeal allowed with costs and half the costs in the court below.

Solicitors: William Charles Crocker (for the plaintiff); Pettiver & Pearks (for the defendant).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

McQUADE v. BARNES.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Birkett, JJ.), November 30, 1948.]

Street—Touting—Prohibition—Touting “in any street”—Touting from forecourt of shop—Construction of bye-law—Intention of local authority.

By a byelaw made by the corporation of the borough of Blackpool it was provided: “No person shall in any street within the borough of Blackpool, to the obstruction, annoyance, or danger of any person, either verbally or by the distribution of handbills, circulars, or advertisements, tout or importune any person for the purpose of selling any article to or of obtaining the custom of such last mentioned person.”

On June 5, 1948, the appellant stood on the forecourt of shop premises known as No. 25, The Promenade, Central Beach, Blackpool, calling out in a loud voice to persons passing along the promenade: “Come inside. This way for your fish and chips. No waiting.” Fried fish and chipped potatoes were being sold on the premises which were occupied by the appellant. The cries were audible on the other side of the promenade, and they annoyed several persons walking on the promenade who deviated from their path to avoid the appellant's shouting. The carriageway and footpath of the promenade together constituted a public thoroughfare. The forecourt where the appellant was standing was private property, but it immediately adjoined the public footpath and normally was not enclosed or divided from the footpath, being open to the public for the purposes of approaching the premises.

HELD: the byelaw must be so construed as to give effect to the intention of the authority which made it, and, so construing it, the appellant had committed an offence although he, himself, had not been standing in the street.

Dictum of LORD ALVERSTONE, C.J., in Dereham (Derham) v. Strickland (1911) (75 J.P. 300; 104 L.T. 821), applied.

Case referred to:

- (1) *Dereham v. Strickland*, (1911), 104 L.T. 820; *sub nom. Dereham v. Strickland*, 75 J.P. 300; 42 Digest 862, 144.

CASE STATED by Blackpool justices.

The appellant was convicted on an information preferred by the respondent, the chief constable of Blackpool, charging that he in a street “unlawfully and to the annoyance of persons did tout for the purpose of obtaining the custom of persons, contrary to the borough byelaws.” It was contended for the appellant that the forecourt of shop premises where he stood was not part of the street. The justices were of the opinion that the offence was proved and convicted and fined the appellant. The Divisional Court dismissed the appeal. The facts appear in the headnote and the judgment of LORD GODDARD, C.J.

R. Lambert for the appellant.

Vernon Gattie for the respondent.

LORD GODDARD, C.J.: This is a Case stated by justices for the borough of Blackpool by whom the appellant was convicted of “unlawfully and to the annoyance of persons” touting “for the purpose of obtaining the custom of persons, contrary to the borough byelaws.” The byelaw in question provides:

“No person shall in any street within the borough of Blackpool, to the obstruction, annoyance, or danger of any person, either verbally or by the distribution of handbills, circulars, or advertisements, tout or importune any person for the purpose of selling any article to or of obtaining the custom of such last-mentioned person.”

The appellant was employed by the owner of a shop which adjoins the street. There is no physical division between the shop and the street, nor do I think it would make any difference for the purpose of the present case if there were a rope or a fence dividing them. The appellant stood on the forecourt of his shop and touted to people in the street to come in and have some fish and chips. If the true construction of the byelaw is that persons in the street shall not be touted, then the appellant committed an offence although he did not actually stand in the street, and, in my view, that is the obvious meaning of the byelaw. It is possible to read it in one of two ways—either, that the tout must be standing in the street or that he must be touting people in the street. We must so construe a byelaw as to give effect to the intention of the authority which made it just as we must construe a statute so as to give effect to the wishes of Parliament, and if we gave to this byelaw the meaning for which the appellant contended it would mean that to a great extent the byelaw would be waste paper. I cannot distinguish this case from *Derham (Dereham) v. Strickland* (1), where the same thing happened except that the piece of land on which the man who was touting stood and which was open to the public and had been declared part of the highway belonged to an owner who had given him permission to stand there. LORD ALVERSTONE, C.J. (delivering the judgment of the court), said (75 J.P. 300) :

“They [the justices] must consider whether the respondent was touting in the street. There seems to be no doubt about it, for he stood on a piece of ground adjoining the street. If he was standing practically at the corner of the pavement, the fact that the title to the land on which he stood was in private hands does not prevent what he did from amounting to touting in the street.”

That is exactly what happened in the present case. The decision in *Derham (Dereham) v. Strickland* (1) gave to the byelaw there exactly the same effect as we are giving to the byelaw in this case by reading it as meaning: “No person shall tout or importune any person who is in any street.” In the present case such persons were importuned. The justices find that they were annoyed, and, therefore, in my opinion, the justices came to a right decision and this appeal should be dismissed with costs.

HILBERY, J. : I agree.

BIRKETT, J. : I also agree.

Appeal dismissed with costs.

Solicitors: *Bentleys, Stokes & Lowless*, agents for *Baden Barnes & Co.*, Blackpool (for the appellant); *Sharpe, Pritchard & Co.*, agents for *Trevor T. Jones*, Blackpool (for the respondent).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

BRITISH BANK FOR FOREIGN TRADE, LTD. v. NOVIMEX, LTD.

[COURT OF APPEAL (Bucknill, Cohen and Singleton, L.JJ.), December 10, 13, 1948.]

Contract—Commission—Agreement to pay commission in return for introduction—Amount to be agreed—Refusal to pay commission after introduction made—Whether agreement binding—Amount of commission—Application to all subsequent transactions.

On Dec. 9, 1946, the defendants wrote to the plaintiffs agreeing to pay the plaintiffs certain commission in respect of a consignment of oilskins with which it had been arranged, with the plaintiffs' assistance, that the P. company, with whom the defendants had not at that time direct contact, should supply the defendants. The letter proceeded: “We also undertake

to cover you with an agreed commission on any other business transacted with your friends [the P. company]. In return for this you are to put us in direct touch with your friends." In due course, the plaintiffs put the defendants in direct contact with the P. company. The defendants entered into further transactions with the P. company, but refused to pay commission to the plaintiffs in respect thereof.

HELD: although, if the arrangement had been wholly executory on both sides, there might have been no binding contract, the plaintiffs had executed their part of the transaction, and the defendants were, therefore, bound to pay, in default of agreement as to the amount, a reasonable sum as commission on all their subsequent business with the P. company, whether or not such business was a direct consequence of the plaintiff's introduction.

[AS TO WHAT TERMS MAY BE IMPLIED, see HALSBURY, Hailsham Edn., Vol. 7, pp. 322, 323, para. 451; and FOR CASES, see DIGEST, Vol. 12, pp. 610-612, Nos. 5044-5058.]

Cases referred to:

- (1) *Levy v. Goldhill & Co.*, [1917] 2 Ch. 297; 86 L.J.Ch. 693; 117 L.T. 442; 1 Digest 523, 1829.
- (2) *Hillas & Co., Ltd. v. Arcos, Ltd.*, (1932), 147 L.T. 503; Digest Supp.
- (3) *Foley v. Classique Coaches, Ltd.*, [1934] 2 K.B. 1; 103 L.J.K.B. 550; 151 L.T. 242; Digest Supp.
- (4) *May & Butcher v. R.*, [1934] 2 K.B. 17, n.; 103 L.J.K.B. 556, n.; 151 L.T. 246, n.; Digest Supp.
- (5) *Scammell (G.) & Nephew, Ltd. v. Ouston*, [1941] 1 All E.R. 14; [1941] A.C. 251; 110 L.J.K.B. 197; 164 L.T. 379; 2nd Digest Supp.
- (6) *Bishop & Baxter, Ltd. v. Anglo-Eastern Trading & Industrial Co., Ltd.*, [1943] 2 All E.R. 598; [1944] 1 K.B. 12; 113 L.J.K.B. 26; 169 L.T. 351; 2nd Digest Supp.
- (7) *Branca v. Cobarro*, [1947] 2 All E.R. 101; [1947] K.B. 854; 177 L.T. 332; 2nd Digest Supp.
- (8) *Central London Property Trust, Ltd. v. High Trees House, Ltd.*, [1947] K.B. 130; [1947] L.J.R. 77; 175 L.T. 332; 2nd Digest Supp.
- (9) *Bryant v. Flight*, (1839), 5 M. & W. 114; 2 Horn. & H. 84; 12 Digest 410, 3311.
- (10) *Wilson v. Harper, Son & Co.*, [1908] 2 Ch. 370; 77 L.J.Ch. 607; 1 Digest 523, 1830.

APPEAL by the plaintiffs from a judgment of DENNING, J., dated May 12, 1948, dismissing an action by them for commission on business transacted by the defendants with a company to which the plaintiffs had provided an introduction following the defendants' promise to pay in return for such introduction "an agreed commission" on any business transacted. The Court of Appeal allowed the appeal. The facts appear in the judgment of COHEN, L.J.

Quintin Hogg for the plaintiffs.

Eustace Roskill for the defendants.

BUCKNILL, L.J.: I will ask COHEN, L.J., to give the first judgment.

COHEN, L.J.: This is an appeal from an order DENNING, J., made on May 12, 1948, in which he dismissed the plaintiffs' action against the defendants for commission in respect of a purchase by the defendants of three parcels of oilskins from a company known as Pritchard & Gee Trading Co., Ltd.

In December, 1943, Mr. Vischer, who was a director of the defendants, approached Mr. Sussmann, who was managing director of the plaintiffs, and told him he wanted to buy 20,000 suits of oilskins. Mr. Sussmann said he had friends in Holland who could provide the requisite number, and as a result

a letter of Dec. 9 was written by Mr. Vischer which has given rise to this action. The first four paragraphs of that letter dealt with a particular parcel of 20,000 skins, and stated that the defendants were willing to buy them from the plaintiffs' friends at 5s. 6d. each. The second and third paragraphs dealt with payment and delivery, and then the letter proceeded :

A "We confirm that we have agreed to cover you on this transaction with a commission of 4d. per oilskin suit."

Then comes the paragraph (the sixth) on which the present dispute arises :

"We also undertake to cover you with an agreed commission on any other business transacted with your friends. In return for this you are to put us in direct touch with your friends."

B The plaintiffs carried out their part of the transaction as mentioned in that letter, namely, to put the defendants in direct touch with the plaintiffs' friends. The case was rightly conducted before us on the basis that, whatever be the effect of that sixth paragraph, it constituted a separate arrangement independent of the original contract for 20,000 oilskins.

C The commission on the original transaction having been paid in September, 1947, nothing further occurred until the plaintiffs wrote to the defendants the following letter of Jan. 8, 1948 :

D "We refer to your letter to us of Dec. 9, 1946, since when we have received the agreed commission upon the oilskins transaction which was referred to in your letter. However, we call attention to the paragraph therein [para. 6, now in question] . . . We think the time has now arrived when, with a view to making up our accounts for 1947, we should receive details of the various businesses you have done with Messrs. Pritchard & Gee Trading Co., Ltd., during 1947, and that we should now meet together to agree the commission to be paid to us thereon."

E The reply to that letter, dated Jan. 13, 1948, repudiated the liability which had been alleged by the plaintiffs. The plaintiffs placed the matter in the hands of their solicitors, and on Jan. 30, 1948, the writ in this action was issued. It refers to the letter of Dec. 9, 1946, and alleges that it was an express or implied term of the request that the defendants be put in touch with the clients of the plaintiffs

F " . . . that the defendants would pay a reasonable commission to the plaintiffs on any business thereafter transacted with the said clients other than a particular transaction for the purchase of oilskin suits dealt with more particularly in the said letter."

G It alleged as a fact that the plaintiffs had put the defendants in touch with Pritchard & Gee Trading Co., Ltd., and further alleged that by their letter of Jan. 13 the defendants had repudiated the obligation which the plaintiffs said arose from para. 6 of the letter of Dec. 9, 1946, and that :

" . . . a reasonable commission would be 5 per cent., alternatively 3 per cent., on the value of the transactions with the said clients after Dec. 9, 1946, and, alternatively, a reasonable commission would be 4d. per oilskin dealt in by the parties within the said period."

H The plaintiffs claimed a declaration that the defendants were liable to pay a commission of 5 per cent., or, alternatively, 3 per cent., on the value of the transactions, or alternatively, 4d. a skin, and they asked for an inquiry or an account of the transactions and for payment of the commission on the value of the transactions found to be due as a result of the inquiry or taking of the account, and, finally, further or in the alternative, damages for breach of contract.

The defendants repudiated liability, though they admitted three subsequent purchases through Messrs. Pritchard & Gee Trading Co. The first,

the defendants admitted, was linked with the original transaction and they were liable to pay commission on it, and they have, in fact, paid it. The other two transactions were these. On or about Aug. 8, 1947, the defendants purchased 1,000 oilskin suits from Pritchard & Gee, Co., Ltd., at a price of 5s. 6d. each, or a total cost of £275. Then, in or about August, 1947, they purchased 20,000 oilskin suits at a cost of £5,000. The defendants denied liability to pay commission on those two transactions, first, on the ground that there was no legally enforceable bargain arising under para. 6 of the letter, it being an agreement to pay a commission to be agreed and no further agreement had been reached. Alternatively, they said that, at any rate as to the 20,000 skins, they were under no liability, because, on the true construction of the letter, if the arrangement constituted an enforceable bargain, it was only a contract to pay commission on business arising directly from the introduction by the plaintiffs to Messrs. Pritchard & Gee and the second transaction arose from an advertisement in a newspaper. The learned judge appears to have accepted both submissions. He says in his judgment :

"I am quite clear that the 20,000 transaction in August, 1947, had nothing to do with the original transaction,"

and on that ground he refused to allow any commission thereon, but, in my opinion, there is nothing in the agreement limiting the commission to commission on orders directly attributable to the introduction. The language used seems to me unambiguous. What is said is that the commission is to be payable "on any other business transacted with your friends." I find it difficult to imagine wider language than that used in the letter, and I am unable to find any circumstances which would justify us in cutting it down. It seems to me a perfectly reasonable arrangement to come to in order to prevent litigation on the point (which it is very difficult to prove) whether or not a particular item of business did or did not arise out of the original introduction.

I turn next to the main question. Is this an enforceable agreement? A number of authorities have been cited to us, to which I do not propose to refer in detail, because, in my view, the effect of the authorities is correctly stated in the learned judge's judgment where he says :

"The principle to be deduced from the cases is that, if there is an essential term which has yet to be agreed and there is no express or implied provision for its solution, the result in point of law is that there is no binding contract. In seeing whether there is an implied provision for its solution, however, there is a difference between an arrangement which is wholly executory on both sides, and one which has been executed on one side or the other. In the ordinary way, if there is an arrangement to supply goods at a price 'to be agreed,' or to perform services on terms 'to be agreed,' then, although, while the matter is still executory there may be no binding contract, nevertheless, if it is executed on one side, that is, if the one does his part without having come to an agreement as to the price or the terms, then the law will say that there is necessarily implied from the conduct of the parties a contract that, in default of agreement, a reasonable sum is to be paid."

With that statement of the principle of law I respectfully agree. My difference with the learned judge is only on the question whether he has correctly applied that statement of principle to the facts of this case. The learned judge goes on :

"The difficulty is to apply the distinction in this case. This is not a case of services to be rendered for wages or goods to be supplied for a price. It is an arrangement in regard to repeat transactions or follow-up transactions, in respect of which the person effecting the original introduction has performed no fresh service whatever apart from his original

introduction. He has, however, done his part. He has effected the original introduction."

If I may pause there for a moment, I can see no difference in principle between a case where the service which is rendered is labour and a case where the service is an introduction. It seems to me here that, whatever the value of the service may be, the plaintiffs have rendered to the defendants the service which was intended to be the consideration for the agreement to pay commission on future orders. I cannot think that there is a difference in principle between such a service and an agreement to serve an employer as a clerk or in any other capacity. The learned judge goes on to say that, in his view, it is impossible to apply the principle to the present case because there is so much left in the air. He says: "Is commission to be payable until the crack of doom?" In my view, if the defendants go on dealing with Pritchard & Gee until the crack of doom, they will have to go on paying commission to the plaintiffs, if they are in existence, until that doom occurs. As was pointed out in *Levy v. Goldhill* (1) by PETERSON, J., parties having entered into a bargain have it in their power to put an end to it, and so the defendants here need not go on dealing with Messrs. Pritchard & Gee. Therefore, I do not feel any difficulty on those points.

The next point put by the learned judge is in these terms: "Does that mean business which is not the result of the introduction at all." That has been covered by what I have already said. As I read the agreement, it says plainly that commission is to be payable on any other business whether or not it has resulted as a direct consequence of an introduction by the plaintiffs, and, therefore, it includes a transaction arising, as happened in this case, from an advertisement in a newspaper. Then the learned judge says: "Is it confined to oilskins or does it apply to business of an entirely different kind, in different commodities, by different departments, and so forth?" Here, again, I can find no ambiguity in the agreement, and I do not, therefore, feel any difficulty in answering the question in favour of the second alternative. The real point comes where the learned judge goes on:

"And what is the amount of the commission to be? If there is no usual or customary commission, how can anyone say what is a reasonable commission for a follow-up transaction or a repeat transaction? That appeared clearly from the evidence which showed that when parties are negotiating for the price they are going to pay, they take account of any commission they have to pay to agents."

DENNING, J., goes on to say that this shows that the agreement is too vague, but this argument involves the proposition that the agreement had not said in terms: "We also undertake to cover you with a reasonable commission on any other business transacted with your friends." DENNING, J., regarded that condition as being too vague to be enforceable. I cannot agree with his view. I think that the court should take the view that a jury properly directed would be able to arrive at a proper conclusion as to what in the circumstances of this case is a reasonable commission.

[HIS LORDSHIP then considered what would be a reasonable commission in respect of the transactions and concluded that it would not exceed $\frac{1}{4}$ d. per skin.]

BUCKNILL, L.J. : I agree.

SINGLETON, L.J. : I agree.

Declaration that the defendants were liable to pay a reasonable commission to the plaintiffs in respect of each transaction entered into with Messrs. Pritchard & Gee Trading Co., Ltd., after Dec. 9, 1946. Defendants to pay the costs here and below.

Solicitors : Herbert Baron & Co. (for the plaintiffs); Wm. A. Crump & Son (for the defendants).

[Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.]

ARGONAUT NAVIGATION CO., LTD. v. MINISTRY OF FOOD.

[COURT OF APPEAL (Bucknill, Cohen and Singleton, L.JJ.), December 9, 10, 1948.]

Charterparty—Demurrage—Loading—Bagging—Cargo of wheat put on board in bulk and requiring to be bagged before stowing.

By a charterparty a ship was to proceed to a port in Canada, as ordered, to load wheat, and was "to be loaded according to berth terms, with customary berth dispatch," and, if detained more than 5 days (Sundays and holidays excepted) the charterer was to pay demurrage "provided such detention shall occur by default of charterer or his agents." The ship arrived at Montreal, as ordered by the charterer, and was ready to load a cargo of grain on Oct. 7, 1946, and by the terms of the charterparty, the lay days started at 7 a.m. on Oct. 8. The charterer loaded no cargo at Montreal, but ordered the ship to proceed to Sorel, where she arrived at 12.45 p.m. on Oct. 11. Loading began at 3.30 p.m. and continued intermittently until Oct. 17, the lay days expiring and the ship coming on demurrage at 7 a.m. on Oct. 15. Under the port regulations the ship, a two-deck steamship, was allowed to carry bulk grain to the full capacity of the lower holds, but all grain in the 'tween decks had to be in bags, and this requirement was necessary for the safety of the ship and the proper stowage of cargo. The loading was done by the charterer's agents who put the wheat on board the vessel by means of elevators. By 8.45 a.m. on Oct. 17, as much wheat as could be carried by the ship in bulk had been loaded on board and some loose wheat had been placed in the 'tween decks where it was being put into bags. As the bagging proceeded, more loose wheat was poured in from the elevators at a reduced rate. The last wheat was put on board at 1 p.m. and the bagging of the loose wheat was completed at 3 p.m. The charterer paid demurrage until 8.45 a.m. on Oct. 17, but contended that he was not liable for demurrage for the period from 8.45 a.m. to 3 p.m. of that day.

HELD: loading was not complete until the cargo was so placed in the ship that she could proceed on her voyage in safety, and, therefore, as bagging was necessary for the safety of the ship and was also required by the port regulations, it was a part of the loading, and, as the detention was due to his default in not providing the cargo at the proper time and place, the charterer was liable to pay demurrage until 3 p.m. on Oct. 17, when the bagging of the loose wheat was completed.

Per BUCKNILL, L.J. The authorities all indicate that the task of loading is a joint operation, that each party must do what is reasonable to enable the other to do his part, and that loading is not complete until the cargo is so placed in the ship that the ship can proceed on her voyage in safety.

Observations of LORD ESHER, M.R., in *Harris v. Best, Ryley & Co.* (1892) (68 L.T. 77), and of WRIGHT, J., in *Svenssons (C. Wilh.) Travaruaktiebolag v. Cliffe S.S. Co.* ([1932] 1 K.B. 494; 147 L.T. 14), *approved*.

Decision of SELLERS, J. ([1948] 1 All E.R. 871), *affirmed*.

[AS TO DEMURRAGE, see HALSBURY, Hailsham Edn., Vol. 30, pp. 344-349, paras. 524-529; and FOR CASES, see DIGEST, Vol. 41, pp. 559-566, Nos. 3851-3909.]

Cases referred to:

- (1) *Akt. Reidar v. Arcos, Ltd.*, [1927] 1 K.B. 352; 96 L.J.K.B. 33; 136 L.T. 1; 41 Digest 341, 1922.
- (2) *Harris v. Best, Ryley & Co.*, (1892), 68 L.T. 76; 41 Digest 564, 3886.
- (3) *Sociedad Anonima Comercial de Exportacion y Importacion (Louis Dreyfus y Cia), Limitada v. National Steamship Co., Ltd.* (1932) 49 T.L.R. 50; *revsg. S.C. sub nom. National Steamship Co., Ltd. v. Sociedad*

Anonima Comercial de Exportacion y Importacion (Louis Dreyfus y Cia), Limitada, 48 T.L.R. 325.

(4) *Svenssons (C. Wilh.) Travaruaktiebolag v. Cliffe S.S. Co.*, [1932] 1 K.B. 490; 101 L.J.K.B. 521; 147 L.T. 12; Digest Supp.

A APPEAL by the charterer from a decision of SELLERS, J., dated Apr. 23, 1948, and reported ([1948] 1 All E.R. 871), in an action by shipowners for a declaration that the charterer was liable to pay demurrage for time spent in stowing the cargo in accordance with statutory port regulations after the full cargo had been loaded, on the ground that the shipowners had completed the stowing with all reasonable dispatch and without any default, and the delay was due to the charterer or his agents. SELLERS, J., gave judgment for the shipowners, and the Court of Appeal now affirmed his decision. The facts appear in the judgment of BUCKNILL, L.J.

Le Quesne, K.C., *E. W. Roskill* and *Holman* for the charterer.
Mocatta for the shipowners.

C BUCKNILL, L.J.: This is an appeal from a judgment of SELLERS, J., in favour of the plaintiffs against the defendants, the Ministry of Food. The amount awarded was £77 10s. The case raises some interesting questions as to the proper interpretation of a charterparty entered into between the plaintiffs, as the owner of the S.S. Argobec, and the Minister of Food.

D The charterparty provided for the loading at one port of several ports mentioned in the charterparty, Halifax, St. John, Montreal, Quebec, Sorel, or Three Rivers, of a full and complete cargo of wheat, or Indian corn, or rye, or oats, or barley, or feedwheat, or soya beans, in bulk—I stress the words “in bulk”—or flour in bags. The vessel was to load:

“ . . . under inspection of underwriters’ agents, at her expense, and to comply with their rules, not exceeding what she could reasonably stow and carry over and above her cabin, tackle, apparel, provisions, fuel and furniture . . . ”

E There is the all-important clause from the point of view of this case:

“ Steamer to be loaded according to berth terms with customary berth dispatch, and if detained longer than 5 days, Sundays and holidays excepted, charterer to pay demurrage as per cl. 19 attached, provided such detention shall occur by default of charterer or his agents. Notification of the vessel’s readiness must be delivered at the office of the charterer or his agents, at or before 4 p.m. (or at or before 12 noon if on Saturday), vessel also having been entered at the Custom House, accompanied by pass of the inspector of vessel’s readiness in all compartments, and the lay days will then commence at 7 a.m. on the next business day, whether in berth or not.”

G A further clause provides:

“ It is also mutually agreed that this contract shall be completed and be superseded by the signing of bills of lading . . . which bills of lading shall however contain . . . ”

H certain clauses. There is no evidence that any bills of lading were signed in this particular case, and I do not propose to refer to those clauses except to say that some of the terms are incorporated in what I have already read.

The ship arrived at Montreal on Oct. 6, 1946. Written notice of her readiness to load a cargo of grain was given to the charterer’s agent at 1.45 p.m. on Oct. 7, and the lay days started at 7 a.m. on Oct. 8. She did not load any cargo at Montreal, but was sent by the charterer to Sorel, where she arrived at 12.45 p.m. on Oct. 11. The loading started on that day at 3.30 p.m., and took place intermittently on Oct. 11, 12, 14, 15, 16 and 17. The five lay days ran out at 7 a.m. on Oct. 15, which was, in fact, a week after Oct. 8,

but there were two days which did not count. It is admitted by the charterer that demurrage started to run from Oct. 15, and that it started to run because of his default.

At 8.45 a.m. on Oct. 17 all the cargo in bulk which the vessel was allowed to carry under the rules and bylaws of the office of port warden of the harbour of Montreal had been loaded. The charterparty does not refer to these rules in terms, but the agreed statement of facts says, in para. 3 :

"The provisions above quoted of the charterparty as to loading under the inspection of underwriters' agents and complying with their rules are only applicable to vessels loading in United States ports, but the said rules are similar to the regulations for the loading and carriage of grain cargoes laid down by the rules and by-laws of the office of port warden of the harbour of Montreal, copies of which are appended and form part hereof. The latter are sanctioned by the Council of the Board of Trade of the Dominion of Canada under an Act of the Canadian legislature, 45 Vict., c. 45, s. 5, and failure by a master or owner to comply with certain of them is punishable by fines. Moreover, until the master of a vessel produces to the Canadian customs authorities a certificate from the port warden to the effect that all the requirements of the regulations have been fully complied with, he is unable to secure a clearance for his vessel to leave the port of Montreal for any port not within the limits of inland navigation. These regulations apply not only to Montreal itself but also to Sorel, a port on the St. Lawrence some 40 miles downstream from Montreal."

The appropriate regulations in this case are those which deal with the loading of two deck steamships :

"Two deck steamships may carry bulk grain to the full capacity of all lower holds, provided properly constructed feeders are fitted in the hatches and trunked in the 'tween decks, and, if necessary, with supplementary feeders as required by para. 4, 'Stowage' . . . 2. All other grain in the 'tween decks and/or deck erections must be in bags, complying with regulations affecting shifting boards and dunnage."

Rule 1 under "Stowage" is :

"In loading, the grain shall be properly stowed, trimmed and secured."

Then there are certain other provisions about bagging.

At 8.45 a.m. on Oct. 17, the ship could not take any more cargo in bulk. If more cargo was to be taken in the ship, it would have to be placed in the 'tween decks, and if it were placed in the 'tween decks it must be in bags. The ship was not at that time down to her marks. The charterer's agents started to pour wheat from the elevators into the 'tween decks at a reduced flow, and the stevedores started to bag the wheat there. This went on, and at 1 p.m. on Oct. 17 the vessel was down to her marks, so that she was then not able to take in any more cargo, but there was still some bagging to be done in respect of the cargo which had been poured into the 'tween decks in bulk. The bagging continued until 3 p.m. on Oct. 17, when that operation was completed, the necessary certificate was issued, and the ship was ready to sail. The total number of bags used was 14,000 bags, and the total amount of wheat in the 'tween decks was 28,300 bushels.

That being the position, the question arose what demurrage the charterer ought to pay. He has, in fact, paid £617 14s. in respect of demurrage of the ship until 8.45 a.m. on Oct. 17. The shipowners claim £77 10s. 10d. in respect of demurrage between 8.45 a.m. and 3 p.m. That sum can be split into two. As regards the demurrage between 8.45 a.m. and 1 p.m., when the cargo was all on board the ship, the sum is £52 14s. 7d. and as between 1 p.m. and 3 p.m. the sum is £24 16s. 3d., making the total of £77 10s. 10d. The learned judge

came to the conclusion that "loading" included the time occupied in bagging. In the course of his judgment, he said ([1948] 1 All E.R. 875) :

"In the case of the loading of a general cargo, time is, of necessity, taken in placing and stowing the cargo as it arrives in the hold. Often the delivery of cargo on board a vessel is slowed down because of the difficulty of stowing certain kinds of cargo, or of stowing it in a place particularly difficult of access, or by reason of its structure or some obstruction. I have never heard it suggested in such a case that, in assessing the time taken in loading for purposes of demurrage, an apportionment should take place (on some estimated basis, for accuracy would be impossible) between time taken in stowing and time taken in bringing the goods to the hold."

Towards the end of his judgment he said (*ibid.*) :

"In this case I find that loading was not completed until 3 p.m. on Oct. 17. The facts reveal that the actual loading took only one day, twelve hours and twenty minutes, and that the charterer was in default in not completing the loading within the lay days. To detain the vessel beyond the lay days was a breach of the contract by the charterer: see *Aktieselskabet Reidar v. Arcos, Ltd.* (1). He remained in default and without any protection under the charterparty until the loading was completed. The shipowners have, therefore, established all that is necessary for them to recover demurrage under the relevant clause of the charterparty."

The question is whether that is a right decision or not. *Harris v. Best, Ryley & Co.* (2) is the leading authority, if it may be called an authority, because I agree with counsel for the charterer that the passage relied on by SELLERS, J., which I am about to read, was not absolutely essential for the purpose of the decision of the case. It is a statement of the law and practice with reference to loading ships, made by that great master of commercial maritime law, LORD ESHER, M.R., as far back as 1892. Although that is fifty-six years ago, counsel for the charterer, with his immense knowledge of this branch of the law, was not able to refer us to any passage by any judge or text book writer or other legal authority which questioned the accuracy and good sense of what LORD ESHER there said (68 L.T. 77). I will read the passage in full because it is so important :

"What is the obligation created by the agreement 'to be loaded' ? Loading is a joint act of the shipper or charterer and of the shipowner ; neither of them is to do it alone, but it is to be the joint act of both. What is the obligation on each of them in that matter ? Each is to do his own part of the work, and to do whatever is reasonable to enable the other to do his part. This puts upon the shipper the obligation of bringing the cargo alongside the ship, and of doing a certain part of the loading. What is that part of the loading ? By universal practice the shipper has to bring the cargo alongside so as to enable the shipowner to load the ship within the time stipulated by the charterparty, and to lift that cargo to the rail of the ship. It is then the duty of the shipowner to be ready to take such cargo on board and to stow it in the vessel. The stowage of the cargo is the sole act of the shipowner. What is a reasonable course of action for both parties ? The shipper has all the lay days within which to bring his cargo to the ship, and, if he did not act reasonably, he might bring it all upon the last of those days ; to do so would be unreasonable ; he must act reasonably and bring the cargo alongside in sufficient time to enable the shipowner to do his part within the lay days."

That passage has been referred to with approval in the Court of Appeal by GREER, L.J., in *National Steamship Co., Ltd. v. Sociedad Anonima Comercial*

de Exportacion y Importacion (*Louis Dreyfus y Cia*), Limitada (3). GREER, L.J., said (48 T.L.R. 328):

"As LORD ESHER pointed out in . . . *Harris v. Best, Ryley & Co.* (2): 'Loading is a joint act of the shipper or charterer and of the shipowner; neither of them is to do it alone, but it is to be the joint act of both. What is the obligation on each of them in the matter? Each is to do his own part of the work, and to do whatever is reasonable to enable the other to do his part' . . . In any event, the use of the winch, or any other method of loading adopted by the ship after the goods are brought by the shipper alongside, is part of the loading."

There is also a passage in CARVER'S CARRIAGE OF GOODS BY SEA, 8th ed., p. 370, s. 250:

"The manner in which the goods are to be shipped is ascertained, so far as not expressly agreed upon, by reference to the usages of the place, and having regard to the regulations and laws there prevailing. The ordinary practice generally determines how, and by whom, the goods are to be taken alongside and put on board. The operation of loading a ship involves all that is required, *i.e.*, stowing, and, *semble*, where necessary, lashing—to put the cargo in a condition in which it can be carried."

The authority for that particular passage is *Svenssons (C. Wilh.) Travaruak-tiebolag v. Cliffe Steamship Co.* (4), decided by WRIGHT, J. The question there was whether the loading of a particular ship had come to an end, it being a loading of a deck cargo. WRIGHT, J., said ([1932] 1 K.B. 494):

"I think that in a case like this, and, indeed, in most cases, the mere reception or dumping down of the cargo on the ship does not involve the completion of the loading, because I think the operation of loading involves all that is required to put the cargo in a condition in which it can be carried. In this case the operation of stowing the cargo was comparatively simple. The pit props came up from the water in the ship's slings and were slung on to the deck. Then the sling was released, but, before it was released, the sling was put in such a position that the props would fall in the proper direction—that is, lying fore and aft—and would more or less sink into their places. Some operation of stowing, however, was necessary in respect of each such sling—some props would not fall in the right position and would have to be straightened out, and the props generally would have to be arranged so that they would lie as closely as possible together with their round sides as neatly in contact as could be achieved. That was a small operation, no doubt, but it was done sling by sling before the next sling could come on board, and it had to be done in respect of the last load. It might only take one, two, three or four minutes in respect of each sling load, but it was, in my judgment, a necessary part of the operation of loading."

It seems to me that those authorities all indicate that the task of loading is a joint operation, that each party must do what is reasonable to enable the other to do his part, and that loading is not complete until the cargo is so placed in the ship that the ship can proceed on her voyage in safety. Looking at the present case, apart from authority, on principle, there seem to me to be two questions. First: Was the loading completed at 8.45 a.m.? To my mind, it certainly was not. The loading of grain continued after that time. It is true that it continued slowly, but it continued slowly because it had to be bagged. It would have been most unreasonable to have poured it in at a great speed, forming large mounds in the 'tween decks and making it difficult to bag it. The ship could not sail unless it was bagged. If it had not been bagged, I presume the charterer would have had to remove it. I am not

at all sure that, strictly speaking, the regulations might not require that the cargo should be bagged before it was put in the 'tween decks. Perhaps, from a business point of view, that would be unreasonable, but the rule is clear that "all other grain in the 'tween decks must be in bags." Therefore, as regards the time, I think that there can be no doubt that the loading was not completed before 1 p.m.

- A The second question is : Was the loading and bagging completed later ? It is said on behalf of the charterer that by 1 p.m. he had completed his contract, had shipped all the wheat, and had nothing more to do. If one applies the test of what is reasonable in a case such as this, it seems to me unreasonable for the charterer to allow no time for the bagging. He ought to have put the cargo into the 'tween decks in sufficient time for the wheat there to be bagged before the five lay days had run out, but he did not do so. He acted reasonably at the time in dribbling it in, but it was impossible to dribble it in in such a way that the flow ended at the precise moment when the last bag was full. The fact that there was some cargo left over to be bagged when the full amount had been put into the ship seems to me to show that the loading had not been completed then. In my view, bagging was a part of loading. It was necessary for the safety of the ship. It was necessary to comply with the rules of the port warden, rules which the charterer agreed to comply with. For these reasons, I think that the judgment of the learned judge was right and this appeal should be dismissed.
- B
- C

COHEN, L.J. : I am of the same opinion. Counsel for the charterer relied on the cesser clause, which, so far as material, is in the following words :

- D "Vessel to have a lien on the cargo for all freight, dead freight, demurrage or average. Charterer's liability under this charter to cease on cargo being shipped, except for payment of freight as per cl. 18."

Counsel for the charterer said that the object of that clause was to supply the charterer with a release co-extensive with the lien on the cargo except in so far as otherwise expressly provided. He said that that object would not be achieved if we adopted the construction placed by SELLERS, J., on the word "loaded," and gave it a different meaning to that given to the word "shipped." According to the construction adopted by SELLERS, J., of the word "loaded," demurrage might cover detention until completion of bagging and stowage, and, therefore, cover a period subsequent to the time at which the cargo was shipped and at which, accordingly, the release would operate.

- F That is true, but I doubt whether it follows that the lien and the release were not co-extensive. The charterer would, I think, get release from all demurrage, whether accruing on completion of shipment or accruing thereafter, and the lien would extend to all demurrage, whenever the liability for that demurrage arose. Be that as it may, that question does not really arise on the facts of this case, since the cesser clause only comes into operation when the bill of lading comes into force, and we have no evidence that a bill of lading was ever executed. Indeed, having regard to the fact that the Minister of Food was both shipper and consignee, it is highly unlikely that any effective bill of lading ever came into being. I do not think that the clause in question affords any reasonable guide to the meaning of the word "loaded" in other parts of the charterparty.
- G
- H

I agree so entirely with what has been said by my Lord and by SELLERS, J., in the court below on the meaning of the word "loaded" that I will only refer to one other short clause in the charterparty. In the early operative part of the charterparty I find this provision :

"Vessel to load under inspection of underwriters' agents, at her expense, and to comply with their rules, not exceeding what she can reasonably stow and carry over and above her cabin, tackle, apparel, provisions, fuel

and furniture, and being so loaded shall therewith proceed to one safe port in the United Kingdom."

It seems to me plain that in that clause the expression "loaded" means not only shipped but stowed. Indeed, counsel for the charterer, perhaps unconsciously, adopted this construction when he relied on the words in the clause "at her expense" as imposing on the shipowner the obligation to pay for the bagging of the wheat in question, and I see no reason for giving a narrower meaning to the same word in the provisions in regard to demurrage. For these reasons, I entirely agree with the construction placed by SELLERS, J., and by my brother BUCKNILL, L.J., on the meaning of the word "loaded," and, in consequence, it seems to me that, having regard to the agreed facts stated in para. 9 of the statement of agreed facts, the shipowners were entitled to succeed and the judgment of SELLERS, J., must be affirmed. I need not read that paragraph, but I would point out that it expressly states: "Had the charterer or his agents had cargo available and desired to load it, there would have been time" within the lay days "to have completed the bagging" of the cargo to be carried in the 'tween decks. It seems to me necessarily to follow, once one accepts the meaning of the word "loaded" which was adopted, and, in my opinion, rightly adopted, by SELLERS, J., that the shipowners must succeed. I agree that this appeal should be dismissed.

SINGLETON, L.J.: I agree that the appeal should be dismissed. I think it right to say a word or two on one aspect of the case. Counsel for the charterer raised a question as to the *onus* of proof, and submitted that it was not shown that the charterer was in default. It would be a matter for regret in a case of this kind, which affects other cases, if it fell to be decided on a question of *onus*. On examination, however, it appears to me that there is no substance in the point as to *onus*. The charterer has paid demurrage on the basis that he was in default. The clause in the charterparty is in these terms:

"Steamer to be loaded according to berth terms with customary berth dispatch, and if detained longer than 5 days, Sundays and holidays excepted, charterer to pay demurrage as per cl. 19 attached, provided such detention shall occur by default of charterer or his agents."

In para. 9 of the agreed statement of facts it is stated:

"Had the charterer or his agents had cargo available and desired to load it, there would have been time between 7 a.m. on Oct. 8, or 3.30 p.m. on Oct. 11, and 7 a.m. on Oct. 15, within which to have put it on board and to have completed the bagging of the portion to be carried in the 'tween decks required by the regulations to be bagged."

Those words alone show that the charterer was in default in that he had not provided cargo at the proper place within reasonable time. These words follow in para. 9 of the agreed statement of facts:

"The bagging of the wheat carried in bags in the 'tween decks was carried out by stevedores employed by the shipowners with all reasonable despatch and without any default by the shipowners or their stevedores, and the operation of bagging could not reasonably have been completed before 3 p.m. on Oct. 17."

That paragraph makes it quite clear (a) that the shipowners were not in default, and (b) that the charterer was at fault in that he did not provide the cargo at the time at which he ought to have done. The default of the charterer lay in not providing the cargo at the proper time and place. It was through that default that the detention occurred.

Appeal dismissed with costs.

Solicitors: *Treasury Solicitor* (for the charterer); *Stokes & Mitcalfe* (for the shipowners).

[Reported by C. N. BEATTIE, Esq., Barrister-at-Law.]

Re GREENE (deceased). GREENE v. GREENE AND OTHERS.

[CHANCERY DIVISION (Harman, J.), November 19, 23, December 7, 1948.]

Company—Shares—Transfer—Disposition on death—Article of association providing for automatic transfer of shares to director's widow on his death—Trust—Contract—Companies Act, 1929 (c. 23), s. 63 (now Companies Act, 1948, s. 75).

On Aug. 20, 1942, following a resolution of the board of directors, an extraordinary general meeting of a private company passed a special resolution: "That the articles of association of the company be altered as follows:—(1) by adding to art. 8 the following sub-clause to be numbered (f), namely:—(f) Provided that sub-cl. (a) to (e) (inclusive) of this clause shall not apply in the case of a transfer or transmission of the share or shares of any male member of the present board of directors, that is to say R.J.F., C.A.G., H.M.J. and J.S.S., arising upon the death of any such director if such director leaves a wife him surviving, in which event the share or shares of such deceased director shall, notwithstanding any provision or direction made by such director in his lifetime as to the disposition of such share or shares upon his death to the contrary, be deemed to have passed upon the death of such director to such deceased director's wife and such wife shall be the only person recognised by the company as having any title to the share or shares and shall forthwith be registered as the holder of such share or shares in place of such deceased director . . ." On Jan. 20, 1945, C.A.G. died intestate, leaving him surviving his second wife, two children of his former marriage, and one child by his second wife. On Feb. 15, 1945, the board of directors of the company resolved that the widow be registered as the holder of the shares held by C.A.G., and the registration was made accordingly. On a summons to test the validity of the registration.

HELD: (i) sub-clause (f) was invalid as being in contravention of the Companies Act, 1929, s. 63, which provided that it should not be lawful for a company to register a transfer of shares unless a proper instrument of transfer had been delivered to the company, and, therefore, the registration was unlawful and the register ought to be rectified by registering the shares in the joint names of the personal representatives of C.A.G.

(ii) the resolutions passed in 1942 did not create a trust in favour of the widow, because the shares were in no way bound during C.A.G.'s lifetime, and for such a trust to take effect on death a testamentary document would be required.

(iii) the resolutions did not constitute a contract between R.J.F., C.A.G., H.M.J. and J.S.S. that, in consideration of a reciprocal promise by the others of them, each would dispose of his shares in favour of his widow, nor could the widow have enforced such a contract if there had been one.

[AS TO TRANSMISSION OF SHARES, see HALSBURY, Hailsham Edn., Vol. 5, pp. 281, 282, para. 486; and FOR CASES, see DIGEST, Vol. 9, pp. 404-411, Nos. 2591-2643.]

Cases referred to:

- (1) *Strong v. Bird*, (1874), L.R. 18 Eq. 315; 43 L.J.Ch. 814; 30 L.T. 745; 25 Digest 538, 268.
- (2) *Re James*, [1935] Ch. 449; 104 L.J.Ch. 247; 153 L.T. 277; Digest Supp.
- (3) *Re Pink*, [1912] 2 Ch. 528; 81 L.J.Ch. 753; 107 L.T. 241; 25 Digest 539, 270.
- (4) *Welton v. Saffery*, [1897] A.C. 299; 66 L.J.Ch. 362; 76 L.T. 505; 10 Digest 958, 6565.

(5) *Re Flavell*, (1883), 25 Ch.D. 89; 53 L.J.Ch. 185; 49 L.T. 690; 43 Digest 837, 2835.

(6) *Re Davies*, [1892] 3 Ch. 63; 61 L.J.Ch. 595; 67 L.T. 548; 25 Digest 312, 170.

ADJOURNED SUMMONS to determine the beneficial ownership of shares in a private company, and, in particular, to determine the validity of a provision in the articles of association of the company under which the shares of a deceased director were to be transmitted on death to the director's widow. HARMAN, J., held that the article was invalid as being contrary to the Companies Act, 1929, s. 63, and that the shares devolved under the deceased director's intestacy. The facts appear in the judgment.

Lightman for the plaintiff, one of the personal representatives of C.A.G., and a child of C.A.G.'s first marriage.

Lindner for the first defendant, the widow of C.A.G., who was also a personal representative of C.A.G., and for the fourth defendant, the company, and the directors of the company and their wives.

Parbury for the second defendant, a child of C.A.G.'s first marriage.

E. J. T. G. Bagshawe for the third defendant, the child of the second marriage.

Cur. adv. vult.

Dec. 7. HARMAN, J., read the following judgment. Charles Alfred Greene, with whose affairs this summons is concerned, died on Jan. 20, 1945, intestate, leaving a widow, the first defendant, who was his second wife, and three children, namely, the plaintiff and the second defendant (children of his first wife) and the infant defendant, the only child of his second wife. These four persons are, therefore, between them entitled to the estate. He was the registered holder at his death of 949 "A" shares and 1 "B" share in a company, known as Faulkner, Greene & Co., Ltd. This company had been formed in 1934 by the intestate and the defendant, Reginald James Faulkner, with the object of taking over, as it did, a glass merchants' business, theretofore carried on in partnership by the intestate and Mr. Faulkner at 99, Red Cross Street, Borough, S.E. The share capital of the company was, and still is, £3,500, divided into 3,495 "A" shares and 5 "B" shares, all of £1 each. There is not any difference in the rights conferred by the "A" and the "B" shares. Formerly the holding of a "B" share was the necessary qualification of a director, but that was altered in 1943, since which time the holding of one share of either class is a good qualification for office. Other directors of and shareholders in the company whose interests may be affected by the question here to be determined are the defendants, Spreckley and James, and the remaining defendants are the wives of the defendants, Faulkner, Spreckley and James respectively.

The company was, and is, a private company and has articles adapting Table A of the Companies Act, 1929. Special article No. 7 provides that no person shall be recognised by the company as holding any share on any trust, and the company is not bound to recognise any equitable interest in any share or any other rights in respect of it except an absolute right in the registered holder. Special article No. 8 is of a usual character, giving members prior rights to purchase any shares which another member wishes to transfer. Clause 20 of Table A of the Companies Act, 1929, provides: "The legal personal representatives of a deceased sole holder of a share shall be the only persons recognised by the company as having any title to the share."

In 1942 a Mr. Purser, then a director of the company, died leaving his shares to his daughter, and this event led to a discussion between the surviving corporators, namely, the intestate and the defendants, James, Faulkner, and Spreckley, and the company's minute book bears the following record of a board meeting on May 27, 1942:

"It was proposed by Mr. Faulkner that the articles of association be

altered to provide that, in the event of the death of any of the present board of directors, the shares held in their name shall be automatically transferred to their wives and that the wife or wives shall be automatically and immediately appointed to the board of directors and receive the same benefits as the other directors. This proposal was unanimously approved and agreed upon, and Mr. Faulkner instructed to call upon the company's solicitors and have the articles of association altered to embrace this decision."

A As a result, apparently, of this proposal, a special resolution was passed at an extraordinary general meeting held on Aug. 20, 1942, in the following terms:

"That the articles of association of the company be altered as follows:—

(1) by adding to art. 8 the following sub-clause to be numbered (f), namely:—(f) Provided that sub-cl. (a) to (e) (inclusive) of this clause shall not apply in the case of a transfer or transmission of the share or shares of any male member of the present board of directors, that is to say, Reginald James Faulkner, Charles Alfred Greene, Harold Magnus James and John Stanley Spreckley, arising upon the death of any such director if such director leaves a wife him surviving, in which event the share or shares of such deceased director shall, notwithstanding any provision or direction made by such director in his lifetime as to the disposition of such share or shares upon his death to the contrary, be deemed to have passed upon the death of such director to such deceased director's wife and such wife shall be the only person recognised by the company as having any title to the share or shares and shall forthwith be registered as the holder of such share or shares in place of such deceased director, and cls. 17, 18, 20 and 21 of Table A in the Companies Act, 1929, sched. I, shall not apply to the transfer or transmission of shares arising under this sub-cl. (f) in so far as they are not consistent with the provisions of this said sub-cl. (f)."

E On the death of the intestate it was resolved at a board meeting held on Feb. 15, 1945, that the intestate's widow, the first defendant, should be registered forthwith as the holder of the shares held by her husband. This was carried into effect, and she has been since, and is now, the registered holder of these shares, and claims to be the beneficial owner of them. The first question which arises is as to the validity of the article introduced by the special resolution of Aug. 20, 1942. Is it competent to a company by an article in this form to by-pass, so to speak, the personal representatives of a deceased holder of shares and to put them direct into the name of his widow? F In my judgment, it is not. Such an article is contrary to s. 63 of the Companies Act, 1929, (now s. 75 of the Companies Act, 1948) which provides:

"Notwithstanding anything in the articles of a company, it shall not be lawful for the company to register a transfer of shares in or debentures of the company unless a proper instrument of transfer has been delivered to the company: Provided that nothing in this section shall prejudice any power of the company to register as shareholder or debenture holder any person to whom the right to any shares in or debentures of the company has been transmitted by operation of law."

G I believe that the primary object of a section in this form, which first appeared H in the Act of 1928, was to scotch the then prevalent practice of providing for the oral transfer of shares to the great detriment of the Revenue, but, in my judgment, it applies to this or a similar case, for no proper instrument of transfer has been delivered, nor has the right to the shares been transmitted to the widow by operation of law. In my judgment, therefore, the registration of the widow was wrong and the register ought to be rectified accordingly by registering the shares in the joint names of the personal representatives, who are the plaintiff and the first defendant.

So far as the company is concerned, there is an end of the matter, for it is not bound to recognise any equitable interest. The first defendant, nevertheless, claims that, as between herself and the other beneficiaries under the intestacy, she is beneficially entitled to the shares, and to this claim I must now turn. The widow puts her claim in three ways. First, she says that there was an imperfect gift to her of the shares which was perfected when she obtained a grant of administration to the donor's estate on the principle of *Strong v. Bird* (1) as extended by *Re James* (2). I can deal shortly with this. There was, in my judgment, no gift at all here. The intestate remained throughout his life completely free to deal with the shares, and his marriage to the first defendant might have come to an end and he might have re-married, in which case she would clearly not be the person having any claim on them. Secondly, it is said that by the resolutions passed in 1942 a trust was created in favour of the first defendant. I cannot see that there was any trust here. Presumably, it must have been created by something tantamount to a declaration whereby the intestate constituted himself a trustee for someone. I have already pointed out that the shares in his hands during his lifetime were in no way bound, and that the first defendant might not have been his widow at his death. If it be said that this was a trust to take effect on the intestate's death in favour of such person (if any) as should then be his widow in respect of such shares (if any) as he should then hold, this was an attempt to make a gift in a way which can only be effected by a testamentary document: compare *Re Pink* (3) ([1912] 2 Ch. 536); and of such there is no trace here. Thirdly, the widow seeks to rest her claim on a contract and she points first to the Companies Act, 1929, s. 20, whereby the articles constitute a contract between the members. The answer to this is that such a contract could only be enforced by or through the company: *Welton v. Saffery* (4) ([1897] A.C. 315); and an article which is, as I have held, *ultra vires* the company clearly cannot be so enforced.

Next, it is said that the resolutions, or one of them, constituted a contract between the intestate and the defendants, Faulkner, Spreckley and James, that each of them would, in consideration of a reciprocal promise by the others of them, dispose of his shares (if he had any at his death) in favour of his widow (if he left one), and that this is a contract of which specific performance might be decreed. I do not find that there was any such contract, in fact, nor could the widow, who was no party to it, enforce it if there were. In truth, these four persons wished to benefit their respective wives, and were, apparently, advised that they could do so by means of the alteration of the articles which they in fact carried out. That alteration was ineffective, and it follows that their intentions were frustrated, but sympathy for the widow cannot induce the court to invent a contract which no one had a mind to make. I was pressed with two decisions—*Re Flavell* (5) and *Re Davies* (6)—which, it was said, showed that a man can by contract made in his lifetime create an obligation which will be enforced against his estate (at any rate, by his creditors, and, apparently, also by beneficiaries) by means of declaring his representatives trustees for the persons for whose benefit the contract was entered into. Each of those cases, however, concerns something which was not the testator's property in his lifetime, and it seems to me that they have no application to that which, till the moment of his death, was the dead man's absolute and unfettered property.

I, therefore, hold that these shares form part of the intestate's estate beneficially as well as legally and must devolve accordingly.

Order accordingly. Costs of all parties as between solicitor and client out of the estate.

Solicitors: *Tucker, Turner & Co.* (for the plaintiff and the second and third defendants); *Davidson, Doughty & Co.* (for the remaining defendants).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

GREEK GOVERNMENT v. MINISTER OF TRANSPORT. THE ILISSOS.

[COURT OF APPEAL (Bucknill, Cohen and Singleton, L.J.J.), December 8, 9, 1948.]

Charterparty—Time charter—Payment of hire—Suspension of hire clause—Hire not payable in respect of time lost owing to “deficiency of men . . . or other accident”—Refusal of officers and men to sail during war except in convoy.

A A clause in the charterparty of a ship, hired under a time charter, provided: “In the event of dry-docking or other necessary measures to maintain the efficiency of the vessel, deficiency of men or owners’ stores, breakdown of machinery, damage to hull or other accident, either hindering or preventing the working of the vessel and continuing for more than 24 consecutive hours, no hire to be paid in respect of any time lost thereby during the period in which the vessel is unable to perform the service immediately required.” An addendum to the clause, with a sidenote, “Deficiency of crew,” provided that “in the event of loss of time due solely to inability to get or to complete a crew,” full hire would be paid for the first 72 hours of such loss of time, and in certain cases, half hire for the next 72 hours. When the ship was due to sail from Newcastle, Australia, on Dec. 16, 1943, she was delayed for a week owing to the refusal of her officers and crew to sail except in convoy, and she was thus unable to perform the service immediately required, although numerically there was a full complement of officers and crew. The charterer contended that the delay was due to “deficiency of men” or “other accident” within the meaning of the suspension of hire clause, and that, therefore, he was not liable to pay hire for that period, or that the addendum applied and he was not liable to pay in full.

HELD: (i) the words “deficiency of men” in the suspension of hire clause meant numerical insufficiency and not deficiency of willingness in men to work.

(ii) the wilful refusal of the officers and crew to sail except in convoy was not an “accident” within the meaning of the clause.

Decision of SELLERS, J. ([1948] 1 All E.R. 904), affirmed.

[AS TO PAYMENT OF HIRE UNDER TIME CHARTER, see HALSBURY, Hailsham Edn., Vol. 30, pp. 308-312, para. 500; and FOR CASES, see DIGEST, Vol. 41, pp. 357-363, Nos. 2060-2106.]

Cases referred to:

- (1) *Mendl & Co. v. Ropner & Co.*, [1913] 1 K.B. 27; 82 L.J.K.B. 75; *sub nom. Meral & Co. v. Ropner & Co.*, 107 L.T. 699; 41 Digest 431, 2708.
- (2) *Radcliffe & Co. v. Compagnie Generale Transatlantique*, (1918), 24 Com. Cas. 40; 41 Digest 361, 2096.
- (3) *Burton v. English*, (1883), 12 Q.B.D. 218; 53 L.J.Q.B. 133; 49 L.T. 768; 41 Digest 596, 4218.

APPEAL by the charterer from a judgment of SELLERS, J., dated Apr. 23, 1948, (reported [1948] 1 All E.R. 904) on a Special Case stated by an arbitrator under the Arbitration Acts, 1889-1934. The Greek Government, as disponent owners of the ship *Ilissos*, claimed from the charterer, the Minister of Transport, hire for the vessel under a time charter for the period Dec. 16 to Dec. 23, 1943, while the vessel was detained at Newcastle, Australia, because the officers and crew refused to sail except in convoy. The charterer claimed that under a suspension of hire clause in the charterparty he was relieved from his obligation to pay hire during that period because the inability to sail was due to a “deficiency of men . . . or other accident” within the meaning of the charterparty, and he counterclaimed to recover a sum paid by him as

hire. The arbitrator made his award in favour of the owners, and was upheld by SELLERS, J., and by the Court of Appeal. The facts appear in the judgment of BUCKNILL, L.J.

E. W. Roskill for the charterer.

Sir Robert Aske, K.C., and *Mocatta* for the shipowners.

BUCKNILL, L.J. : The point raised is one very simple to state. It is : what is the meaning to be attached to the words "deficiency of men or owners' stores" in a charterparty which was made on Aug. 29, 1941, between the claimants, the Royal Greek Government, as disponent owners of the steamship *Ilissos*, and the Minister of Transport as charterer. A

The dispute arises in the following circumstances which are set out in para. 2 of the Special Case :

"On Dec. 16, 1943, while the vessel was subject to the charter and was ready to sail from Newcastle, Australia, her officers and crew refused to sail except in convoy, and because of this refusal the vessel remained in Newcastle until, on Dec. 23, 1943, the officers and crew agreed to proceed without convoy. There was at all material times a full complement numerically of officers and crew, but they were not willing to work, and consequently the vessel was unable to perform the service immediately required." B C

Then the learned arbitrator sets out the details of the times lost. Clause 11A in the charterparty is :

"In the event of drydocking or other necessary measures to maintain the efficiency of the vessel, deficiency of men or owners' stores, breakdown of machinery, damage to hull or other accident, either hindering or preventing the working of the vessel and continuing for more than 24 consecutive hours, no hire to be paid in respect of any time lost thereby during the period in which the vessel is unable to perform the service immediately required." D

The exact period of delay at Newcastle was 6 days, 7 hours, and 32 minutes, and, therefore, if the facts which I have stated amounted to a deficiency of men, then no hire was to be paid by the charterer in respect of that time. Clause 34, the side note of which is "Deficiency of crew," provides : E

"Addendum to cl. 11A. Notwithstanding the provisions of cl. 11A it is agreed that in the event of loss of time due solely to inability to get or to complete a crew (a) full hire will be paid for the first 72 hours of such loss of time and (b) in the event of such loss of time taking place at a port in the United Kingdom or in ports in the British Empire overseas and continuing beyond such 72 hours, half hire will be paid for a further period of 72 hours, but thereafter hire shall cease until the vessel is again ready to resume her service. Owners shall not be entitled to claim hire under this clause more than once during every round voyage or any period of 3 calendar months, whichever period be the shorter." F G

Assuming that I have understood the figures aright, if the owners are entitled to hire under cl. 34, the amount due would be £964 16s. 1d. On the other hand, if neither cl. 11A nor cl. 34 apply, and they are entitled to their full hire, it would amount to £1,353 3s. 7d. H

SELLERS, J., came to the conclusion that the facts did not bring cl. 11A into operation. On that point he said ([1948] 1 All E.R. 906) :

"The inability of officers and men to work through sickness or injury would, in my view, amount to 'deficiency of men' and the clause would apply if the working of the vessel was hindered or prevented thereby, and it would make no difference if the incapacitated members of the crew were in the ship or in hospital on shore. Physical inability to work is

different in quality and character from refusal to work when full capacity to work exists. In my opinion, the provision 'deficiency of men' in the suspension of hire clause is directed to putting the vessel off hire when a complement of officers and crew for working the ship is not available. Here there was no failure in the complement. The complete crew was present in the ship and able to work, but, for the time being, they were unwilling to take the ship to sea, except in convoy. On these facts the learned arbitrator has found that there was not at any material time a 'deficiency of men.' I am of opinion that his decision was right in law."

The question we have to decide is whether that decision of the learned judge is right. Counsel for the charterer, in his careful and interesting argument, has put forward certain cogent reasons to the contrary, but, although at one time I confess that they appeared to me to be very attractive, after hearing counsel for the shipowners and reconsidering the whole matter, I think the learned judge was right. First of all, there is no doubt that the word "deficiency" has a variety of dictionary meanings. The question is what meaning are we to give to the word in this document. I do not think I can do better than cite this passage in SCRUTTON ON CHARTERPARTIES AND BILLS OF LADING, 15th ed., art. 6:

"The construction to be given to charters and bills of lading is not an unnecessarily strict one, but such a one as with reference to the context and the object of the contract will best effectuate the obvious and expressed intent of the parties. They are to be construed according to their sense and meaning, as collected in the first place from the terms used understood in their plain, ordinary and popular sense."

Those words were cited with approval by BRAY, J., in *Mendl & Co. v. Ropner & Co.* (1) ([1913] 1 K.B. 32). BRAY, J., went on to say (*ibid.*):

"Being commercial documents the terms used must be understood in a business and practical sense."

Looking at the words as they stand, and endeavouring to give them a meaning which business men, as ordinary reasonable beings, would give them, I think that "deficiency of men" means deficiency of men and not deficiency of willingness in men to work. There is no doubt that the men on board this ship amounted to a full complement of officers and crew. That is what the owners agreed to provide, and they provided them. By a mere change of mind these men would have been competent at once to work the ship. It was not even as though they were sick. I am not sure that the learned judge is right when he says that sickness might amount to deficiency, but we have not to decide that point because these men were not sick. They were able and competent to do their work, and, therefore, I think, giving the words "deficiency of men" their ordinary sense, the facts in this case do not come within those words.

Then one has to look at the general lay-out, if I may use that expression, of the charterparty. As counsel for the shipowners pointed out, the cardinal rule in interpreting such a charterparty as this is that the charterer will pay hire for the use of the ship unless he can bring himself clearly within an exception. If there is a doubt what the words mean, those words must be read in favour of the owners because the charterers are attempting to cut down the owners' right to hire. In that connection, I attach considerable importance to the words in cl. 34, which I have already quoted. To illustrate the way in which the courts interpret rather strictly against the charterers words of this kind, which cut down the liability to pay hire, one may refer to *Radcliffe & Co. v. Compagnie Generale Transatlantique* (2), where the words concerned were very much like these—"loss of time from deficiency of men or stores." In that case there was a deficiency of men because the gunners

who had to man the guns to protect the ship against enemy submarines were not available. It was said that that amounted to a deficiency of men. BANKES, L.J., said (24 Com. Cas. 44) :

"And as for the alleged deficiency of men, I think it is clear from other clauses in the charterparty that the word 'men' is only intended to include officers, seamen, firemen, or others who would properly constitute part of the crew."

I think the word "men" in cl. 11A must be read as meaning "officers and crew." Clause 34 provides :

"Addendum to cl. 11A. Notwithstanding the provisions of cl. 11A it is agreed that in the event of loss of time due solely to inability to get or to complete a crew full hire will be paid . . ."

I think it is a very fair reading of those two clauses to say that they refer to a deficiency of men "due to inability to get or to complete the crew." In other words, the clauses deal with numbers and not with willingness.

That, I think, disposes of the point. It does not seem helpful to go through all the different clauses in this charterparty. The owners have to appoint officers and pay them their wages. Clause 9 provides that the master is to prosecute all voyages with the utmost despatch and to render customary assistance with the vessel's crew. In dealing with the bills of lading, the charterparty says :

"If the charterer has reason to be dissatisfied with the conduct of the master, officers, or engineers, the owners on receiving particulars of the complaint [undertake] promptly to investigate the matter, and, if necessary, and practicable, to make a change in the appointments."

It does not say that, if the conduct of the master, officers, or engineers causes delay or disuse of the ship, the ship is to come off hire. It seems to me that, if counsel for the charterer was right in his interpretation of this clause, it might well happen that during a voyage war was declared and the crew declined to continue the voyage on the ground that it was dangerous, and that must be taken to be a case of "deficiency of men" although the crew were in the ship and it was only their unwillingness to work which caused delay or loss. One must read these words fairly and not stretch them beyond their plain meaning.

The only other question is whether this is "an accident" within cl. 11A. SELLERS, J., dealt with that matter in this way ([1948] 1 All E.R. 907) :

"The wilful refusal of the officers and crew to sail except in convoy does not appear to me to have any element of 'accident.' It is not an accident and it in no way resembles any of the other enumerated events which would serve to put the vessel off hire."

I agree with that so completely that I do not think there is anything I need add. For these reasons, in my opinion, this appeal should be dismissed.

COHEN, L.J. : I am of the same opinion. Despite the able and ingenious argument of counsel for the charterer. I agree with the learned judge that in the context in which it appears in this charterparty "deficiency" means numerical insufficiency. Counsel invited us to say that the word imported a qualitative as well as a quantitative element. He cited definitions from the OXFORD DICTIONARY which show that the meaning he argued for is a possible meaning of the word, but I agree with counsel for the shipowners that "deficiency" is normally used in contrast to "sufficiency" and that, if it were desired to introduce the qualitative element, the natural contrast would be between efficiency and inefficiency. I think I should have come to this conclusion from the consideration of cl. 11A by itself, but, in my opinion, that view is reinforced by a reference to cl. 34, where the side note to the clause is "Deficiency of crew," and the operative words, so far as material, are :

"Addendum to cl. 11A. Notwithstanding the provisions of cl. 11A it is agreed that in the event of loss of time due solely to inability to get or to complete a crew (a) full hire will be paid for the first 72 hours of such loss of time . . ."

I think the natural meaning of the words in the body of the clause suggests that the clause is dealing only with numerical deficiency in the numbers of the crew. Reading it with the marginal note, it seems to me to throw light on the sense in which the word "deficiency" is used in this charterparty. Be it remembered that the clause is described as "Addendum to cl. 11A." I cannot believe that "deficiency of crew" in the marginal note to cl. 34 is used in a different sense to "deficiency of men" in cl. 11A. I will add that, if there is an ambiguity, the ambiguity appears in an exceptions clause, and the charterer must show that he is clearly within the exceptions clause. I think the passages in *Burton v. English* (3), to which counsel for the shipowners referred, are in point. The first passage is from the judgment of BRETT, M.R., where with regard to a clause in a charterparty that "the steamer shall be provided with a deck load required at full freight, but at merchant's risk," he said (12 Q.B.D. 220):

"The stipulation is in favour of the shipowners, and is in restriction of their liability under their contract to carry. The general rule is that where there is any doubt as to the construction of any stipulation in a contract, one ought to construe it strictly against the party in whose favour it has been made."

Finally, at the end of the judgment of BOWEN, L.J., appears this passage (*ibid.*, 224):

"But still, what is the sound principle to apply? Why, it is that those who wish to make exceptions in their own favour, and by which they are to be relieved from the ordinary laws of the sea, ought to do so in clear words; and on that principle I think this case ought to be decided, and my judgment goes upon the basis that the terms used here are not clear enough to absolve the shipowners."

That being so, in my opinion, the first argument of counsel for the charterer fails.

So far as the alternative argument based on the words "or other accident" is concerned, I do not desire to add anything to the observations of the learned judge in the court below which have been approved by BUCKNILL, L.J. In conclusion, I would only add this. Supposing I had been prepared to accept the argument that "deficiency of men" contained the qualitative element which counsel desires to import into it, as well as a quantitative element, I should still have felt a difficulty in giving a different effect to a somewhat similar phrase, "Deficiency of crew", in the marginal note to cl. 34. I think it would then have been necessary to have read cl. 34 as if after the word "crew" appears the words "willing to act."

SINGLETON L.J.: I agree that this appeal should be dismissed, and I do not wish to add anything to that which has been said by my Lords.

Appeal dismissed with costs.

Solicitors: *Treasury Solicitor* (for the Minister of Transport, the charterer); *Holman, Fenwick & Willan* (for the Royal Greek Government, the shipowners).

[Reported by C. N. BEATTIE, Esq., Barrister-at-Law.]

KAIN v. NORFOLK AND ANOTHER.

[CHANCERY DIVISION (Jenkins, J.), December 7, 8, 1948.]

Easement—Right of way—Right “to go pass and re-pass” over way “at all times hereafter with or without horses carts and agricultural machines”—Grant made in 1919—Use of road by 3-ton motor lorries.

Easement—Right to take water from pond—Right of owner of pond to clean pond.

By a conveyance, dated Feb. 13, 1919, N., the purchaser, was granted rights of way and water over adjoining land retained by the vendor, in the following terms: “a right . . . at all times hereafter with or without horses carts and agricultural machines and implements to go pass and re-pass over and along” a certain strip of land leading from the dominant tenement to the highway, “and also to take water from and to water horses sheep and cattle at the pond . . . but the vendor does not guarantee a supply of water in the . . . pond.” At the time of the grant the dominant tenement was mainly agricultural land. By a conveyance, dated May 10, 1945, the servient tenement was sold to K., subject to N.’s rights of way and water. In September, 1946, K. removed a wall of the pond in order to clean it, as it was silted up and full of rubbish, and he failed to replace the wall until after writ issued. On Apr. 26, 1947, N. sold to E.B., Ltd., a large quantity of sand on his land, and to remove this sand E.B., Ltd., employed convoys of 6 to 8 three-ton motor lorries which passed daily up and down the way which was the subject of the grant. In an action brought by K. against N. and E.B., Ltd., it was contended by K. that the use of the way by motor lorries was an excessive user. In a counter-claim by N. it was contended that K. had interfered with N.’s easement of water by wrongfully draining the pond:—

HELD: (i) on the true construction of the grant of the right of way, a “cart” was a vehicle adapted to carry materials and goods and the particular mode of propulsion of the cart was immaterial, and, therefore, no excessive user of the way was involved in its use by E.B., Ltd., as licensees of K., as a way for carting sand from the dominant tenement by means of motor lorries.

A.-G. v. Hodgson ([1922] 2 Ch. 429; 127 L.T. 329), *applied*.

(ii) as the owner of the pond, K. was entitled to drain and clean it, but he was at fault in not replacing the wall after the pond had been cleaned.

[AS TO RIGHT OF WAY UNDER EXPRESS GRANT, see HALSBURY, Hails-ham Edn., Vol. 11, pp. 324-326, paras. 575-577; and FOR CASES, see DIGEST, Vol. 19, pp. 107-109, Nos. 683-688.]

Cases referred to:

- (1) *White v. Grand Hotel, Eastbourne, Ltd.*, [1913] 1 Ch. 113; *affd.*, (1913), 84 L.J.Ch. 938; 110 L.T. 209; 19 Digest 114, 738.
- (2) *Taylor v. Goodwin*, (1879), 4 Q.B.D. 228; 48 L.J.M.C. 104; 40 L.T. 458; 43 J.P. 653; 26 Digest 438, 1553.
- (3) *Danby v. Hunter*, (1879), 5 Q.B.D. 20; 49 L.J.M.C. 15; 41 L.T. 622; 44 J.P. 283; 26 Digest 438, 1554.
- (4) *A.-G. v. Hodgson*, [1922] 2 Ch. 429; 91 L.J.Ch. 426; 127 L.T. 329; 87 J.P. 121; 36 Digest 250, 30.
- (5) *Re Hall*, (1912), 107 L.T. 196; 44 Digest 736, 5905.
- (6) *Re Ashburnham*, (1912), 107 L.T. 601; 44 Digest, 648, 4875.
- (7) *Re White*, [1916] 1 Ch. 172; 85 L.J.Ch. 368; 114 L.T. 353; 44 Digest 714, 5625.
- (8) *Re Fortlage*, (1916), 60 Sol. Jo. 527; 44 Digest 735, 5900.
- (9) *Lock v. Abercester, Ltd.*, [1939] 3 All E.R. 562; [1939] Ch. 861; 108 L.J.Ch. 328; 161 L.T. 264; Digest Supp.

(10) *Cannon v. Villars*, (1878), 8 Ch.D. 415; 47 L.J.Ch. 597; 38 L.T. 939; 42 J.P. 516; 19 Digest 108, 685.

ACTION by the owner of a servient tenement alleging excessive user of a right of way by the owner of the dominant tenement and his licensees.

By an express grant the dominant owner had the right to use a certain way "with or without horses carts and agricultural machines," and the servient owner contended that the user of the way by 3-ton motor lorries was in excess of the terms of the grant. The dominant owner brought a counterclaim alleging that the servient owner had interfered with an easement of water to which the dominant owner was entitled. JENKINS, J., held (a) that there had been no excessive user of the right of way, and (b) that the dominant owner was entitled to nominal damages on the counterclaim. The facts appear in the judgment.

Lightman for the plaintiff (the servient owner).

Milner Holland, K.C., and *Morgan Blake* for the defendants (the dominant owner and his licensees).

JENKINS, J.: The plaintiff, Mr. Colin Howell Kain, is the owner of a house, outbuildings and garden grounds known as the Old Rectory, Bradwell, in Essex. The first defendant, Mr. Albert Arthur Norfolk, owns adjoining land amounting in area to some 30 acres. The whole of the land, *i.e.*, the plaintiff's and the first defendant's land, was formerly comprised in the rectory and glebe land of the parish, and they both derived title from the rector for the time being on the respective dates of the conveyances to them. The action concerns the alleged excessive user by the first defendant and by the second defendants, E. Baker (Hauliers), Ltd., as the first defendant's licensees, of a right of way to which the first defendant is admittedly entitled by express grant under the conveyance to him. The right of way is granted in terms to which I shall have to refer presently, and it is said that on the facts the user complained of was in excess of the terms of the grant. In addition to the road-way alleged to be excessively used, there is on the plaintiff's land a pond, and the conveyance to the first defendant gave him a right to take water from, and to water his beasts at, the pond. There is a counterclaim by the first defendant that the plaintiff has interfered with that easement of water.

The conveyance of the first defendant's property to him contains the grants of the rights in dispute and the case must turn very largely on the construction of the material parts of it. It is a conveyance dated Feb. 13, 1919, made by the then rector of the first part, the Ecclesiastical Commissioners of the second part, the patron of the living of the third part, and the first defendant of the fourth part, of:

"All those pieces or parcels of land (part of the glebe lands belonging to the said benefice) with the barn yards stable sheds and out buildings thereto belonging situate in the parish of Bradwell aforesaid, and containing by admeasurement 31 acres 2 roods 22 perches or thereabouts and now in the tenure or occupation of Hugh Webster which said hereditaments are more particularly described in the schedule hereunder written and for the better identification thereof delineated with the dimensions and abutments thereof on the plan drawn hereon and thereon coloured pink and green."

In the schedule the parcels are set out, with their respective quantities totalling the 31 acres, 2 roods and 22 perches, and consisting of various acreages of arable land, some plantation and some pasture, and some buildings and yards, the character of the buildings being, according to the schedule description of them, clearly agricultural. Then comes the grant of the right of way which has given rise to this litigation:

"Together with a right for the purchaser his heirs executors and assigns

and his and their tenants being owners or occupiers of the hereditament hereby conveyed at all times hereafter with or without horses carts and agricultural machines and implements to go pass and re-pass over and along the strip of land near the said rectory to and from the hereditaments hereby conveyed from and to the highway there which strip of land is delineated upon the said plan and therein coloured yellow upon contributing a fair proportion towards the upkeep and maintenance of the roadway upon the said strip of land."

A

Immediately after that grant comes the grant of the right of water, which is the subject of the counterclaim and is in these terms :

"And also to take water from and to water horses sheep and cattle at the pond also delineated upon the said plan and therein marked 'pond' and coloured blue but the vendor does not guarantee a supply of water in the said pond."

B

It will be convenient if I refer also at this stage to certain rights of way which were excepted and reserved to the vendor as the form of those excepted rights has been relied on as throwing some light on the scope to be attributed to the right of way granted. Those exceptions are : "Except and reserved to the vendor and his successors" and so on, certain pieces of ground :

C

"And also a right for the vendor and his successors and his and their tenants being owners or occupiers of the said rectory at all times hereafter without horses carriages or carts to go pass and re-pass over the footpath lying between the points marked with the letters A and B upon the said plan and thereon coloured green and also with or without horses carts and carriages to go pass and re-pass over and along the strips of land lying between the points marked with the letters A, C, and D upon the said plan to and from the said coachhouse and garden from and to the said rectory which strips of land are delineated upon the said plan and therein also coloured green."

D

It is to be noted that, in these excepted rights of way, in the one case the way is to be "without horses carriages or carts" and, in the other case, it is to be "with or without horses carts and carriages," whereas the expression used in the granted right of way is "with or without horses carts and agricultural machines and implements," there being no reference to carriages.

E

In 1919, or shortly thereafter, the first defendant put his land down mainly to grass, and it was used for grazing until about 1939, when, I assume, owing to the war and the consequent change in agricultural policy, most of it was ploughed up. After it was ploughed, the pond ceased to be of such great interest as it had been while the land was used for pasture. In 1937 the first defendant leased the right to take sand and gravel from the property to a company, called Alresford Sand and Ballast Co., for a period of 7 years, expiring, therefore, in 1944. That company seems to have carried on its business on a large scale and it made very considerable excavations on the first defendant's property and carried away the gravel and sand. At the end of the term there was on the first defendant's property a large quantity of sand which had been won by Alresford Sand and Ballast Co., Ltd., but not carried away by them. The first defendant bought that sand from Alresford Sand and Ballast Co., and from 1945 or so onwards he sold it to purchasers who came and took it away in vehicles. On Apr. 26, 1947, the first defendant sold the rest of the sand on the ground to E. Baker (Hauliers), Ltd., the second defendants, and it is really the user of the way by the second defendants which has given rise to the present action.

F

G

H

The plaintiff first came to the Old Rectory in 1943, or thereabouts, as a tenant. He decided to buy the property and it was conveyed to him by a conveyance dated May 10, 1945. I do not think I need refer to anything in

that conveyance in detail except to say that there were these exceptions corresponding to the rights of way and water which had been granted in the first conveyance to the first defendant, subject to the right of the first defendant :

A “ . . . his heirs executors administrators and assigns . . . being owners or occupiers of the adjoining property on the west side of the property hereby conveyed (a) at all times with or without horses carts and agricultural machines and implements to go pass and re-pass to and from the said adjoining property over and along the strip of land delineated on the said plan and thereon coloured yellow upon the said Albert Arthur Norfolk his heirs executors administrators and assigns contributing a fair proportion towards the upkeep and maintenance of the roadway upon the said strip of land (b) to take water from and to water horses sheep and cattle at the pond also delineated upon the said plan and thereon marked ‘pond’ and coloured blue.”

B It will be seen, therefore, that the plaintiff first came on the scene as tenant when Alresford Sand and Ballast Co.’s lease was nearing an end, and it had come to an end the year before he actually bought the property. He said in C his evidence that following the termination of that lease, various vehicles came to take sand, but there was no user of the way in question of which he felt inclined to complain until the second defendants began to take away the rest of the sand. The user by the second defendants, *i.e.*, the user of which he complains, amounted to what he described as a convoy of four, six or eight lorries coming every day including Sundays. His evidence on this point is not in dispute. D An agreed plan has been prepared showing the relative positions of the plaintiff’s and the first defendant’s property, and that shows the way in yellow. It runs from the southern end of the eastern boundary of the first defendant’s land over the plaintiff’s land, skirting the pond. The pond lies between the way and the southern boundary of the plaintiff’s property. The way goes past the pond, which is immediately to the south of it, and joins the drive going up to the rectory door. That drive runs northwestward to the Old Rectory house. E After that junction the way takes a turn to the southeast and so into the road. The inconvenience to the plaintiff of the use of this way by lorries is increased by the fact that the way joins the drive to the Old Rectory, so that the first part of the way proceeding from the main road is the plaintiff’s approach to his house. He has young children, and he says that the risk of there being F lorries coming along this road is a source of anxiety. He also says that the lorries wear the road and make pot holes on it, and it becomes rough and disagreeable to go over, especially with children. I mention those matters because at one stage it was suggested on behalf of the defendants that the plaintiff’s objection to the user of the way by these three-ton sand lorries had something fanciful about it. I do not agree. I see nothing unreasonable in G the plaintiff wishing to prevent the use of this way by three-ton lorries if he is entitled to prevent it. There is no doubt that the use of the road by lorries of this size imposes a larger burden on the plaintiff’s property than would be imposed if, as the plaintiff contends, the use of the way is limited to horse-drawn vehicles as opposed to motor vehicles.

H I have now stated all the relevant facts with regard to the claim which relates simply to the question of the scope of this right of way. It is a right of way depending on an express grant and, therefore, its extent in the modes of user it permits must be determined by the construction of the document granting it, *i.e.*, the conveyance of 1919 to the first defendant. The document must, of course, be construed in the light of the surrounding circumstances. Counsel for the plaintiff relies on the fact that at the date of the grant the dominant tenement, *i.e.*, the land conveyed to the first defendant, was agricultural land. That is a circumstance which it is perfectly legitimate to

take into account. He does not contend that one may infer from the fact that the dominant tenement was then agricultural land a limitation of the user to purposes connected with the use of the dominant tenement as agricultural land. He expressly disclaimed that contention, and, in my view, he was right in doing so having regard to the law as laid down in *White v. Grand Hotel, Eastbourne, Ltd.* (1), the headnote to which states :

"A right of way granted for general purposes is not to be restricted to access to the land merely for such purposes as were reasonably required at the date of the grant ; therefore a right of way for general purposes to a private dwelling-house is not affected by the house being turned into a hotel." A

But, says counsel for the plaintiff, the mode in which the dominant tenement was used at the date of the grant is a matter to be taken into account in resolving any doubt as to the modes of user permitted. He says that, bearing in mind that the land was agricultural land, a right to pass "with or without horses carts and agricultural machines and implements" should be construed as meaning horse-drawn carts of the kind one expects to see going up and down a farm road and agricultural machines and implements. He uses the character of the dominant tenement as an aid to the construction of the mode of user, but his main argument turns on the meaning of the word "carts." He says with force that by a "cart" anyone means a handcart or a cart drawn by a horse or by some kind of draught animal. No one, he says, has ever heard of a "motor cart," and he submits that his contention that "cart" was used in the ordinary sense is reinforced by the circumstance that the land at the time was agricultural land. He contrasts with the word "carts" the word "carriages," which twice appears in the excepted rights of way. He says that "carriage" is a far wider word, and he has cited to me *Taylor v. Goodwin* (2) as authority for the proposition that even a bicycle is a carriage. In contrast to that he has referred me to *Danby v. Hunter* (3) which related to the use of a cart on the highway without the owner's name being painted thereon, as required by the Highway Act, 1835, s. 76. The cart in question was a light spring cart with two wheels, and it was : B C D E

"Held, that the 'cart or carriage' contemplated by the Highway Act, 1835, s. 76, was 'ejusdem generis' with a waggon, and that this was not such a cart, and that the magistrates were therefore right."

That case is far removed from the present case, as, indeed, is *Taylor v. Goodwin* (2), but it illustrates the proposition that "cart" is a word with a more restricted meaning than carriage. Counsel for the plaintiff further relied strongly on the one particular surrounding circumstance, if one may so term it, viz., the date of the conveyance to the first defendant being Feb. 13, 1919. He said that at that date motor transport was in general use and everyone knew about it, and he urged me to hold that it is impossible when one is considering a deed dated in 1919 to regard such an expression as "with or without horses carts and agricultural machines and implements" as including motor lorries, because, if the grantor had had motor lorries in mind, he would have expressly mentioned them. F G

By way of contrast, counsel for the plaintiff referred me to *A.-G. v. Hodgson* (4) where it was considered whether a right of carriage, horse and footway through a certain park, such right having been granted between 1853 and 1861, extended to motor cars. The decision was : H

"... that the right of carriage way was not restricted to carriages impelled by any particular kind of traction, and that a motor car was within the meaning of the grant . . ."

PETERSON, J., in his judgment, said ([1922] 2 Ch. 437) :

A “The plaintiffs’ first contention was that the conveyance to Mr. Milnes did not grant a right of way for motor vehicles; that the right was confined to carriages to which was applied the kind of traction known in 1861. In support of this argument reference was made to various cases, such as *Re Hall* (5); *Re Ashburnham* (6); *Re White* (7) and *Re Fort-lage* (8). These were cases in which the court in construing wills came to the conclusion that, having regard to the context, the word ‘carriage’ did not include a motor car. But authorities of this kind have not any bearing on the present case. The question which I have to consider is what is meant by a carriage way in the conveyance of 1861. The right which was granted was a right to pass along the roads on foot or on horse or in carriages. There is not, I think, anything in the deed which shows that the right of carriage way is restricted to carriages which are impelled by any particular kind of traction; nor is there in my opinion any ground for saying that the word ‘carriage’ ought to be restricted to a carriage drawn by horses. A motor car, is, I think, a carriage within the meaning of this grant.”

C Counsel for the plaintiff sought to distinguish that decision on the following grounds: (i) that “carriage” is a far wider word than “cart” and a motor car can be properly called a carriage, *i.e.*, a “motor carriage”; (ii) that the document there in question was dated long before the date of motor cars; and (iii) that the learned judge was there considering what was called a right of carriage way, which might well be a different thing from a right of passing or re-passing with or without a carriage, and, certainly, an entirely different thing from a right of passing or re-passing with or without a cart.

D Counsel for the plaintiff also cited *Lock v. Abercester, Ltd.* (9) in which BENNETT, J., had to consider the fact of the change over from horse to mechanical transport in a case of a way claimed by prescription. The headnote is:

E “Where proof is given of the user of a way by carriages drawn by horses for the required period, so as to establish the right to an easement for a carriage-way, the right so acquired is one which enables the owner of the dominant tenement to use the way with mechanically propelled vehicles.”

F It does not seem to me that that decision has any bearing on the present case, as in the present case one has to find out what the meaning is of the words of an express grant of a right of way exercisable in certain modes. The decision to the effect that user by horse-drawn carriages prescribes for use by mechanical transport, in my view, does not throw any light on this matter. On the other hand, counsel for the defendants says that this is a right of way for all purposes. He says, and I think he is supported by authority, that a right to the grantee of property “at all times hereafter” “to go pass and re-pass over and along” a certain way, without any reference to horses, carriages, carts or anything else, will, *per se*, unelaborated as it is, give a right of way for all purposes, *i.e.*, a right to pass with vehicles as well as on foot, provided that the way to which the grant refers is a way suitable at the date of the grant for use by vehicles. I think that accords with the statement of the law contained in the judgment of SIR GEORGE JESSEL, M.R., in *Cannon v. Villars* (10). Therefore, says counsel for the defendants, one starts with that which would be sufficient in itself to give a right of way for all purposes, but superadded to that are certain explanatory notes, “with or without horses carts and agricultural machines and implements.” That, according to the argument, is intended, not to limit the general right, but merely to illustrate, not necessarily exhaustively, the various modes whereby it is contemplated that the right may be exercised. Counsel for the defendants accepts the difference between the particular modes mentioned in the grant of the way and the particular modes mentioned in the reservation of ways by saying that in the former case the land was at the date of the grant agricultural, and, therefore

horses, carts, agricultural machines and implements were the kinds of things one would expect to be the typical sort of traffic on it, whereas, on the other hand, the ways under consideration when one comes to the exception are ways connected with a private house where one might expect to find carriages. Counsel for the defendants further contends that, whether his previous contention is right or not, the word "carts" in this context should not be restricted to carts drawn by horses. He admits that the word "cart" is not a word apt in itself to describe a motor vehicle. For some reason or other, although the word "lorry," for instance, which was originally a word descriptive of a certain kind of horse drawn vehicle, was adapted for use in connection with motor vehicles, and for a time the word "carriage" was so used in the old fashioned expression "horseless carriage," the word "cart" has never, if I may use the expression, been mechanised. Counsel for the defendants admits all that, but he says that, nevertheless, in this context one should not construe the reference to carts as excluding, if I may so describe them, carts propelled by mechanical means, or, in other words, either carts drawn behind a separate mechanical tractor or mechanical horse or carts propelled by a power unit carried on their own frame or chassis.

In my judgment, the argument of counsel for the defendants on this point should prevail. It is unnecessary for me to decide that this is a right of way for all purposes. I propose to limit myself to the question whether the use of this way by motor lorries is an excessive user. In my judgment, it is not. I think that a reasonable construction should be placed on this grant, and that it should be construed as meaning that the grantee, his executors, assigns and so forth, and tenants can pass and re-pass over the way either on foot or with vehicles in the nature of carts or with agricultural machines or implements. A cart for this purpose, in my judgment, is primarily a vehicle adapted to carry materials, goods, and so forth, possibly in contradistinction to a vehicle adapted for carrying passengers, and I do not think the particular mode of propulsion of the cart or vehicle is for the present purpose of any materiality. I think I can derive assistance from the passage I have read from the judgment of PETERSON, J., in *A.-G. v. Hodgson* (4). To hold the contrary would, as it seems to me, produce an absurd result which is not to be imputed to the parties. If counsel for the plaintiff is right, the way would be available for a horse-drawn cart or lorry or waggon, however large, but would not be available for a motor van, however small. I cannot impute to the parties the intention of making the mode of propulsion the criterion. I think that what is granted is in substance a right of way including the carting of loads, *i.e.*, including the right of carting things along the way, as well as leading horses along the way, and as well as bringing agricultural implements and machines along the way.

That being the construction I place on the grant, and in view of the admission—in my view, rightly made—by counsel for the plaintiff to the effect that the user of the way was not to be limited to purposes connected with the dominant tenement as agricultural lands, it follows, in my judgment, that no excessive user of the way is involved in its use by the second defendants as licensees of the first defendant as a way for carting sand from the dominant tenement by three-ton lorries, and, that being the excessive user complained of, it follows that the case of excessive user has not been made out, with the result that the action fails and must be dismissed with costs.

That leaves the question of the counterclaim concerning the alleged interference with the first defendant's right to take water from and water horses, sheep and cattle at the pond. The facts about the pond are obscure. There is a conflict of evidence about it. I think there is no doubt that interest was lost in it in 1939 when the bulk of the first defendant's property changed over from pasture to arable. The plaintiff gave evidence that when he came into the property the pond could not really be called a pond. It was silted up and

overgrown with grass and bushes and brambles, and it became a "dump" for rubbish. On the other hand, the first defendant claimed that in 1939, *i.e.*, some years before the plaintiff's first acquaintance with the pond, but still fairly recently, it was a good pond with water lilies in the deep end. The plaintiff's evidence is supported by two neighbours both of whom speak to the silting up of the pond and also to the deposit of refuse in it. The first defendant's evidence was supported by a witness who had occupied the Old Rectory during the winter of 1942-43, and was able by means of the pond to supply one cow with water.

The acts of the plaintiff of which the first defendant complains were of this nature. The pond was fed through a culvert at its western end. It also took and takes, presumably, some surface water off the roadway which skirts it on the northern side, and it shares with everything else such rain as may fall.

The flow in the pond is from the culvert at the west end towards the east. At the east end the water is prevented, or intended to be prevented, from running away by means of a wall, which has been referred to as a retaining wall and is made of brick and backed with a bank of earth. The plaintiff found the pond—quite naturally, having regard to his description of it—a highly unpleasant neighbour. He said that it was not a pond, but a bog, with nothing in it but silt and rubbish, and all overgrown, so he decided to clean it out, and in September, 1946, with that in view he took down a section of the retaining wall at the east end, and dug a trench about 18 ins. deep from end to end of the pond to drain away the water, which was not clear water but a sort of aqueous mud. The effect of those operations was to allow such water as there was in the pond to run away. The plaintiff was then enabled

to clear out the accumulated silt and rubbish and clean the pond. These activities were not unknown to the first defendant, but it was of no importance to him that there should be any water in the pond because at that time he had not got any beasts. Indeed, accepting, as I do, the plaintiff's evidence, I think it is pretty plain that in September, 1946, before the plaintiff started his operations on it, the pond was not suitable for the watering of beasts. I think the cleaning out work which the plaintiff did was quite necessary. As I have said, the first defendant attached no importance to these operations, at that time, having no beasts to water at the pond, but, when the action started or was threatened, he brought up this matter of the pond by way of counterblast to the plaintiff's claim about the right of way, and it was not until after the counterclaim had been delivered that the plaintiff made good the breach which he had made in the retaining wall, so there was a period of something like two years during which the breach remained in the retaining wall and any water coming down into the pond would flow straight through it. In 1948, after the delivery of the counterclaim, the plaintiff repaired the retaining wall. I, therefore, cannot take the view that, as matters stand at present, there is anything of which the first defendant can justly complain so far as the pond is concerned. It will be remembered that the plaintiff's predecessor in title, as vendor to the first defendant, was said in the first defendant's conveyance "not to guarantee a supply of water in the said pond." The plaintiff, therefore, clearly was not obliged to do anything to maintain the supply of water. His obligation was limited, I think, to doing nothing to interfere with the supply of water in the way of active steps by him, as opposed

to mere non-feasance, which would not involve him in any liability. The pond was his pond, on his property, and he could do what he liked with it, provided that he did not interfere with the first defendant's right of taking water. He did nothing wrong, in my judgment, in draining and cleaning the pond. That is a perfectly proper step which the owner of a pond is clearly entitled to take. There is no evidence that when his work on it was finished the pond was any worse for beasts to drink at than it had been immediately before the plaintiff started his work of cleaning it. The only matter on which the plaintiff

may be said to have been technically in fault is that, having made this breach in the retaining wall for his cleaning operations, he did not mend it for two years. There it seems to me that he was in fault, because the first defendant was entitled to have the pond left in being as a pond whether it contained water or not, *i.e.*, the receptacle, if I may so describe it, constituting the pond, was essential to the first defendant's easement, and he was entitled to have it left as a receptacle capable of retaining such water as might flow into it, and it is clear that, so long as the breach in the retaining wall remained, the pond could not hold water, because any water that came into it would flow straight through. The defect not having been remedied until after delivery of the counterclaim, it seems to me that I ought to hold, although I confess with reluctance, that on that matter the first defendant is entitled to recover nominal damages of £2.

In the result, the action is dismissed with costs, and the first defendant will recover on his counterclaim the nominal sum of £2 by way of damages, but without costs.

Action dismissed with costs. Judgment for the defendant on the counterclaim, the defendant to recover nominal damages of £2 without costs.

Solicitors: *Attwater & Liell*, agents for *H. J. Smith*, Braintree (for the plaintiff); *G. Howard & Co.*, agents for *Holmes & Hills*, Braintree (for the defendants).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

RANSOM & LUCK, LTD. v. SURBITON BOROUGH COUNCIL.

[COURT OF APPEAL (Lord Greene, M.R., Somervell, L.J., and Wynn-Parry, J.),
December 13, 14, 15, 16, 1948.]

Town and Country Planning—Interim development agreement between landowners and local authority—Permission to develop land in accordance with specified method—Permission relating to period after planning scheme in force—
A *Revocation of permission for interim development—Town and Country Planning Act, 1932 (c. 48), ss. 10 (3), 34 (1)—Town and Country Planning (Interim Development) Act, 1943 (c. 29), s. 4 (1), (2).*

B The plaintiffs were the owners of certain land in Chessington forming part of the Chessington Hall estate and the defendants were the interim development authority for the area for the purpose of the Town and Country Planning Acts. On May 11, 1934, the Minister of Health, in exercise of powers conferred by s. 10 (5) of the Town and Country Planning Act, 1932, allowed an appeal by the plaintiffs from the refusal of the defendants to grant permission for the development of the land in question under the Town and Country Planning (General Interim Development) Order, 1933, and gave permission for its development in accordance with
C the original lay-out plan or any lay-out plan approved by the defendants or the Minister. In 1938 the defendants had made a planning scheme under the Act of 1932 and submitted it to the Minister, but it had not yet been approved. On May 19, 1939, the plaintiffs entered into two agreements with the council, one known as the development agreement and the other known as the roads and sewers agreement. The development
D agreement was supplemental to and in consideration of the roads and sewers agreement by which the plaintiffs agreed (*inter alia*) to dedicate certain lands to the public for highways, to convey certain other lands to the defendants, and to expend money on the construction of sewers. The development agreement stated that it was intended to be made under s. 34 of the Act of 1932 (which empowers "authorities and owners to enter into agreements restricting use of land") and that it was to be
E scheduled to the defendants' planning scheme. By cl. 3 of the agreement: "The lands described in the first and second parts of sched. I hereto may be used for the purposes mentioned in and subject to the restrictions set out in sched. II hereto and in accordance with the lay-out in plan No. 2 hereto annexed." The schedules and plan provided for the erection on
F the plaintiffs' lands of a limited number of dwelling-houses, shops or business premises, as specified. Clause 4 (a) provided: "Until the scheme shall come into force this agreement shall operate as if the owners . . . had submitted an amended lay-out plan for the approval of the council and the council by this agreement had approved the said plan and had granted permission to the owners . . . to develop by virtue of s. 10 of the Act and the Town and Country Planning (General Interim Development) Order, 1933." Section 10 of the Act of 1932 deals with the interim
G development of land. Pursuant to the development agreement and the roads and sewers agreement, the plaintiffs withdrew objections they had lodged against the defendants' proposed planning scheme which included the Chessington Hall estate, and they dedicated certain lands as public
H highways, conveyed land to the defendants, and expended money on the construction of sewers, but, owing to the outbreak of the war, they were unable to start the development of their land. In January, 1946, the plaintiffs applied to the defendants for permission to proceed with part of the development, but were refused on the ground that the proposed development would contravene the proposals of the Greater London Plan of 1944. By the Town and Country Planning (Interim Development) Act, 1943, s. 4 (1), permissions for interim development may be revoked or modi-

fied by order made with the consent of the Minister, and by s. 4 (2) the Minister may initiate proceedings for the revocation of any permissions. By the Surbiton Town and Country Planning (Interim Development) Direction, dated July 12, 1946, the Minister, under s. 4 (2) of the Act of 1943, directed the council to submit for his consent under s. 4 (1) of the Act, an order revoking the permission granted on May 19, 1939, to the plaintiffs for the development of part of the Chessington Hall estate. The defendants made this order and, on Aug. 8, 1946, wrote to the plaintiffs informing them of the fact. The plaintiffs contended that under the development agreement the defendants had assumed a contractual obligation that they would not at any time thereafter exercise any existing or future statutory powers so as to restrict the development of the plaintiffs' lands to a greater extent than was provided for by the agreement and that the defendants were competent so to limit their powers by virtue of s. 34 of the Act of 1932.

HELD: (i) section 34 (1) of the Act of 1932, which was of very limited application, and only gave power to a local authority to accept restrictions offered to it by a landowner, and, by so doing, to acquire the right to enforce those restrictions against the land as if they had been entered into for the benefit of an adjoining landowner, did not empower the authority to undertake, in consideration of the landowner's submission to restrictions, not to use its planning powers or otherwise to fetter its discretion in respect of powers conferred on it by the Town and Country Planning Acts.

(ii) the development agreement, on its true construction, was nothing more than a permission to develop under s. 10 of the Act of 1932, or as part of the bargain under the express terms of cl. 4 (a) of the agreement, was to be treated as such a permission. Accordingly, there had been no breach of the agreement by the defendants.

A.-G. v. Barnes Corpn. and Ranelagh Club, Ltd., ([1938] 3 All E.R. 711; [1939] Ch. 110; 159 L.T. 305), distinguished.

Decision of ROMER, J. (reported *sub nom. Chessington Development Co., Ltd. v. Surbiton Borough Council* ([1948] 1 All E.R. 876; [1948] Ch. 369), affirmed on different grounds.

[AS TO INTERIM DEVELOPMENT, see HALSBURY, Hailsham Edn., Vol. 32, pp. 264-270, paras. 419-429, and 1948 Supplement.]

Case referred to:

- (1) *A.-G. v. Barnes Corpn. and Ranelagh Club, Ltd.*, [1938] 3 All E.R. 711; [1939] Ch. 110; 107 L.J.Ch. 385; 159 L.T. 305; 102 J.P. 448; Digest Supp.

APPEAL by the plaintiffs from a decision of ROMER, J., dated Apr. 21, 1948, and reported [1948] 1 All E.R. 876.

The plaintiffs claimed damages for breach of a term of an agreement made under s. 34 of the Town and Country Planning Act, 1932, alleging that the defendants thereby undertook, in consideration of certain restrictions assented to by the plaintiffs, not to interfere in any way with the development of their land, provided that it was in accordance with the limits prescribed by those restrictions. Pursuant to the Town and Country Planning (Interim Development) Act, 1943, s. 4, the defendants, on a direction from the Minister under s. 4 (2) of the Act, made an order revoking the permission granted by the agreement, and the plaintiffs claimed that this revocation amounted to a breach of the said undertaking. ROMER, J., held that the revocation did not constitute a breach of contract and dismissed the action. The Court of Appeal now dismissed an appeal from his decision on the ground that, on the true construction of s. 34, no such undertaking could be implied. The facts appear in the headnote.

Blain and Boydell for the plaintiffs.

Capewell, K.C., and *Wilfrid Hunt* for the defendants.

LORD GREENE, M.R. : The discussion in this appeal has led to some rather complicated considerations, but, in my opinion, the answer to it is comparatively simple. The plaintiffs are the owners of land at Chessington, in the area of the defendants, the Surbiton Borough Council. That council
A is the planning authority and the interim development authority in respect of that area under the Town Planning Acts. The action in its original form, as appears from the endorsement on the writ, was for damages for breach of an agreement, a declaration that under the agreement the plaintiffs were entitled to erect houses and buildings, and an injunction to restrain the defendants from taking any steps to prevent the plaintiffs from erecting them.
B When the statement of claim was delivered, the second and third claims to relief were dropped, and there only remained a claim for damages. That claim is based on the proposition that the agreement has been repudiated by the defendants and that the plaintiffs, therefore, are entitled to claim damages as for an entire breach. Of course, in that proposition is implicit the assertion that the plaintiffs accepted the breach alleged as a repudiation of the agree-
C ment, thereby discharging it altogether.

The case of the plaintiffs is really based on the construction and effect of s. 34 of the Town and Country Planning Act, 1932. That Act was a comprehensive Act in relation to town and country planning. It contained the well-known provisions for the making of schemes, dealt with the various stages of bringing them into force, with the powers of the Minister in relation to
D them, the rights of objectors, and so forth. Under that Act very large and important powers are given to the planning authorities, and the scheme, when it has gone through all the necessary stages and has become a definitive scheme, acquires, by one of the schedules to the Act, what is equivalent to statutory force. The main part of the Act is taken up with the provisions relating to the making of schemes, but, since schemes would take a long time to prepare,
E provision was made for what might be done in the meanwhile under the provisions relating to the interim development of land. That is provided for by s. 10. Under that section the Minister is to make a general order with respect to the interim development of land within the areas to which resolutions to prepare or adopt a scheme apply. This was such an area. Under sub-s. (2) an order so made by the Minister might itself permit the development of land
F or might empower an authority to permit it. Under sub-s. (3), when the authority is applied to for permission to develop, it may grant the application either unconditionally or subject to such conditions as it thinks fit. I may say in passing that the word "development" is not confined to the construction of buildings, but includes a change of user from that existing at the time. That appears in the definition section. Under s. 10, in case the authority refuse
G consent to an interim application, there is a right of appeal to the Minister. In the present case that machinery was gone through by the present plaintiffs or their predecessors in title, and, their application for permission for interim development having been refused, they took the matter on appeal to the Minister, and the Minister reversed the decision of the local authority. On that basis the parties negotiated. Permission was again applied for to the defendants,
H a new and different plan was agreed, and, finally, the parties entered into two agreements under seal. One of them is called the development agreement and the other the roads and sewers agreement. They are both dated May 19, 1939. They are supplemental to one another. Each appears to be by way of consideration for the execution of the other, and each of them purports to be made by virtue of s. 34 of the Act of 1932. The parties to the development agreement were the parties to this appeal. The two agreements are interlocked in the way which I have mentioned, and the conditions which they impose

are of a very miscellaneous character. The covenants which they contain are in part restrictive and in part affirmative. The plaintiffs affirmatively agreed, *e.g.*, in the roads and sewers agreement, to dedicate land to the public. They also entered into restrictive agreements as to the amount of development to be permitted on their land. The defendants entered into certain affirmative undertakings, such as making roads and sewers and so forth.

The essence of the case put forward by the plaintiffs is that this is an agreement which, on its true construction, contains, either expressly or by necessary implication, an undertaking by the defendants, in consideration of the restrictions assented to by the landowners, not to interfere in any way with the development of their land provided that it is in accordance with the scheme of those restrictions. We are not here dealing with the ordinary subject-matter of a contract which can provide for something permanent. The period with which the agreement is concerned is what I call the interim period as well as the period if and when a final scheme comes into effect. It would be possible in a case where permission for interim development has been granted under s. 10 for that interim development to be annulled and the physical results of it destroyed by the scheme which ultimately comes into operation. There is nothing permanent about it, but there are provisions in the Act relating to compensation in cases where a party is aggrieved by something which is done to the land which he has developed under the interim permission. The argument here, based on s. 34, carries it a step further. It is said that under s. 34 it is competent to the local authority, when accepting the offer of a landlord to subject his land to restrictions, itself to enter into an affirmative or a negative covenant not to interfere with the operations of that landlord within the limits specified by the restrictions. The defendants maintain that, under statutory provisions to which I shall refer, they have power to revoke any permission that they have given or to cancel, or procure the cancellation of, any agreement that they have entered into. It is asserted by the plaintiffs that by doing so they commit a breach of their agreement.

The first thing is to examine s. 34. If the argument of counsel for the plaintiffs is right, he concedes that the section will have empowered the planning authority to bargain away the statutory powers of planning and of altering its plans at any time before a scheme is final and complete—powers which are conferred on it by the Act in the public interest—because the agreement on which he relies would have the effect of stabilising the quantity or quality of development specified in that agreement without any possibility of the planning authority being able ever afterwards to alter it except on the terms of paying damages for breach of contract. I am bound to say that, in approaching an Act of this character, I do so without any expectation that I shall find in it a power in the planning authority to bargain away important powers that the legislature has conferred on it. Section 34 which is to be found in a fasciculus of sections headed by a cross-heading "Supplemental Provisions with respect to Schemes." That group of sections begins with s. 27 and ends with s. 34, and it deals with a miscellaneous collection of matters, all of them ancillary to the making of schemes in one way or another. Under s. 34 (2), the local authorities, who are empowered to enter into such agreements as are mentioned in s. 34 (1), comprise any of the therein specified authorities, who need not be planning authorities, and yet, if counsel for the plaintiffs is right, the effect of entering into such an agreement is in substance to do a great deal of planning and carry out a great deal of the effective results of planning, power to do which is given, subject to many checks and balances, to planning authorities. Section 34 (1), which contains the basic words, starts in this way :

"Where any person is willing to agree with any such authority as is mentioned in sub-s. (2) of this section that his land, or any part thereof, shall, so far as his interest in the land enables him to bind it, be made subject,

either permanently or for a specified period, to conditions restricting the planning, development, or use thereof, in any manner in which those matters might be dealt with by or under a scheme . . .”

That is what I may call the contemplated initiation leading to an agreement dealt with under the sub-section. One has to get a landowner who is willing to agree that his land shall be subject to restrictions of the character which might be inserted lawfully in a scheme. When a willing person has appeared and announced his willingness, “the authority may, if they think fit, enter into an agreement with him to that effect,” *i.e.*, to the effect of subjecting his land to restrictions. That, and nothing more, is expressly mentioned.

Pausing there, I might usefully make an excursion into the law of property and state the well-known fact that restrictive covenants, apart from some special provision like those we are going to find here, only run in equity so as to bind the land when they are taken for the benefit of the adjoining land of a covenantee. Parliament was minded to make use of that valuable theory, but, to do so, it had to put the local authority artificially into the same position as a neighbouring landowner, because a restrictive covenant entered into by the landowner with the local authority would not bind the landowner under the ordinary law, for it would not have been made for the benefit of adjoining land. The legislature does this by a simple device of draftsmanship. After empowering the local authority to enter into an agreement to the effect mentioned, it inserts this provision :

“ . . . and shall have power to enforce the agreement against persons deriving title under him in the like manner and to the like extent as if the authority were possessed of, or interested in, adjacent land and as if the agreement had been entered into for the benefit of that adjacent land.”

It appears to me that s. 34 has a very limited application. It gives a local authority power to do, in terms, one thing and one thing only—to accept restrictions offered to it by a landowner and by so doing to acquire the right to enforce those restrictions against the land as if they had been entered into for the benefit of an adjoining landowner. There is not a word expressed in the section which specifies the consideration which the local authority is to give or be able to give for the subjection by the landowner of his land to the restrictions indicated. Here we are only concerned with one type of consideration. The consideration in the present case, the plaintiffs say, was an implied or expressed undertaking by the defendants not to do anything in exercise of its statutory planning powers which might go beyond the restrictions entered into by the landowner. In other words, the consideration consists of a partial, or, perhaps, total, relinquishment by a planning authority of certain of its statutory powers in relation to planning. I think it is conceded that, unless there is to be found somewhere in the statute power to restrict a planning authority in the matter of planning, no such power could exist. Counsel for the plaintiffs says that power is to be found in s. 34 itself.

Is it likely that Parliament, in a section falling under the head I have mentioned, and without express words to that effect, would do anything so unusual, so explosive, as to enable a planning authority to do something which all the principles laid down and observed by the courts and the legislature in regard to statutory duties of this kind forbid, namely, to tie its hands and contract itself out of them ? The weakness of the argument on behalf of the plaintiffs is that it is based on what is said to be extracted from a single word, “agreement.” A local authority, says counsel for the plaintiffs, is entitled to enter into an agreement which, apart from documents under seal, requires consideration. What objection can there be, he says, to the planning authority, by way of consideration for the subjection of the landowner to restrictions, itself undertaking not to subject his land to some plan which would prevent the landowner building up to the limit of the restrictions into which he has entered ? It is

argued that, as there is nothing in the section to prevent the making of such an agreement, the section must be construed as though it authorised it and gave effect to such an agreement. Such an undertaking in an agreement under s. 34 would be a contractual undertaking entered into by the authority with an individual. I find nothing either in the section or in the general law which would enable, for instance, the successors in title of the landowner to enforce such a covenant against the authority. The running of the burden of the restrictive covenant entered into by the landowner is provided for expressly by the section. The running of the benefit of any restrictive covenant which the authority may enter into restricting its planning powers is not mentioned in the section, nor is any provision made for it. One would have expected that, if the intention had been what counsel says it was, the section would have expressly provided for what I may call mutuality—that the successors in title of the landowner should be not only bound by, but also entitled to, the benefit of these covenants. Nothing of the kind is mentioned. ROMER, J., I think, accepted the view that s. 34 authorised the local authority to enter into restrictive agreements which might have the effect of limiting or circumscribing the exercise of their statutory planning powers. He felt himself constrained to take that view by the authority of *A.-G. v. Barnes Corpn. and Ranelagh Club, Ltd.* (1), but I do not read that decision of LUXMOORE, J., as covering the present case. The contest there was whether it was competent to a local authority to agree with a landowner for the imposition of restrictions less severe than had been imposed on neighbouring landowners. It was said that, if a local authority tried to do that, it was, in effect, doing something permissive and not restrictive, a view which the learned judge negatived. That is quite a different question from the one which we have here. If the language of LUXMOORE, J., is wide enough to cover the proposition of counsel for the plaintiffs in the present case, then I would respectfully disagree with it, but I do not think it has that meaning. In any event, I cannot accept the view that s. 34 empowers a planning authority, by an agreement under that section, in any way to tie its hands for the future.

I think at this stage I should refer shortly to one or two things in the development agreement. It recites, among other things, the Minister's reversal of the defendants' refusal to grant interim permission. It then says, by cl. 1 :

"This agreement is made by virtue of s. 34 of the Act and is intended to be scheduled to the scheme."

Clause 2 :

"This agreement is supplemental to and as respects the parties hereto in consideration of an agreement of even date herewith" [the roads and sewers agreement.]

Clause 3 :

"The lands described in the first and second parts of the sched. I hereto may be used for the purposes mentioned in and subject to the restrictions set out in sched. II hereto and in accordance with the lay-out in plan No. 2 hereto annexed."

So far, in my opinion, the agreement is defining what it is proposed to include in the matter of restrictions on these lands in the scheme when finally settled, but that was not enough. Naturally the landowner wishing to develop the land would want to get ahead and build the houses that it was contemplated could be built under the proposals to be embodied in the scheme. That is provided for in cl. 4 which says this:

"(a) Until the scheme shall come into force this agreement shall operate as if the owners and the development company had submitted an amended lay-out plan for the approval of the council and the council by this agreement had approved the said plan and had granted permission to the owners

and the development company to develop by virtue of s. 10 of the Act and the Town and Country Planning (General Interim Development) Order, 1933. (b) To the extent to which this agreement operates and is valid as from the date of this agreement the recited instrument in writing [the Minister's Order] shall cease to have effect."

A By (c) the objections made by the owners to the approval of the scheme were withdrawn. Having regard to the conclusion to which I have come as to the meaning and very limited scope of s. 34, I ought, perhaps, to say this with regard to the statement in this agreement: "This agreement is made by virtue of s. 34 of the Act and is intended to be scheduled to the scheme." In so far as the agreement contains what is expressly provided for by s. 34, namely, an agreement by the landowner that his land shall be subject to conditions
B restricting the planning, development or use thereof, it is an agreement made under and having force by virtue of that section—a special statutory force, as I have pointed out, which goes beyond the force it would have had as a mere contract, because it gets all the characteristics, so far as enforceability by the authority is concerned, of a restrictive covenant. In so far as this agreement and the roads and sewers agreement, which is supplemental to it, contain other
C matters, s. 34 appears to me to have nothing to do with the case. I am not attempting to deal with the question what other considerations can validly be incorporated in an agreement under s. 34. All I have said so far is that it is not competent for the local authority in such an agreement to incorporate a consideration consisting of a restriction of its statutory planning powers such as that for which counsel contended.

D To return to the contention of the plaintiffs, it is said that the agreement must be taken to mean that the plaintiffs, if they found the defendants doing anything which would affect detrimentally to them (the plaintiffs) the measure of restriction to which they had subjected themselves, could interfere and obtain an injunction to stop it. In other words, the court, according to counsel, might be asked by injunction to restrain the defendants, who are given by
E the legislature a number of important planning powers, from exercising any of those powers in so far as such exercise involved a departure from the provisions of this agreement. I cannot accept that view. Although the claim for an injunction is now dropped, the same principle is implicit in the claim for damages, namely, that the defendant authority has tied its hands.

I now come to the action which, it is alleged, was a breach of contract by the defendants, and to explain that it is necessary to refer to the Town and
F Country Planning (Interim Development) Act, 1943. Section 4 provides:

"(1) If at any time before a scheme under the principal Act comes into operation it appears to an interim development authority that it is expedient, having regard to the provisions then proposed to be included in that scheme, that any development for which permission has been granted on an interim
G development application should not be carried out or completed, or should not be carried out or completed to the extent or in the manner allowed by the permission, they may, by order made with the consent of the Minister, revoke or modify the permission to such extent as appears to them to be necessary in that behalf. (2) The Minister may give directions to any
H interim development authority requiring them to submit to him for his consent under the foregoing subsection an order for the revocation of any permission specified in the directions, or for the modification thereof in such manner as may be so specified; and if any such directions are not complied with within the time specified therein, the Minister may himself make the order on behalf of the authority."

Then there is provision for an inquiry when there is a proposal to revoke such a permission and under sub-s. (4) power is given in the case of revocation to the interim development authority to:

" . . . pay to any person whose property is injuriously affected thereby any such contribution as might have been made by them under sub-s. (4) of s. 10 of the principal Act if a fresh application for such permission had been made by that person."

It is to be observed that that section deals with interim development for which permission has been granted on an interim development application. A mere permission under s. 10 of the Act of 1932 would be nothing more than an executive licence. It would have no contractual force, but its revocation might clearly injuriously affect the licensee because on the faith of it he may, *e.g.*, have incurred expense, and for that reason, no doubt, the legislature makes provision permitting compensation to be granted in such a case. Counsel for the plaintiffs points out that the section says nothing about agreements. Basing himself on his theory as to the scope of s. 34, he says: "Here is an agreement which by contract gives a right to a certain interim development. Sub-section (4) does not in terms provide for the cancellation of any such contract. It only provides for the cancellation of interim development permissions, that is to say, permissions granted under s. 10 of the Act of 1932." By way of reinforcing that, he calls attention to s. 10 of the Act of 1943 which provides:

"No agreement made after the commencement of this Act under s. 34 of the principal Act for restricting the planning, development or use of any land shall have effect unless it has been approved by the Minister."

That, he says, shows that under s. 34, agreements made before the Act are not to be subject to the power of revocation. Of course, the whole of counsel's argument falls to the ground if his initial proposition as to the scope of s. 34 is wrong, because if the contract, in so far as it would have the effect of limiting the powers of the defendants is void, no revocation would be necessary and the defendants could disregard that limitation.

The defendants took into consideration the position raised when, after the war, the plaintiffs in terms applied for permission to develop on the lines of the agreement. That permission, according to counsel's argument, was unnecessary because they had at that moment the contractual right to continue that development and nothing the defendants could do or say could stop them. Permission was, in fact, refused, but the defendants had pointed out to them by their town clerk that there was a complication in the position owing to the existence of the development agreement, whatever view might be formed of the effect of that agreement in law. Since the making of the agreement a further complication had occurred. A plan called the Greater London Plan had been prepared and was much in the public eye and that of the Ministry and the local authorities concerned. This area was in the ambit of that plan. If that plan were to be carried out, it would be impossible for the houses which are mentioned in the agreement ever to be built. The two things are completely inconsistent, but, according to counsel's argument, the defendants would not be entitled, however much they wished to change their minds, to depart from the terms of the agreement with the plaintiffs. Of course, if, by virtue of overriding powers, the Minister could interfere, that would not be the fault of the defendants and would not constitute any breach by them, but the defendants themselves, it is said, must not do anything which would involve a departure from what was contemplated by the agreement. The defendants did not make up their minds as to what they were going to do because they were waiting for the then expected new Act which might have some bearing on the question of compensation. It is notorious that the defects in the operation of the earlier Town Planning Acts were largely due to the heavy burden of compensation which local authorities found lay on their shoulders if they put their powers into execution, and one of the objects of the Town and Country Planning Act, 1947, was to get rid of that deterrent to effective development. It was

not unnatural, therefore, that any local authority concerned should endeavour to mark time until the compensation provisions were passed by Parliament. It seems to me obvious that the power to revoke permissions under s. 4 of the Act of 1943 and the overriding power of the Minister in that regard given by that section have a very sensible application, because an interim development permission might very well impede, directly or indirectly, the formulation of satisfactory schemes. An authority who had given permission to a landowner might, as a practical matter, be unable to revoke it or to insert in the scheme any different or improved provision. Therefore, it is given power to revoke subject to compensation of a limited description, and, in the event of its not exercising the powers, the Minister is given an overriding power himself to make the revocation on behalf of the authority.

As I have said, the remarks of counsel for the plaintiffs on this section have only any applicability if he is right on his construction of s. 34 of the Act of 1932 and I might content myself with saying that, as I think he is wrong on that, this point under s. 4 of the Act of 1943 does not arise, but there is the further point that, even if he was right on his construction of s. 34, all that is being attempted to be done here is a revocation of a permission such as is contemplated by s. 4 (1) of the Act of 1943. It is said that sub-cl. (4) (a) of the agreement (the sub-clause which expressly gives the right to interim development) is nothing more nor less than a permission under s. 10 of the Act of 1932. The fact that it is incorporated in this document with a lot of other things, does not make it in character anything different from a permission, and, being such, it is revocable under s. 4 (1) of the Act of 1943. An application for permission under s. 10 had been made. All the necessary formalities had been gone through. It could have been dealt with simply as a permission and granted or not granted. That, however, was not done. The parties were discussing a variety of matters and they incorporated the permission in this agreement. That does not, in my opinion, alter its character as a mere permission or deprive the defendants of the powers, in the case of development for which permission has been granted on an interim development application, of revoking that permission.

Even if that be wrong, there is a further point, and it is this. It seems to me that under cl. 4 (a) of the agreement, on its true construction, the parties have contracted that the permission shall have the same effect as a permission under s. 10 of the Act of 1932. That means that they agreed that the permission which is incorporated in this agreement was to be no better and no worse than a permission granted under s. 10. It would have all the force and convey all the rights that such a permission would give. On the other hand, it would be subject to any defects or powers in relation to it which might exist. It is true that the power of revocation is subsequent to the agreement. If at the date of the agreement a section similar to s. 4 of the Act of 1943 had been in force, it appears to me that cl. 4 (a) of the agreement would necessarily have meant that the permission there given was subject to the statutory powers of revocation. I cannot see that it makes any difference that the statutory power of revocation was introduced by later Acts. I cannot construe cl. 4 (a) of the agreement in a way which would prevent any subsequent statutory power of revocation relevant to that type of permission being brought into operation or as meaning that no future provision made by Parliament for the revocation of such a permission should have effect as between these parties. That appears to me to be a thing which cannot be read into the clause.

I ought to return to one matter, which I forgot to mention when I was dealing with the construction of s. 34. I said that, as I understand the decision of ROMER, J., he thought that s. 34 did entitle the authority to enter into agreements which would prevent it from interfering with a permission which it was supposed contractually to have granted. He said ([1948] 1 All E.R. 883) :

"In the light of the foregoing considerations, the effect which I attribute to cl. 3 of the agreement is, accordingly, that the council, by virtue of s. 34 of the Act, contractually debarred itself from interfering, after the scheme came into force, with the specified method of development by requiring the plaintiffs to pull down or alter buildings erected in conformity with that method."

One of the reasons which I think, apart from the decision of LUXMOORE, J., A led the learned judge to take that view was this consideration. He points out in his judgment that, if it was not competent to the authority to give a consideration of that kind to the willing landowner, no landowner would be willing to subject his land to such restrictions. With great respect to the learned judge, I cannot take that view. A landowner who has, hanging over his head, the possibility or probability of a stringent scheme being introduced B and made effective which would seriously affect the development of his land, coupled with the prospect of having, perhaps, to oppose the scheme at great expense to himself, would naturally prefer to meet his enemy at the gate and say to him: "I am prepared myself voluntarily to subject my land to certain restrictions. Now let us talk about it and see if we cannot agree". They come C to an agreement, and the local authority accepts his offer to subject his land to named restrictions. That appears to me to be of real benefit to a landowner. Until s. 34 was passed it was impossible in law for an authority to accept such an offer in such a way as to get a permanent benefit out of it, for the simple reason that such a restrictive covenant could not be made enforceable against the successors in title of the landowner. Now, under s. 34, the authority is D empowered to take advantage of offers of that kind, and that seems to me to open up a possibility extremely beneficial to the landowner. It may operate, of course, in another way. If, even as here, two or more adjoining landowners agree on a measure of restriction and are prepared to enter into restrictive E covenants with the authority, landowner A. may think it worth his while to enter into such a restrictive covenant provided landowner B. is doing the same thing at the same time. By that means each can mutually provide for the protection of his land from deterioration by reason of some worse form of development on his neighbour's land which the authority would be unable to prevent without a scheme.

I now return to say one word with regard to the allegation of breaches. As I have said, I think the argument breaks down *in limine* owing to the true construction of s. 34. If, however, the construction which I have put on that F section be wrong, it appears to me that the argument breaks down on the construction of the agreement, which, either by itself, is nothing more than a permission under s. 10 of the Act of 1932, or, as part of the bargain under the express terms of cl. 4 (a) of the agreement, is to be treated as such a permission. I have said that on that basis it is subject to all the incidents which affect G such a permission including a power of revocation in the authority. That is enough to dispose of the case. The allegation that the defendants had repudiated their contract is of a rather peculiar nature, at any rate on one aspect of it, because it seems to me that, if the statute has given power to the defendants to revoke something that they have done, it cannot be said to be a breach of contract if that power is exercised. Moreover, when it is pointed out that the H defendants, so far, have not revoked, and, indeed, so far as they are concerned, were prepared to mark time, it was really the action of the Minister in calling on the defendants under s. 4 (2) of the Act of 1943 to submit for his consent an application for power to revoke, and not the action of the defendants, which has led to the present position. I only refer to that because I do not wish it to be thought that I am in any way accepting the proposition that there is a repudiation, much less two effective repudiations of different characters, or that repudiation has been accepted so as to entitle the plaintiffs,

even if they were right, to sue for damages as on an anticipatory breach. It is not necessary for me, in view of what I have said, to go into that matter, because the appeal, in my opinion, fails for the reasons which I have stated.

SOMERVELL, L.J.: I agree. If a planning authority wishes to put into operation the Town and Country Planning Act, 1932, the first step for it to take is to pass a resolution under s. 6. A scheme is then prepared in draft and submitted to the Minister, and it requires his approval under s. 8. In this appeal we are concerned with the period between the passing of the resolution and before any scheme comes finally into operation. Broadly speaking, the position in that period is this. There is no legal machinery for stopping the owners developing their land in any way which seems good to them, but, if they do it without the approval of the planning authority (and I will refer to the form in which approval is sought and obtained in a moment), they run the risk of having any buildings they put up pulled down without getting compensation. That, I think, is the combined effect of ss. 13, 18, 20 (2), and the definition of "existing building" in s. 53. If they do not wish to run that risk they must operate the machinery of s. 10, and it is on that part of the Act that this appeal in the main turns. Section 10 provides, first, for the Minister making a general order with respect to the interim development of land. Such an order was made here and we were referred to one or two paragraphs in it. That order having been made, a landowner, in any area where a resolution has been passed, may apply for permission to develop his land. That permission may be granted in the form in which it is asked for, or there may be negotiations and the parties may agree on modifications, or, if they do not, the planning authority has a power to impose conditions. In the present case in this period an application for permission under s. 10 was put in. There were then negotiations, and the parties came to what I may call a composite arrangement which is set out in the two documents before us. The plaintiffs were prepared to agree to restrictions being imposed on their land under s. 34 of the Act of 1932. In these documents restrictions under s. 34 were imposed on the land. The documents also deal expressly with the owners' position in the interim period before a scheme came, if it ever was to come, into operation, and they also make provision, as between these parties and certain other parties, for various events which, no doubt, it was contemplated in 1939 would happen fairly soon, namely, covenants as to sewers, drains and roads.

I agree with what has been said by the MASTER OF THE ROLLS that it is impossible to construe s. 34 as itself empowering the planning authority to undertake, in consideration of the landowner's submission to restrictions, not to use its planning powers or to fetter its discretion in respect of powers conferred on it by statute, nor do I think that there is anything in these documents to indicate that the defendant planning authority purported to enter into an undertaking of that kind. I think that clause 4 (a) of the development agreement, on its true construction, negatives any such intention. It says, I think, in plain terms that, so far as development is concerned, the owner is agreeing that he shall be in exactly the same position, *quoad* interim development, as if no s. 34 restriction had been imposed, and he had applied and obtained permission under s. 10. That is what I would have expected to find, and that, it seems to me, is what in the plainest terms one does find. On that basis the argument, in my opinion, fails. If that is right, when we come to s. 4 of the Act of 1943, the statutory powers conferred by that section on the planning authority and on the Minister plainly apply to the plaintiffs in this case. *Quoad* their interim development rights, they either have obtained permission under s. 10 (which I think is the more probable view) or they are to be treated as being in law in exactly the same position. These words of s. 4 (1), therefore, apply:

"If at any time before a scheme under the principal Act comes into

operation it appears to an interim development authority that it is expedient, having regard to the provisions then proposed to be included in that scheme, that any development for which permission has been granted on an interim development application should not be carried out or completed . . . they may, by order . . . revoke . . . the permission . . ."

It seems to me that the permission to develop, which the plaintiffs had, was granted on an interim development application, and it can, therefore, be A
revoked under the provisions of this section of the 1943 Act. I agree with what has fallen from the MASTER OF THE ROLLS on the subject of the learned judge's application or construction of the decision in the *Ranelagh* case (1). For these reasons, I think that this appeal fails.

WYNN-PARRY, J. : I agree. In my view, the case can be made to turn on the true construction of s. 34 of the Act of 1932 and the development agreement. Section 34 is concerned with agreements, but agreements only, B
or those parts of agreements only, which, as between a landowner and a local authority, have as their object the subjection of the land of the landowner, either permanently or for a specified period, to conditions restricting the planning development or use thereof in any manner in which those matters might be dealt with by or under a scheme. Having regard to the rule that C
covenants to the effect of such conditions cannot exist *in gross*, the latter part of s. 34 (1) is introduced to allow the desired result to be achieved, notwithstanding that the proposed covenantee, the local authority in question, is not possessed of, or interested in, adjacent land. I think that is the whole scope of the section. That, however, does not mean that an agreement designed, *inter alia*, to achieve a result within the scope of s. 34, must contain nothing D
more, but, if it does so, effect must only be given under s. 34 to such part of an agreement as if within the scope of that section. Otherwise the result would be that this section, which finds its place under the heading "Supplemental Provisions with respect to Schemes," could be used to by-pass the whole of the preceding provisions of the Act regarding schemes.

On this view no difficulty arises on the construction of the development E
agreement. Whatever be the true scope of the earlier clauses of that agreement, which has to be read in conjunction with the sewers agreement, I share the view that cl. 3 relates only to the period after the scheme comes into force. Clause 4 relates to the interim period, and, in my view, it introduces s. 10 of the Town and Country Planning Act, 1943, for all purposes, and is, therefore, outside the scheme of s. 34. The result is that, during the period between the F
date of the agreement and the expected coming into force of the scheme, the only respect in which the land was affected was that it became the subject of an interim development consent. At the date of the development agreement that consent could not be revoked, although the defendants could have refused to have scheduled it to the scheme, in which case it would have ceased to have effect. The Town and Country Planning (Interim Development) Act, G
1943, by s. 4, gave a means of revoking the interim development consent. It must be open to the defendants to take advantage of this provision because s. 34 of the Act of 1932 cannot have the effect of enabling a local authority to bind itself not to exercise future statutory powers. Section 4 of the Act of 1943 was effectively brought into operation, and the interim development consent given by cl. 4 (a) of the development agreement revoked. I agree that H
in taking part in that revocation the defendants committed no breach of the development agreement, and I, therefore, agree that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors : *Bennett & Bennett* (for the plaintiffs) ; *Lees & Co.*, agents for *R. H. Wright*, Town Clerk, Surbiton (for the defendants).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

COW v. CASEY.

[COURT OF APPEAL (Lord Greene, M.R. and Wynn-Parry, J.), December 16, 17, 1948.]

Rent Restriction—Sub-tenant—Sub-tenant of part of premises—Whole premises outside Rent Acts—Surrender of lease of whole premises—Right of landlord to possession of part sublet—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), s. 3 (1)—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 15 (3).

In 1942, the plaintiff demised to S.-R. Ltd. for a term of three years from Sept. 29, 1942, a dwelling-house to which the Rent Restrictions Acts did not apply. On the expiration of the term S.-R. Ltd. held over as yearly tenants, and in 1944 they assigned their yearly tenancy to F. A. Ltd., that tenancy being terminable by six months' notice expiring on Sept. 29 in any year. The defendant was employed by F. A. Ltd. who sub-let a flat in the premises to him on a weekly tenancy at a rent of 30s. per week. The rateable value of the flat brought it within the Rent Restrictions Acts. On Dec. 23, 1947, the plaintiff served on F. A. Ltd. a notice to quit expiring on June 24, 1948, and, in spite of the fact that it was bad, the company accepted it, vacated the house and thereby surrendered the tenancy. On June 14, 1948, F. A. Ltd. served the defendant with a notice to quit on June 26, 1948, *i.e.*, two days after the company was due to leave the premises. On a claim for possession of the flat the defendant contended that, on the surrender of the head lease, he became a tenant of the plaintiff as head lessor, with two days of his contractual tenancy to run and thereafter as statutory tenant, and, therefore, was entitled to claim the protection of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3 (1).

HELD : (i) the whole of the dwelling-house being outside the scope of the Rent Restrictions Acts, after June 26, 1948, the defendant was a trespasser and his tenancy was not only protected by s. 3 (1) of the Act of 1933.

(ii) section 15 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, is limited to a case where the tenant is tenant of a dwelling-house to which the Acts apply, and, as F. A. Ltd. was a tenant of a dwelling-house to which the Acts did not apply, the defendant was not to be deemed to become the statutory tenant of the plaintiff.

Wright v. Arnold ([1946] 2 All E.R. 616 ; [1947] K.B. 280 ; 176 L.T. 45) followed.

[AS TO THE POSITION OF SUB-TENANTS UNDER THE RENT RESTRICTIONS ACTS, see HALSBURY, Hailsham Edn., Vol. 20, pp. 333, 334, para. 399 ; and FOR CASES, see DIGEST, Vol. 31, pp. 581, 582, Nos. 7303-7310.]

Case referred to :

(1) *Wright v. Arnold*, [1946] 2 All E.R. 616 ; [1947] K.B. 280 ; [1947] L.J.R. 341 ; 176 L.T. 45 ; 2nd Digest Supp.

INTERLOCUTORY APPEAL by the defendant from an order of PRITCHARD, J., dated Nov. 23, 1948, confirming an order of MASTER HORRIDGE giving leave to the plaintiff to sign final judgment in an action for possession and mesne profits against the defendant sub-tenant, who asked leave to defend because he had an arguable point of defence, *viz.*, that after the surrender of the head lease, the defendant became the direct tenant of the landlord and as such entitled to the protection of the Rent Restrictions Acts. The Court of Appeal now dismissed the appeal. The facts appear in the headnote.

L. A. Blundell for the defendant.

Heathcote-Williams for the plaintiff.

LORD GREENE, M.R. : This is an appeal from an order of PRITCHARD, J., confirming an order of MASTER HORRIDGE giving leave to the plaintiff to sign

final judgment for possession with mesne profits. The defendant says that he has a reasonably arguable defence and ought to have been given leave to defend.

[HIS LORDSHIP stated the facts and continued :] The defendant argues that the effect of his sub-tenancy was that on the surrender of the head lease on June 24, 1948, he became in direct relation as tenant with the plaintiff as his landlord. On that date, he says, he was a tenant of the plaintiff in occupation with two days of his contractual tenancy to run, and that entitles him now to claim against the plaintiff the protection of the Rent Restrictions Acts, his flat being clearly within the scope of the Acts. In my opinion, that argument is completely misconceived. At common law, it is true, he had two days' occupation to which he was entitled as against the superior landlord. On the expiration of those two days at common law he became a trespasser. What possible ground is there for his claiming the protection of the Rent Restrictions Acts ?

The defendant says that s. 3 (1) of the Rent, etc., Restrictions (Amendment) Act, 1933, protects him. That is the main operational provision of this Act, and it provides :

" (1) No order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply or for the ejectment of a tenant therefrom, shall be made or given unless . . . "

and then are set out the well-known conditions.

He contends that this flat is a dwelling-house to which the Rent Acts apply, that an order for the recovery of possession of that dwelling-house is being sought against him, and that it is not open to the court to make such an order by virtue of s. 3 (1). That appears to me to be a complete misconception of the true position. What is being sought is recovery of possession of part of the dwelling-house which was demised by the plaintiff. That dwelling-house is not one to which the Rent Acts apply. It is a mere accident that only part of that dwelling-house is occupied, the reason being that the tenant of the rest of it has moved out. Test the matter in this way. Suppose the head tenant had surrendered by deed and afterwards refused to move out and an action had to be brought to eject him. That would have been an action against a head tenant and his sub-tenant for the recovery of possession of the whole house, which is not a dwelling-house to which the Rent Acts apply. In that case the Acts would have had nothing to do with the case. It cannot make any difference that the head tenant is not a defendant because he has vacated the house. What the plaintiff is trying to do is to get possession of the whole of his house and occupying a corner of it is a person who at common law is a pure trespasser. It seems to me impossible to say that in those circumstances s. 3 (1) applies.

I am not sure whether reliance is placed on s. 15 (3) of the Rent Act, 1920, which deals with sub-tenancies, but, in my opinion, it is equally impossible to rely on that sub-section. The sub-section provides :

" Where the interest of a tenant of a dwelling-house to which this Act applies is determined, either as the result of an order or judgment for possession or ejectment, or for any other reason, any sub-tenant to whom the premises or any part thereof have been lawfully sub-let shall, subject to the provisions of this Act, be deemed to become the tenant of the landlord on the same terms as he would have held from the tenant if the tenancy had continued."

That sub-section deals with a case where there is a dwelling-house to which the Acts apply occupied by a tenant, whom I will call the head-tenant, whose tenancy is determined. It would cover, therefore, a case where the head tenancy is determined by a surrender, but the sub-section is clearly limited to a case where the head-tenant whose tenancy is determined is tenant of a dwelling-house to which the Rent Acts apply. Here the company was not a tenant of a dwelling-

house to which the Acts apply. It was tenant of a dwelling-house to which the Acts did not apply.

The matter is not devoid of authority, because in *Wright v. Arnold* (1) this court had to consider a question of the position under s. 15 (3) of a sub-tenant of part of a house which did not fall within the Act. In that case the head tenancy came to an end by the expiry of the lease. It was not a case of surrender, but that distinction makes not the slightest difference. It was clearly said in that case that s. 15 (3) only applies where the head tenant is tenant of a house to which the Acts apply. If that was not the case, the position would be fantastic. It would mean that the tenant of a house to which the Act did not apply could grant a sub-tenancy of a part and then, his own tenancy having been brought to an end, could leave the landlord saddled with a statutory sub-tenant. In other words, it would put the head tenant in a position to foist on the head landlord a statutory tenant by carving out of the house demised to him a small portion and subletting it. Section 15 (3) permits nothing of the kind, in my opinion. The result, therefore, is that the defendant is clearly a trespasser at common law as the two days, the remainder of his weekly tenancy, had expired before the writ was issued and there is nothing in the Rent Restrictions Acts which can give him protection.

WYNN-PARRY, J.: I agree.

Appeal dismissed with costs.

Solicitors: *H. C. Morris, Woolsey, Morris & Kennedy* (for the plaintiff); *Rising & Ravenscroft*, agents for *Sherwood Cobbing & Williams*, Kingston-on-Thames (for the defendant).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

Re HEATH'S WILL TRUSTS. HAMILTON v. LLOYDS BANK, LTD.

[CHANCERY DIVISION (Harman, J.), November 30, December 1, 21, 1948.]

Married Woman—Restraint on anticipation—Validity—Imposition by will dated 1932—Codicils dated 1937 confirming will—Law Reform (Married Women and Tortfeasors) Act, 1935 (c. 30), s. 2 (1) (2).

The Law Reform (Married Women and Tortfeasors) Act, 1935, s. 2 provides: "(1) Subject to the provisions of this Part of this Act all property which—(a) immediately before the passing of this Act was the separate property of a married woman or held for her separate use in equity; or (b) belongs at the time of her marriage to a woman married after the passing of this Act; or (c) after the passing of this Act is acquired by or devolves upon a married woman, shall belong to her in all respects as if she were a *feme sole* and may be disposed of accordingly: Provided that nothing in this subsection shall interfere with or render inoperative any restriction upon anticipation or alienation attached to the enjoyment of any property by virtue of any provision attaching such a restriction, contained in any Act passed before the passing of this Act, or in any instrument executed before Jan. 1, 1936. (2) Any instrument executed on or after Jan. 1, 1936, shall, in so far as it purports to attach to the enjoyment of any property by a woman any restriction upon anticipation or alienation which could not have been attached to the enjoyment of that property by a man, be void."

By his will, dated Dec. 10, 1932, the testator directed his trustees to hold a share of his estate on trust to pay the income to his daughter during her life for her separate use and so that during coverture the same should be without power of anticipation, with remainders over to her children. In 1933 and 1934 the testator executed four codicils which did not vary the provision for his daughter, but confirmed the will except as otherwise

varied. In 1937 the testator executed two further codicils which did not affect the said provision for his daughter, but they both confirmed his will as amended by the former codicils. In 1939 the testator died.

HELD: the restraint on anticipation was attached by an instrument executed before Jan. 1, 1936, and was contained in no other instrument, and, therefore, notwithstanding the codicils of 1937, it was not rendered invalid by the Act of 1935.

[FOR THE LAW REFORM (MARRIED WOMEN AND TORTFEASORS) ACT, 1935, s. 2, see HALSBURY'S STATUTES, Vol. 28, p. 105.]

Cases referred to :

- (1) *Re Waring*, [1942] 2 All E.R. 250; [1942] Ch. 426; 111 L.J.Ch. 284; 167 L.T. 145; *revsg.*, [1942] 1 All E.R. 556; [1942] Ch. 309; 2nd Digest Supp.
- (2) *Re Tredgold*, [1943] 1 All E.R. 120; [1943] Ch. 69; 112 L.J.Ch. 68; 168 L.T. 135; 2nd Digest Supp.
- (3) *Re Sebag-Montefiore*, [1944] 1 All E.R. 672; [1944] Ch. 331; 113 L.J.Ch. 280; 170 L.T. 395; 2nd Digest Supp.
- (4) *Berkeley v. Berkeley*, [1946] 2 All E.R. 154; [1946] A.C. 555; 115 L.J.Ch. 281; 175 L.T. 153; 2nd Digest Supp.
- (5) *Grealey v. Sampson*, [1917] 1 I.R. 286; 44 Digest 375, 2091 *i*.
- (6) *Goonewardene v. Goonewardene*, [1931] A.C. 647; 100 L.J.P.C. 145; 145 L.T. 7; Digest Supp.
- (7) *Re Fraser*, [1904] 1 Ch. 726; 73 L.J.Ch. 481; 91 L.T. 48; 44 Digest 376, 2102.
- (8) *Rolfe v. Perry*, (1863), 3 De G.J. & Sm. 481; 32 L.J.Ch. 471; 8 L.T. 441; 44 Digest 377, 2109.
- (9) *Re Elcom*, [1894] 1 Ch. 303; 63 L.J.Ch. 392; 70 L.T. 54; 44 Digest 380, 2144.
- (10) *Re Moore*, [1907] 1 I.R. 315; 41 I.L.T. 150; 8 Digest 285, *d*.
- (11) *Doe d. Biddulph v. Hole*, (1850), 15 Q.B. 848; 20 L.J.Q.B. 57; 15 L.T.O.S. 392; 44 Digest 376, 2106.
- (12) *Hopwood v. Hopwood*, (1859), 7 H.L. Cas. 728; 29 L.J.Ch. 747; 34 L.T.O.S. 56; 44 Digest 375, 2099.
- (13) *Mountcashell (Earl) v. Smyth*, [1895] I.R. 346; 44 Digest 375.
- (14) *Re Hardyman*, [1925] Ch. 287; 94 L.J.Ch. 204; 133 L.T. 175; 44 Digest 385, 2196.
- (15) *Re Reeves*, [1928] Ch. 351; 97 L.J.Ch. 211; 139 L.T. 66; 44 Digest 382, 2165.

ADJOURNED SUMMONS to determine whether a restraint on anticipation imposed on a gift to the testator's daughter by his will made on Dec. 10, 1932, to which the testator had made four codicils in 1933 and 1934 and two in 1937, was invalidated by the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 2. **HARMAN, J.**, held that the restrain on anticipation was valid. The facts appear in the judgment.

M. Albery for the plaintiff (the testator's daughter).

Wilfrid Hunt for the defendants (the trustees of the will).

Cur. adv. vult.

Dec. 21. **HARMAN, J.**, read the following judgment. The late Cuthbert Eden Heath made his will on Dec. 10, 1932. The only clause with which I am here concerned is cl. 14 (3) whereby the testator directed his trustees to hold two-thirds of the moiety of his trust estate which he called "my daughter's portion" on trust to pay the income to his daughter, the plaintiff, during her life for her separate use and so that during coverture the same should be without power of anticipation, with remainders over to her children. The testator made four codicils to his will in 1933 and 1934 which did not vary the provisions above mentioned, but did confirm his will except as otherwise varied.

The Law Reform (Married Women and Tortfeasors) Act, 1935, s. 2 (1) enacts that all property which either before or after the passing of the Act was held for the separate use of a married woman should belong to her in all respects as if she were a *feme sole* and might be disposed of accordingly subject to a proviso in the following terms :

A " Provided that nothing in this sub-section shall interfere with or render inoperative any restriction upon anticipation or alienation attached to the enjoyment of any property by virtue of any provision attaching such a restriction, contained in any Act passed before the passing of this Act, or in any instrument executed before Jan. 1, 1936."

Sub-section (2) provides :

B " Any instrument executed on or after Jan. 1, 1936, shall, in so far as it purports to attach to the enjoyment of any property by a woman any* restriction upon anticipation or alienation which could not have been attached to the enjoyment of that property by a man, be void."

Sub-section (3) (c) reads :

C " the will of any testator who dies after Dec. 31, 1945, shall (notwithstanding the actual date of the execution thereof) be deemed to have been executed after Jan. 1, 1936."

So far, it is clear that the Act did not affect the testator's testamentary dispositions and that the restraint on anticipation imposed on the plaintiff's enjoyment of her portion remained a valid restriction. It is said by the plaintiff that this state of things has been altered because the testator in 1937 made two further D codicils. These did not expressly affect the disposition of his residuary estate, but did in each case confirm his will as altered by the former codicils. The testator died in 1939. His will has been duly proved, and the defendants are now the trustees of it. The question is whether the execution by the testator of the codicils of 1937 operated, having regard to the terms of the Act, to invalidate the restraint on anticipation imposed by his will. This is a question E of the true construction of the Act, and, particularly, of the proviso to s. 2 (1).

Now, at first sight and without consulting authority, I should come to the conclusion that this restriction which appears in the will executed on Dec. 10, 1932, was " contained in an instrument executed before " the critical date, and, therefore, was valid, but the plaintiff invokes the doctrine of re-publication and claims that by executing codicils in 1937 the testator brought his will F down to that year so that it must be read in all respects as though executed on the date of his latest codicil, and that, if so read, the restriction is void under s. 2 (3) as being contained in " an instrument executed after Jan. 1, 1936." The doctrine of re-publication of wills has been much canvassed in recent years in connection with another statute, namely, the Finance Act, 1941. Section 25 G of that Act varied provisions as to tax free annuities by words (so far as relevant) modifying " any provision, however worded, for the payment . . . of a stated amount free of income tax . . . being a provision which (a) is contained in any . . . will . . . and (b) was made before Sept. 3, 1939." This section has had a chequered career. It was first considered by FARWELL, J., in *Re Waring* (1) where the learned judge held that provisions contained in a will do not take effect till the death of the testator, and that, therefore, provision H for a tax free annuity made in the will of a testator dying after Sept. 3, 1939, was not affected though the will bore an earlier date. This decision was reversed by the Court of Appeal, the court holding that the provision was made on the date when the will was executed. There was in that case a codicil after Sept. 3, 1939, but it did not expressly confirm the will and was held to be irrelevant. In the next year, however, SIMONDS, J., in *Re Tredgold* (2) had before him a case where there was a will before the date and a codicil after it which expressly confirmed the will, and he distinguished *Re Waring* (1) and

held that the provision was made at the date of the codicil, and was, therefore, not modified. There was no appeal in that case, but the decision was overruled by the Court of Appeal in *Re Sebag-Montefiore* (3) where it was held that the provision was made by a will before the date notwithstanding that there was a subsequent codicil expressly confirming the will. The whole question was re-considered by the House of Lords in *Berkeley v. Berkeley* (4) where the House, in effect, restored the original decision of FARWELL, J., and held that the provision was not made till the testator's death. This made it unnecessary to consider the question of confirmation by codicil on which subject the House was divided. It is to be observed that the majority concluded on that Act that the word "provision" signified the thing given and not the words creating the gift. LORD PORTER, the only member of the House who took a contrary view of the meaning of the word "provision," also disagreed with the majority about the relevant date. He held that the relevant date was that of a codicil after 1941, and, therefore, in the result agreed with the majority while rejecting all their reasons. It appears to me that in the Act of 1935 which I have to consider, the word "provision" could not possibly mean anything but the words used to attach the restriction. This at once deprives me of any real guidance in the construction of the statute of 1935 based on the views of the majority of the House of Lords on the statute of 1941.

LORD PORTER'S observations are more germane for my purpose, and he held that the provision, i.e., the words creating the bequest, was contained in the last codicil and used these words ([1946] 2 All E.R. 163) :

"The second question is what is the codicil in which the provision is contained. Originally, no doubt, it is to be found in the second, but that codicil is confirmed by the fourth, and in the end it has to be determined which of the two ultimately 'makes' it. The inquiry goes back behind the Wills Act, 1837, to the history of the publication and re-publication of wills, an expression now meaningless, but still unhappily in use. I do not, however, think it necessary to explore its origin ; it is enough to say that there is a series of cases since the Wills Act, 1837 was passed insisting that, just as re-publication of the will substituted the date of the re-publication for that of the will before the Wills Act was passed, so afterwards the will spoke from the date of confirmation rather than from that of its original execution, and this result occurred even when there was no express confirmation contained in the codicil, provided the will was referred to and it appeared that the codicil intended to confirm it. To this result, it is true, there were some exceptions made with the object of preserving the intention of the testator where a strict fulfilment of the general rule would defeat it, e.g., in cases where an exact compliance with the rules would result in the giving of double portions, or would defeat a gift to charity which the testator obviously intended to be effective. It may be enough to quote *Grealey v. Sampson* (5) and *Goonewardene v. Goonewardene* (6), as exemplifying the rule, and *Re Fraser* (7), as exemplifying the exception. In the present case, however, there are no facts rendering either of these two exceptions applicable and the general rule that a will or earlier codicil is made at the date when it is confirmed by a codicil of later date must, in my opinion, prevail."

It will be seen that the principle which he enunciated is, according to him, not of universal application, but only a general rule, and is not to be adhered to where it defeats the intention of the testator. That consideration did not apply in *Berkeley v. Berkeley* (4) and LORD PORTER, therefore, held that the doctrine of re-publication prevailed. What is the position here ? It seems to me that this testator clearly intended when he made his will in 1932 to impose this restriction on his daughter, and that, so far from changing his mind, he adhered to that view at least until the date of his last codicil in 1937,

for each of these instruments confirms the will. If then I am, by applying the doctrine, to prevent the restriction from being effective, I conceive that I am defeating the testator's intention, and if I am to follow LORD PORTER's guidance, this must be an exception from the rule.

I turn, therefore, to the earlier cases for guidance as to instances of the application of the rule, or its rejection, and first to *Rolfe v. Perry* (8). In that case the will was executed before the coming into force of the Real Estate Charges Act, 1854 (Locke King's Act), which altered the incidence of debts charged on real estate, excepting, however, "the rights of any person claiming under or by virtue of any will, deed, or document already made, or to be made before" a certain date. There was a codicil following that date, but LORD WESTBURY, L.C., held that the will was a will "already made" within the exception. His Lordship held that on the construction of the statute a will was "already made" on the date of its execution and not at the date of a codicil re-publishing it or at the testator's death.

The like case is *Re Elcom* (9) which was concerned with the Married Women's Reversionary Interests Act, 1857 (known as Malins' Act). This entitled a wife to assign a reversionary share provided she was "entitled under any instrument made after Dec. 31, 1857." The will under which the lady in question claimed was made before that date, but there was a subsequent codicil confirming the will. CHITTY, J., who was affirmed by the Court of Appeal, held that she was not entitled under any instrument made after Dec. 31, 1857, relying particularly on the word "instrument," and held that whether or no the codicil in terms re-published the will was immaterial. In the Court of Appeal, LINDLEY, L.J., made the following observations ([1894] 1 Ch. 312):

"The will was made in March, 1856. Whether it would remain in force depended on the subsequent proceedings of the testatrix. She made a codicil in 1864, after Dec. 31, 1857. By this codicil she bequeathed various pecuniary legacies, and thereby diminished the residue, but did not otherwise affect the disposition of it. She did not in terms re-publish her will; but that, in my judgment, is quite immaterial. It is ingeniously argued that her will is made up of the aggregate of all her testamentary instruments, and for many purposes that is so; but can it be said that this lady became entitled to this reversionary interest under an instrument made after Dec. 31, 1857? I think that it cannot by any ingenuity be made out that she did. How do you 'make' a testamentary instrument? By signing it with such formalities as the law requires. Under what instrument does Mrs. Hamilton derive her title? Under the will, and the will was made before the Act. I do not think it necessary to refer to cases—there are none that throw much light upon the point. The case that comes nearest is *Rolfe v. Perry* (8) and it makes against the appellant. But we do not want cases, for the language of the Act is plain."

I cite next the Irish case of *Re Moore* (10) which decided that a charitable devise by will dated more than three months before the death followed by a codicil confirming it within three months of the death was valid notwithstanding s. 16 of the Charitable Donations Act, 1844, which enacts that no devise for charitable uses in Ireland shall be valid to create any estate in lands "unless the will or other instrument containing the same shall be duly executed three calendar months at least before the death." BARTON, J., made the following observations ([1907] 1 I.R. 318):

"It is well settled that for many purposes re-publication brings the will down to the date of the codicil, and makes it speak as a new will of that date, and take effect as if it had been reinserted in the codicil and re-executed at the date of the codicil. But it is equally well settled that there are limits to the doctrine. 'The rule is subject to the limitation that the intention of the testator is not to be defeated thereby'; per

PATTESON, J., in *Doe d. Biddulph v. Hole* (11). 'It does not necessarily operate as if the will had been originally made at the date of the codicil': *per* LORD CAMPBELL, L.C., in *Hopwood v. Hopwood* (12). The effect of the decision of the Court of Appeal in *Mountcashel v. Smyth* (13) is that re-publication re-publishes the will with all its contents, including its original date. It is as if the old document, with its old date, were translated into the codicil. Re-publication gives to the will a fresh starting point, but it does not erase the old date. Nor does it, in my opinion, falsify the fact that the will contained a particular devise and was executed at a particular time. The authorities which have been cited lead me to the conclusion that the courts have always treated the principle that re-publication makes the will speak as if it had been re-executed at the date of the codicil not as a rigid formula or technical rule, but as a useful and flexible instrument for effectuating a testator's intentions, by ascertaining them down to the latest date at which they have been expressed."

In the more recent case of *Re Hardyman* (14), ROMER, J., after considering the cases and citing from *Re Moore* (10), made the following observations ([1925] Ch. 292):

"In other words the court, for the purposes of ascertaining the intention of the testator, would regard the re-publication of the will by the codicil as an expression of the testator's intention as at that date. When, therefore, the testator, at the date of his codicil, by which time legacy duty had been replaced by succession duty, expressed a wish that the legacy duty on the particular legacy should be paid, the court was able to arrive at the conclusion that the testator intended to refer to succession duty."

Then he cites from *Re Moore* (10) and goes on (*ibid.*):

"It appears to me, in the circumstances, and having regard to the authorities, that I must construe the present will in light of the fact that by re-publication the testatrix has said to me: 'This will expresses my intentions at this date' (*i.e.*, the date at which this codicil was made), and that I must not disregard that fact."

He came to the conclusion that in that case he would be effectuating the testator's intention by holding that a second wife existing at the date of a confirming codicil was intended by a bequest which if it had been contained in the will alone would have operated in favour of the first wife. The same principles are seen at work in *Re Reeves* (15) and *Re Goonewardene* (6).

Finally, I find the following observation in JARMAN ON WILLS, 7th ed., vol. 1, p. 192:

"It would seem, on general principles, that if a testamentary gift is valid at the date of the will, it cannot be invalidated by mere re-publication of the will."

The editor cites *Re Moore* (10) for this proposition which seems to me to have much to commend it.

In my judgment, in this state of the authorities, I am free, if, indeed, I am not bound, to follow what would have been my own inclination. The instrument by which this restriction attached was dated before Jan. 1, 1936, and the restriction is contained in no other instrument, and, in my judgment, therefore, it is a valid restriction notwithstanding the Act of 1935 and the codicils of 1937.

Declaration accordingly. Costs as between solicitor and client out of the capital.
Solicitors: *Gibson & Weldon* (for the plaintiffs); *Deacons & Pritchards* (for the defendants).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

AKTIEBOLAGET MANUS v. R. J. FULLWOOD & BLAND,
LIMITED.

[COURT OF APPEAL (Lord Greene, M.R., Somervell and Evershed, L.JJ.),
November 22, 23, 24, 25, 26, 29, 30, December 15, 1948.]

Trade Mark—Removal from register—Non-user—“Special circumstances in the trade”—Foreign manufacturing company—War conditions preventing importation of goods—Trade Marks Act, 1938 (c. 22), s. 26 (1) (b), (3).

The Trade Marks Act, 1938, s. 26, provides: “(1) . . . a registered trade mark may be taken off the register . . . on application by any person aggrieved to the court or . . . to the registrar, on the ground . . . (b) that up to the date one month before the date of the application a continuous period of 5 years or longer elapsed during which the trade mark was a registered trade mark and during which there was no *bona fide* use thereof in relation to those goods by any proprietor thereof for the time being . . . (3) An applicant shall not be entitled to rely for the purposes of sub-s. (1) (b) . . . of this section on any non-use of a trade mark that is shown to have been due to special circumstances in the trade and not to any intention not to use or to abandon the trade mark in relation to the goods to which the application relates.”

Prior to 1940 the defendants had acted as sole commercial agents in England for the marketing of a milking machine evolved and manufactured (with the exception of certain accessories) in Sweden by the plaintiffs, a Swedish company. The machines bore the word “Manus,” which was registered in Part B of the register as the plaintiffs’ trade mark. On June 10, 1940, when, owing to war-time restrictions imposed in both Sweden and England, the importation of the machines had terminated, the parties entered into an agreement for the period until September, 1941, under which the defendants were to manufacture the machines in England, continuing the use of the name, “Manus,” with the object of keeping the plaintiffs’ name and good will alive in the English market. The defendants continued the manufacture of the machines during the war, and it was admitted that the plaintiffs, did not themselves use the trade mark after the date of the agreement. The plaintiffs’ factory in Sweden was requisitioned from 1941 until 1944. On May 6, 1946, the defendants applied for the rectification of the register by the removal of the trade mark.

In an action in which the plaintiffs claimed an order restraining the defendants from passing off their goods as those of the plaintiffs and from infringing their trade mark, the defendants, by a counterclaim and on the ground of alleged non-user, claimed the removal of the mark from the register under s. 26 (1) of the Act of 1938.

HELD: “special circumstances” within the meaning of s. 26 (3) were peculiar or abnormal circumstances experienced by persons engaged in a particular trade as the result of the working of some external force as distinct from the voluntary act of any individual trader; “the trade” in the sub-section meant the trade in which the proprietor of the trade mark was engaged—in the present case that of a foreign manufacturer of milking machines dealt in on the English market; it was not necessary that the “special circumstances” should be such as to afflict all traders equally, or all traders, equally or otherwise; and, therefore, the war conditions were “special circumstances in the trade” within the meaning of s. 26 (3) notwithstanding that they did not affect everyone in the trade in the same way, and the defendants were not entitled to rely on non-user arising therefrom for the purposes of s. 26 (1) (b).

[FOR THE TRADE MARKS ACT, 1938, s. 26 (1) (b) and (3), see HALSBURY’S STATUTES, Vol. 31, pp. 772, 773.]

Cases referred to :

- (1) *Bowden Wire, Ltd. v. Bowden Brake Co., Ltd.* (No. 1), *Re Bowden Wire, Ltd.'s Trade Marks*, (1913), 30 R.P.C. 580; *on appeal*, 31 R.P.C. 385; 43 Digest 195, 429.
- (2) *Gledhill (G. H.) & Sons, Ltd. v. British Perforated Toilet Paper Co.*, (1911), 28 R.P.C. 714; *affmg.*, 28 R.P.C. 429; Digest Supp.
- (3) *Re Columbia Graphophone Co., Ltd.*, (1932), 49 R.P.C. 621; Digest Supp.
- (4) *Re Crean (James) & Son, Ltd.'s Trade Mark*, (1921), 38 R.P.C. 155; 43 Digest 204, 499.

APPEAL by the defendants from an order of HARMAN, J., dated June 16, 1948.

Before the war the defendants had been the marketing agents in England for milking machines made by the plaintiffs, a Swedish company. Owing to war-time restrictions, the importation into England of the machines became impossible, and, by an agreement made between the parties on June 10, 1940, the defendants were licensed by the plaintiffs to manufacture the machines in England, and to continue to use the plaintiffs' registered trade mark "Manus" with the object of maintaining the plaintiffs' goodwill. The defendants having claimed the right to continue to apply the name "Manus" to machines of their own manufacture independently of the plaintiffs, the plaintiffs brought this action for passing-off and infringement of their registered trade mark. The defendants contended that in this country the word "Manus" was never distinctive of the plaintiffs as the business origin of the milking machines. Alternatively, they said that, if it ever was distinctive of the plaintiffs, it had lost that distinctiveness by reason of subsequent events, and they counter-claimed that, by virtue of s. 26 (1) (b) of the Trade Marks Act, 1938, the trade mark should be removed from the register. HARMAN, J., granted an order restraining the defendants from passing-off their goods as and for those of the plaintiffs and from infringing the plaintiffs' trade mark. The Court of Appeal dismissed the appeal.

Beney, K.C., and *Mould, K.C.*, for the defendants.

Arthian Davies, K.C., and *P. Stuart Bevan* for the plaintiffs.

Cur. adv. vult.

Dec. 15. LORD GREENE, M.R., and SOMERVELL, L.J., intimated that they agreed with the judgment of EVERSLED, L.J.

EVERSHED, L.J. (read by SOMERVELL, L.J.): [HIS LORDSHIP dealt with the facts summarised above, and with the allegation of passing-off, and continued:] Beyond question the plaintiffs did not from the inception of the licence agreement of June 10, 1940, themselves use the mark. They say, however—and this is their substantial answer to the defendants' counterclaim—that such non-user was the direct result of the compelling circumstances of the second world war, and, particularly, of the war-time legislation both in Great Britain and Sweden which made the importation of their Swedish manufactured machines practically impossible, to which they add that their factory at Noorkoping was requisitioned by the Swedish government from 1941 to 1944. The plaintiffs rely on these circumstances as constituting "special circumstances in the trade" within the meaning of s. 26 (3) which so far as material is in the following language :

"An applicant shall not be entitled to rely for the purposes of para. (b) of sub-s. (1) . . . of this section on any non-use of a trade mark that is shown to have been due to special circumstances in the trade and not to any intention not to use or to abandon the trade mark in relation to the goods to which the application relates."

The language of the sub-section has, in the present case, given rise to two distinct questions. First, it is said on the defendants' behalf that the alleged special circumstances must be circumstances affecting (and, as I understand

their argument, affecting disadvantageously to an equal or substantially equal degree) all persons engaged "in the trade" during the relevant period, or, at least, must not be circumstances peculiar to a particular trader. "The trade," according to the defendants' argument, must mean the trade of all manufacturers, whether British or foreign, of machines in fact marketed in England. It was not (so ran the argument) established that the war conditions operated even to prevent all foreign manufacturers from trading in England since some

A had or may have had subsidiary factories in England, and, in any case, the effect of the war was, in fact, to stimulate rather than to depress the business of the English manufacturers, among whom, notably, were the defendants themselves.

B It is, I think, clear that the words "the trade" in the sub-section must mean the trade in which the proprietor is engaged. I should, therefore, in the present case be disposed to define "the trade" as meaning that of foreign manufacturers of milking machines dealt in on the English market. But even if the word be extended so as to comprise also English manufacturers, I am unable to accept the defendants' argument, for though the phrase in question may or may not be apt to cover the case of a calamity suffered exclusively by a particular trader—e.g., if his factory were destroyed by fire or bombs—it is not, in my view, necessary that the "special circumstances" should be such as to afflict all traders equally, or, indeed, to afflict all of them equally or otherwise. It is important to my mind to note that the relevant phrase is used in contrast to that which immediately follows—"and not to any intention not to use or to abandon the trade mark." In that context it seems to me (without attempting any precise definition) that the words must be taken to refer to circumstances which are "special" in the sense of being peculiar or abnormal and which are experienced by persons engaged in a particular trade as the result of the working of some external forces as distinct from the voluntary acts of any individual trader. According to such a test no less than (in my view) the ordinary and common sense meaning of the words the impact of war conditions making impracticable the ordinary usages of international trade would amount to special circumstances in the trade, and, if the non-user of his mark by a particular trader was, in fact, due to the effect on his business of those conditions, then he would, in my view, be within the protection of sub-s. (3).

E The case was put by SOMERVELL, L.J., in the course of the argument of the imposition of prohibitive tariffs practically effective to keep out of England altogether machines manufactured abroad. It is clear that such a tariff would strike hardest at those manufacturers who had no means of manufacturing in England and would (as it would be intended to do) immensely benefit English manufacturers. Whether or not the words "the trade" be given their widest significance, the effect of such a tariff would, in my judgment, amount to "special circumstances in the trade."

G Counsel for the defendants relied strongly and naturally on a passage in *Re Columbia Graphophone Co. Ltd.* (3), from the judgment of LORD HANWORTH, M.R., where he said : (49 R.P.C. 628) :

H "SARGANT, J., points out in that case [*Crean's case* (4)], and we agree with him, that the non-user must be due to circumstances of the trade and not to special circumstances attaching to and belonging to the trader personally. It must be something of a wider nature than the latter ; it must be circumstances belonging to the trade as a whole."

Reference to the judgment of SARGANT, J., shows, I think, clearly that the MASTER OF THE ROLLS' paraphrase—particularly the last few words—went further than was justified by the language of the learned judge, and, if by those last few words LORD HANWORTH intended to express the view that special circumstances within the meaning of the sub-section must affect similarly every trader in the trade (a view which was unnecessary to the decision in

the case before him) I respectfully think that it ought not to be followed.

In my judgment, therefore, **HARMAN, J.**, came on this part of the case to a correct conclusion which he expressed shortly as follows :

"It was also urged that the war did not affect everyone in the trade in the same way, and, therefore, was not a special circumstance in the trade. It was said that the plaintiffs were so affected because they had not set up business in this country while other Swedish manufacturers of milking machines had done so. In my judgment, the war conditions were a special circumstance in the trade none the less because these circumstances bore more hardly on some than on others."

Appeal dismissed with costs.

Solicitors : *Ernest Winterbotham & Co.* (for the defendants) ; *Evans Baker & Co.* (for the plaintiffs).

[Reported by **F. GUTTMAN, Esq.**, Barrister-at-Law.]

BRITISH MOTOR TRADE ASSOCIATION *v.* SALVADORI AND OTHERS.

CHANCERY DIVISION (Roxburgh, J.), November 29, 30, December 1, 2, 3, 6, 7, 8, 9, 10, 13, 14, 15, 16, 17, 20, 21, 1948.]

Conspiracy—Procurement of breach of contract—Trade protection association—Covenant by purchaser not to re-sell at more than specified price—Purchase of article at higher price—Trade interest—Damages—Measure—Right of non-trading body to maintain action—Trade union.

The plaintiffs, a certified trade union, were an association, the main function of which was to protect the interests of the motor trade and the purchasing public by ensuring that list prices of cars were neither cut nor inflated. All British motor car manufacturers and their authorised dealers were members of the association and as such were bound to sell cars at the list prices. To effect this, on or before delivery of a new car the purchaser of the car executed a deed of covenant with the plaintiffs and the dealer who supplied the car not to re-sell it for the period of one year. The defendants, who were either not members of the association or were on a "stop list" as being persons with whom the members of the association were forbidden to trade, were members of a "ring" of dealers whose object was to obtain new or practically new cars for re-sale at prices greatly above the list prices. The usual method adopted was for a member of the ring to put up an ostensible purchaser (in fact, an agent of the operator) who was provided with sufficient funds to pay the list price and to reward himself and who signed the covenant. This agent then handed the car to the operator, and the car was sold to the public at a greatly enhanced price.

HELD : (i) each defendant was guilty of procuring breaches of contract, since any active step taken by a defendant having knowledge of the covenant by which he facilitated a breach of that covenant constituted the procuring of a breach of contract, and a defendant, by agreeing to buy, paying for, and taking delivery of a motor car known by him to be offered to him in breach of covenant, took active steps by which he facilitated such a breach, *dictum of LORD MACNAGHTEN in Quinn v. Leathem* ([1901] A.C. 510 ; 85 L.T. 291), *applied*. Even if a covenantor offered a car for sale, the element of inducement was present, since he was not ready unconditionally to break his covenant. He was willing to do so only if the price offered was high enough, and, accordingly, a defendant who offered such a price induced the seller to take the final steps towards breaking his covenant by making his willingness to sell unconditional.

(ii) the plaintiff association, although a certified trade union, were, nevertheless, entitled to maintain an action against the defendants for damages for conspiracy to procure breaches of contract and for injunctions without proof of specific damage.

Exchange Telegraph Co. v. Gregory & Co. ([1896] 1 Q.B. 147; 74 L.T. 83), and *National Union of General and Municipal Workers v. Gillian* ([1945] 2 All E.R. 593; [1946] K.B. 81; 174 L.T. 8), *applied*.

(iii) the maintenance of fixed prices and the covenant system as an integral feature of that policy was a trade interest which the plaintiffs were entitled to protect against unlawful interferers, and the expenses incurred in detecting each separate breach by the defendants, although unable to be precisely quantified, were proveable as damage.

Thorne v. Motor Trade Association ([1937] 3 All E.R. 157; [1937] A.C. 797; 157 L.T. 399); and *Dunlop Pneumatic Tyre Co., Ltd. v. New Garage and Motor Co., Ltd.* ([1915] A.C. 79; 111 L.T. 862), *applied*.

[AS TO TORTS ARISING OUT OF THE OPERATIONS OF TRADE UNIONS, see HALSBURY, Hailsham Edn., Vol. 32, pp. 516-524, paras. 813-822; and FOR CASES, see DIGEST, Vol. 43, pp. 112-120, Nos. 1171-1236.]

C Cases referred to :

(1) *Quinn v. Leathem*, [1901] A.C. 495; 70 L.J.P.C. 76; 85 L.T. 289; 65 J.P. 708; 42 Digest 971, 30.

(2) *Lumley v. Gye*, (1853), 2 E. & B. 216; 22 L.J.Q.B. 463; 42 Digest 987, 169.

(3) *Blake v. Lanyon*, (1795), 6 Term Rep. 221; 34 Digest 170, 1331.

(4) *De Francesco v. Barnum*, (1890), 63 L.T. 514; 34 Digest 170, 1332.

(5) *Wilkins (Fred) & Brothers, Ltd. v. Weaver*, [1915] 2 Ch. 322; 84 L.J.Ch. 929; 34 Digest 1329.

(6) *Exchange Telegraph Co. v. Gregory & Co.*, [1896] 1 Q.B. 147; 65 L.J.Q.B. 262; 74 L.T. 83; 60 J.P. 52; 42 Digest 988, 178.

(7) *National Union of General and Municipal Workers v. Gillian*, [1945] 2 All E.R. 593; [1946] K.B. 81; 115 L.J.K.B. 43; 174 L.T. 8; 2nd Digest Supp.

(8) *Thorne v. Motor Trade Asscn.*, [1937] 3 All E.R. 157; [1937] A.C. 797; 106 L.J.K.B. 495; 157 L.T. 399; Digest Supp.

(9) *Ware & De Freville, Ltd. v. Motor Trade Asscn.*, [1921] 3 K.B. 40; 90 L.J.K.B. 949; 125 L.T. 265; 42 Digest 984, 141.

(10) *Dunlop Pneumatic Tyre Co., Ltd. v. New Garage & Motor Co., Ltd.*, [1915] A.C. 79; 83 L.J.K.B. 1574; 111 L.T. 862; 17 Digest 138, 426.

(11) *Elphinstone (Lord) v. Monkland Iron & Coal Co.*, (1886), 11 App. Cas. 332; 17 Digest 146, 483.

ACTION by the plaintiffs claiming an injunction to restrain the defendants from procuring breaches of covenants made with the plaintiffs by the purchasers of new cars whereby those purchasers undertook not to re-sell the cars for a period of one year without the consent of the plaintiffs. The plaintiffs further claimed damages for (1) conspiracy to procure breaches of contract; (2) procuring breaches of contract; (3) breach of contract. ROXBURGH, J., gave judgment for the plaintiffs, granted an injunction, and ordered an inquiry as to damages.

Pritt, K.C., *Aldous* and *J. Brewis* for the plaintiffs.

Shelley, K.C., and *Hunter-Brown* for the defendants.

ROXBURGH, J.: The plaintiffs, a certified trade union, are an association of which all British motor car manufacturers and all their authorised distributors and dealers are members. No imported cars are available at present. Accordingly, no dealer who is not a member of the association can obtain from any manufacturer in the ordinary course of trade

a new car for sale to the public. Every authorised distributor or dealer who obtains such a car is bound to sell at the list price. If he breaks this rule he is liable to be fined, and in the end he may be put on a stop list. The effect of this is that no member of the association is permitted to trade with him. All the defendants are either not members or on the stop list, and, accordingly, they cannot obtain a new car through an authorised dealer except by some device, such as corruption or impersonation. [His LORDSHIP stated the facts, referred to the "ring" in the market of which the defendants were members, and continued :—] The usual plan of operation is for one of the members or associates in this market to put up an ostensible purchaser to sign the covenant, providing him with enough notes to pay the list price for the car, reward himself handsomely, and, if necessary, grease a palm or two. Many of the transactions which I have investigated tend to conform to this pattern. While the ostensible purchaser is really an agent of the operator who supplies the money, he executes the deed in his own name and without power of attorney. Accordingly, he is alone liable on the covenant, and when his principal, in accordance with the bargain, calls on him to hand over the car, he procures a breach of covenant. This operator, however, does not in the normal case himself sell the car to the public. He sells to another trader. If that other trader is an independent operator, he cannot be sued for procuring breach of covenant, because the covenant does not run with the car, and, accordingly, the second operator is dealing not with the covenantor but with another operator who is not bound by the covenant. It would be otherwise if the first operator was the agent of the second operator. Sometimes, however, there is only one operator who finds an independent covenantor anxious and willing to sell.

This case necessitates a close investigation of the law relating to procurement of breaches of contract. In *Quinn v. Leathem* (1) LORD MACNAGHTEN, referring to the decision in *Lumley v. Gye* (2) said ([1901] A.C. 510) :

"Speaking for myself, I have no hesitation in saying that I think the decision was right, not on the ground of malicious intention—that was not, I think, the gist of the action—but on the ground that a violation of legal right committed knowingly is a cause of action, and that it is a violation of legal right to interfere with contractual relations recognised by law if there be no sufficient justification for the interference."

I have already said enough about the defendants and their activities to show that, if they interfere knowingly with contractual relations, they have no justification for doing so, but counsel for the defendants contends that it is no tort merely to make a price with a man who is offering a car for sale in breach of covenant, because a willing seller needs no inducement. The importance of the point is obvious, because, if it is well founded, the question whether a tort has been committed will depend on whether the buyer or the seller speaks the first word, and, as the buyer and the seller may both be hostile to the plaintiffs for obvious reasons, the plaintiffs are likely to be met with unchallengeable evidence that the seller took the initiative.

It is true that the tort is often spoken of as inducing or procuring breach of contract, but I shall adhere to LORD MACNAGHTEN'S word "interference," and I shall endeavour to interpret that word in the knowledge that LORD MACNAGHTEN, in using it, had *Lumley v. Gye* (2) in his mind. *Lumley v. Gye* (2) is, undoubtedly, a case in the direct line of descent of this principle of the common law, but *Lumley v. Gye* (2) had an earlier ancestry, and I feel that I shall not err if I interpret LORD MACNAGHTEN'S phrase in the light of those earlier cases. The first is *Blake v. Lanyon* (3). That decision was :

"An action will lie for continuing to employ the servant of another after notice without enticing him away. Here no fault could be imputed to the defendant for taking Hobbs into his service in the first instance

because then he had no notice of Hobb's prior engagement with the plaintiff, but as soon as he had notice of that fact, he ought to have discharged him."

That case was followed in *De Francesco v. Barnum* (4), the headnote of which is :

"The plaintiff in May, 1889, entered into agreements with five girls whereby they agreed to perform in the ballet for the plaintiff during the following pantomime season at certain salaries. In October, 1889, Barnum, who had at that time no notice of these agreements, engaged the same girls to perform under his directions. The plaintiff, on discovering this engagement, gave notice to Barnum of the agreements of May, 1889, but notwithstanding this the girls continued to be employed by Barnum. The plaintiff sued Barnum for damages for continuing to employ the girls after notice of the agreements of May, 1889, and the girls for breach of those agreements. Held, following *Blake v. Lanyon* (3), that an action will lie against one who continues to employ the servant of another after notice of the prior contract of service, and that in order to maintain such an action it is not necessary that the employer and employed should stand in the strict relation of master and servant."

FRY, L.J., who was sitting as an additional judge of the Chancery Division, said (63 L.T. 515) :

"Then this further point arises : in *Blake v. Lanyon* (3) the case was one of master and servant, and not merely of employer and employed. It is suggested that the doctrine cannot be applied except in the strict case of master and servant. But it is to be observed in the case of *Lumley v. Gye* (2) the strict relation of master and servant did not exist, and the court nevertheless held that the doctrine of enticement did apply and was actionable, although the relation of master and servant might not have existed. It appears to me plainly to follow that, inasmuch as it has been now held that in the cases where it is not master and servant the doctrine of enticing will apply, the law is the same in the case of continuing in employment after notice, and has been settled to be this, that you can maintain an action either for enticing away a servant or person employed, or for continuing to employ a person, a servant, or employee after notice. I think, therefore, that the action lies."

I cannot doubt that LORD MACNAGHTEN, in using the word "interference," had such cases in mind. Indeed, it is possible that, in choosing that word for his statement of general principle, he intended to make some reduction in their ambit, for those cases seem to treat something akin to mere passivity as a tort and to require active dissociation from the breach of contract, and they are still of unimpaired authority in the circumstances to which they apply and have since been followed by JOYCE, J., in *Wilkins (Fred) & Brothers, Ltd. v. Weaver* (5). LORD MACNAGHTEN preferred the word "interference" for his statement of the doctrine, and this seems to me to predicate active association of some kind with the breach, but, in my judgment, any active step taken by a defendant, having knowledge of the covenant, by which he facilitates a breach of that covenant is enough. If this be so, a defendant, by agreeing to buy, paying for, and taking delivery of a motor car known by him to be offered to him in breach of covenant, takes active steps by which he facilitates a breach of covenant, and it is not seriously contended that in any of the cases with which I am concerned the defendant did not know of the existence of the covenant or thought that the covenantor had obtained a release. The plaintiffs will succeed even if I have construed the word "interference" too broadly, because, if a further element of inducement must be present, that further element can be found. The covenantor who offers a car for sale is not unconditionally ready to break his covenant. He is willing

to do so only if the price offered is high enough, and, accordingly, a defendant who offers such a price induces the seller to take the final step towards breaking his covenant by making his willingness to sell unconditional. It is, of course, necessary for the tort of procurement of breach of contract to establish damage. I will postpone the consideration of that question until a later stage in my judgment.

[HIS LORDSHIP then referred to the evidence and found as a fact that there had been breaches or procurement of breaches of covenants by the defendants, and continued :] I now come to the question of damages, and I have to deal with it both in connection with the conspiracy and also in relation to the breaches of covenant. In *Exchange Telegraph Co. v. Gregory & Co.* (6), a decision of the Court of Appeal, the headnote is :

"In order to support an action for maliciously inducing persons to break their business contracts with the plaintiff proof of specific damage need not be given ; it is sufficient to prove facts from which it may properly be inferred that some damage must result to the plaintiff from the defendant's wrongful acts."

KAY, L.J., said (*ibid.*, 155) :

"As to the third head, it was argued that the defendant was not bound by any contract with the plaintiffs, and that, in order to maintain an action against him for inducing subscribers to break their contracts with the plaintiffs, damage to the plaintiffs must be shown. I agree that the gist of the action would be damage ; but if a judge or jury could properly infer from the acts complained of that those acts must result in damage to the plaintiffs, that is enough. As I have already pointed out, if the defendant had not obtained the information fraudulently the only other way would have been to get it from the newspaper, which he must have bought. But further, what the defendant did was a direct interference with the plaintiffs' business. It was an obtaining of very valuable information, in respect of which the plaintiffs made profits by communicating it to a limited number of persons. It is obvious that what the defendant did could be done by others, and very few persons would become subscribers if the information could be got by inducing some person who had it as a subscriber to communicate to others in this way. The inference is irresistible that damage must accrue to the plaintiffs from such an act as the defendant has committed."

The Exchange Telegraph Company was a trading corporation and the plaintiff association is a certified trade union. Does that distinction stand in the way of the plaintiffs ? I think not. The headnote in *National Union of General and Municipal Workers v. Gillian* (7), a decision of the Court of Appeal, begins :

"A trade union can, in general, maintain an action in tort, and an action for libel is no exception to that rule."

SCOTT, L.J., dealing with this important matter and the Acts relating to trade unions, said ([1946] K.B. 86) :

"In my view, the true interpretation of the Acts is that a trade union is given all powers of a *persona juridica* except (a) those solely characteristic of a natural person, and (b) those which are expressly excepted by the creating or enabling statute. This conclusion is strongly supported by a consideration of what must have been in the mind of Parliament. The policy of the Act was to encourage collective bargaining by legalising the position of trade associations formed for purposes which, taken alone, were obnoxious to the common law as being in restraint of trade. The main feature of collective bargaining is to collect the members on each

bargaining side into coherent units which can speak or make agreements for the side."

It is noticeable that SCOTT, L.J., says "each side." He continued (*ibid.*) :

- "Therefore, the more each side in an industry can be collected together so as to act with one mind, the better for the policy. Enthusiasm for joint action is the driving force, and disintegration of the union is the supreme danger. The men's union, more especially, must be able to protect itself against any form of attack calculated to arouse doubts and suspicions in the minds of members, and so to destroy the cohesion and will to act of the union. Against endeavours of this sort the union must have powers of defence; and the most effective power of all is the right of action in the King's courts. Indeed, that right seems to me vital, and
- A I cannot think that Parliament could possibly have intended not to confer it."
- B

It is strange how appropriately those words apply to the present case, once you make the transference which SCOTT, L.J., himself contemplates from a union of men to a union of masters. UTHWATT, J., said (*ibid.*, 88) :

- "It is well established that in certain cases a trading corporation may bring a suit in respect of an imputation on its trading reputation, and I see no reason why a non-trading corporation should not have the same rights as respects imputations on the conduct by it of its activities. A trade union to my mind stands in the same position. It, too, has its reputation. Why should it not be protected? The social duty so to conduct the affairs of the union as not to invite well-founded criticism is hardly forwarded by a denial of the right to seek redress for an unjustified disparagement of its activities."
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- D

- The plaintiff association is a trade union having its trade interests which it is entitled to protect. In *Thorne v. Motor Trade Association* (8), LORD ROCHE, in a reference to *Ware & De Freville Ltd. v. Motor Trade Association* (9)—the
- E Motor Trade Association in those two cases being the same body as the present plaintiffs—said ([1937] 3 All E.R. 171) :

"The reason why procedure by way of stop list was there held not to be unlawful was that, though it was taken by persons acting in combination, the intent of the procedure was the protection of the defendants' trade interests."

- F I must hold, therefore, that the maintenance of fixed prices and the covenant system as an integral feature of that policy is a trade interest which the plaintiffs are entitled to protect against unlawful interferers. The present market is an organised counter attack on the covenant system. The defendants are a ring within that market which is counter attacking by
- G means of a conspiracy to procure breaches of contract and many overt acts have been proved. These counter attackers adopt every available means of covering up their tracks, and, as occasion requires, resort to false names, false addresses, and false documents. The plaintiffs are bound to react strongly against such a counter attack which imperils their very existence. I must recall what the plaintiffs' secretary said :

- H "There would be no manufacturers' prices if they were not maintained. It would be beyond human endurance to expect dealers to sell at a narrow margin when they saw their customers immediately obtain the price of three times that amount within a few minutes of sale . . . At the moment . . . all the functions of the association turn on the covenant system. . . . With the covenant scheme removed, in the present state of the market I can see no useful purpose that the association can perform."

I accept that evidence, and if, of course, the association could perform no

useful purpose, I am prepared to infer that its membership would decline almost, if not quite, to the point of extinction. To resist such a counter attack, and also counter attacks from various other directions, the plaintiffs maintain a large investigation department, and the money actually expended in unravelling and detecting the unlawful machinations of the defendants which have been proved in this case before any proceedings could be taken must have been considerable. I can see no reason for not treating the expenses so incurred which could not be recovered as part of the costs of the action as directly attributable to their tort or torts. That these expenses cannot be precisely quantified is true, but it is also immaterial. The plaintiffs have proved the damage which is essential to the tort of conspiracy, and they are entitled to an inquiry.

Not all the overt acts are exclusively referable to the conspiracy. Two transactions, though forming no part of the conspiracy, represent breaches of covenant. Damages for each breach of covenant must be assessed separately, and great care must be taken to ensure that in no case are damages awarded twice over in respect of the same transaction. Counsel for the defendants, however, contended that this is not enough. He submits that there should be no inquiry as regards damages for breach of covenant, because, as he contends, only nominal damages are recoverable. I do not think so. I think that as regards each separate breach the Chancery master must estimate as best he can the pecuniary loss which the plaintiffs have suffered having regard to the circumstances in which it occurred and the difficulties which have confronted the plaintiffs in detecting and unravelling these transactions before they were in a position to take proceedings, and I shall direct an inquiry accordingly.

For these propositions I feel that I may legitimately derive some support from the speech of LORD DUNEDIN in *Dunlop Pneumatic Tyre Co., Ltd. v. New Garage & Motor Co., Ltd.* (10). The second part of the headnote, which I must read in order to explain the point of the case, is:

"The appellants, who were manufacturers of motor tyres, covers, and tubes, supplied these goods to the respondents, who were dealers, under an agreement whereby the respondents, in consideration of certain trade discounts, bound themselves not to tamper with the marks on the goods, not to sell or offer the goods to any private customers or to any co-operative society at less than the appellants' current list prices, not to supply to persons whose supplies the appellants had decided to suspend, not to exhibit or export without the consent of the appellants, and to pay the sum of £5 by way of liquidated damages for every tyre, cover, or tube sold or offered in breach of the agreement. The respondents sold a tyre cover to a co-operative society below the current list price. In an action for breach of contract, it was proved that substantially the whole of the appellants' business in these articles was done through the trade; that in order to prevent underselling the appellants insisted upon all their trade customers signing agreements of this nature; and that the probable effect of underselling by any particular trade customer was to force their other trade customers to deal elsewhere:—*Held*, assuming, without deciding, that the stipulated sum applied to all the preceding stipulations in the agreement, that it was liquidated damages."

LORD DUNEDIN said (*ibid.*, 88):

"Turning now to the facts of the case, it is evident that the damage apprehended by the appellants owing to the breaking of the agreement was an indirect and not a direct damage. So long as they got their price from the respondents for each article sold, it could not matter to them directly what the respondents did with it. Indirectly it did. Accordingly, the agreement is headed 'Price Maintenance Agreement,' and the way in

which the appellants would be damaged if prices were cut is clearly explained in evidence by Mr. Baisley, and no successful attempt is made to controvert that evidence. But though damage as a whole from such a practice would be certain, yet damage from any one sale would be impossible to forecast. It is just, therefore, one of those cases where it seems quite reasonable for parties to contract that they should estimate that damage at a certain figure, and provided that figure is not extravagant there would seem no reason to suspect that it is not truly a bargain to assess damages, but rather a penalty to be held *in terrorem*."

Then LORD DUNEDIN deals with certain cases, including *Elphinstone (Lord) v. Monkland Iron and Coal Co.* (11) and in a reference to *Elphinstone's* case (11) in the Court of Appeal, he says this (*ibid.*, 89) :

"... if my view of the facts in the present case is correct, then RIGBY, L.J., would have agreed with me, for the last words of his judgment are as follows : 'On the other hand it is stated that, when the damages caused by a breach of contract are incapable of being ascertained, the sum made by the contract payable on such a breach is to be regarded as liquidated damages. The question arises, what is meant in this statement by the expression "incapable of being ascertained" ? In their proper sense the words appear to refer to a case where no rule or measure of damages is available for the guidance of a jury as to the amount of the damages, and a judge would have to tell them they must fix the amount as best they can.' To arrive at the indirect damage in this case, supposing no sum had been stipulated, that is just what a judge would, in my opinion, have had to do."

As the tort of conspiracy, accompanied by many overt acts, has been proved, I must grant an injunction to restrain the defendants and each of them by themselves, their servants, or agents, or otherwise, from buying, or facilitating the dealing with, a motor-car, including a chassis, offered for sale or other disposal by a person, or by the agent of a person, known by them to have executed a deed of covenant with the plaintiffs and to contemplate breaking such covenant.

Order accordingly. Defendants to pay costs.

Solicitors : *Osmond, Bard & Westbrook* (for the plaintiffs) ; *S. Myers & Son* (for the defendants).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

E. & S. RUBEN, LTD. v. FAIRE BROS. & CO. LTD.

[KING'S BENCH DIVISION (Hilbery, J.), December 2, 3, 6, 1948.]

Sale of Goods—Sale by sample—Goods not in accordance with sample—Simple process necessary to make goods correspond with sample.

G *Sale of Goods—Acceptance—Acts of ownership in relation to goods—Re-sale—Dispatch by seller direct to buyer's customer—Goods not in accordance with sample—Right of subsequent rejection—Sale of Goods Act, 1893 (c. 71), s. 35.*

H Vulcanised rubber material was sold under the description of "Linatex ... in 41 ft. rolls, 5 ft. wide," with a small sample consisting of a flat soft piece. The material supplied was not of the measurement specified and was crinkly and, in some cases, hard and folded, but evidence was given that these defects could have been corrected by warming the material and pressing out the crinkles. Following a request from the buyers, the sellers sent half of the material direct to a customer of the buyers to whom it had been re-sold by description and by the same sample. The customer rejected the material and the buyers purported to reject it. In an action by the sellers against the buyers for the price :—

HELD: (i) when goods were delivered requiring even a simple process to make them correspond with the sample, they were not supplied in accordance with the sample.

(ii) constructive delivery of the material took place when it was set aside against the contract, and delivery to the buyers' customers, being effected by the sellers as agents for the buyers, constituted acceptance of the material by the buyers within the Sale of Goods Act, 1893, s. 35, and, therefore, the buyers were debarred from rejecting it and could claim only on a breach of warranty.

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[AS TO ACCEPTANCE OF GOODS, see HALSBURY, Hailsham Edn., Vol. 29, pp. 145-150, paras. 183-192; and FOR CASES, see DIGEST, Vol. 29, pp. 583-594, Nos. 1854-1934.]

AS TO SALE OF GOODS BY DESCRIPTION AND SAMPLE, see HALSBURY, Hailsham Edn., Vol. 29, pp. 59-62, para. 71, and pp. 67-69, paras. 75, 76; and FOR CASES, see DIGEST, Vol. 39, pp. 432-438, Nos. 616-675, and pp. 451-457, Nos. 789-847.]

B

Case referred to:

(1) *Hardy (E.) & Co. (London) v. Hillerns & Fowler*, [1923] 2 K.B. 490; 92 L.J.K.B. 930; 129 L.T. 674; *affg.*, [1923] 1 K.B. 658; 39 Digest 456, 831.

C

ACTION for the price of goods sold and delivered and for carriage, and counter-claim for loss of profit by reason of breach of contract.

By letter dated June 3, 1947, the plaintiffs offered to sell to the defendants "3/5 tons of Linatex, this is in 41 ft. rolls, 5 ft. wide, 6 oz. to the square yd. at 1s. 9d. per lb. We enclose a small sample showing what it is like. We sell this largely for making soles for slippers . . ." On June 5, in reply to a request from the defendants, they sent a larger sample and stated: "(a) This material does not age. It is government disposal stock. It is pure natural rubber of very high quality and is vulcanised on the plantation. (b) As regards colour, it is in the original natural and grey. It comes in rolls, and is not protected. The outside of the rolls may be slightly soiled, but the inside is all perfectly clean . . . (d) With reference to further supplies, we would like to say that the 25 tons would be the total quantity and there would be no more available." On June 17 the defendants' commercial traveller made an offer of the material by description and by the same sample to Skelmersdale Shoe Co., Ltd., of Skelmersdale, Lancashire, and obtained an order for "10 tons vulcanised rubber material, surplus government stock, grey, at 2s. 0½d. a lb." He informed his principals by telephone that he had received the order. The defendants' representative telephoned to the plaintiffs' representative, asking whether the plaintiffs would take an order for 10 tons, 5 tons for delivery at once and 5 tons to be held for delivery at a later date. He said that half would go direct to the customer to whom he had re-sold it and half would be delivered to him at Leicester. This was accepted on behalf of the plaintiffs. Confirming this arrangement, the defendants wrote a letter to the plaintiffs the same day saying: "With reference to our conversation with you this morning regarding the Linatex natural colour rubber material, we should like you to reserve for us 10 tons of this as our customer is definitely interested. Five tons will be required at once and 5 tons to be delivered in August. We should like to know whether you can send the 5 tons direct for us and whether you are prepared to hold the other 5 tons in stock until August when we can give you further delivery instructions or whether you would prefer us to have this latter quantity to Leicester. Naturally we would prefer you to hold it as it will save carriage charges . . . Our official order together with delivery instructions and labels, etc., will be sent in the course of post, most probably tomorrow." The official order when sent read as follows: "10 tons vulcanised rubber material. Grey. In rolls 5 ft. wide. Half at once direct to: Skelmersdale Shoe Co., Ltd.,

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Skelmersdale, Lancs. Half Sept. 1, delivery instructions to be given later.” No reference was made to samples or to the material being in 41 ft. rolls. Thereupon the defendants’ representative confirmed the re-sale to Skelmersdale Shoe Co., Ltd., accepting their order and sending off instructions for the labelling of the material to them. The following day he telephoned instructions to the plaintiffs to send the material for the defendants to the Skelmersdale Shoe Co., Ltd., in Lancashire. The plaintiffs sent it there as requested.

A Skelmersdale Shoe Co., Ltd., examined the material, and refused to accept it. The defendants informed the plaintiffs’ representative that the goods had been rejected by Skelmersdale Shoe Co., Ltd., whereupon the plaintiffs’ representative visited Skelmersdale Shoe Co., Ltd., to inspect the goods. The defendants’ representative also inspected the goods, and on July 4 the defendants wrote to the plaintiffs, enclosing two cuttings and saying: “You will readily see that it is impossible to cut this material on a machine press, because it will not lie flat. When we quoted for the goods, we submitted a sample which you sent along, and quoted for the material in rolls. It is certainly not in rolls, but in a crinkled condition, which means it is impossible to cut it satisfactorily. Evidently Mr. Bolton” (a director of Skelmersdale Shoe Co., Ltd.) “was right when he stated to Mrs. Ruben” (the plaintiffs’ representative) “that the material could not be cut on the press and was not worth 3d. per pound. Having received our representative’s report, we are now satisfied that the material is not as represented in your letter of June 3.” On July 11, Skelmersdale Shoe Co., Ltd. wrote to the defendants, saying: “. . . there is not one piece anywhere near 41 ft. in length and 5 ft. in width, as offered. We are also inclosing a small piece which has gone hard.” On July 23 the defendants’ solicitors wrote to the plaintiffs’ solicitors: “According to the instructions which we received from our clients the goods supplied by your clients did not conform either to the description contained in your clients’ letter of June 3, 1947, nor to the sample on which the order was placed.”

Caplan for the plaintiffs.

E *T. G. Roche* for the defendants.

HILBERY, J., stated the facts and found as a fact that the order given on the telephone on June 17 was a contract for the purchase of the material and that the written order which followed was not intended to be an exhaustive statement of the contract in writing but was a confirmation of an order for material of the description and in accordance with the sample already supplied.

F He also found that the defendants were right in their contention that the material was not of the description contracted for. He held that the dispatch of the goods to the defendants’ customer was undertaken by the plaintiffs on behalf of the defendants as a matter of business courtesy and not as a matter of contractual obligation. He held further that the defendants purported to reject the goods. He continued: The next question that arises is: Had the

G defendants lost their right to reject? If they re-sold after making their contract with the plaintiffs and after delivery of the goods to them, even though it was merely a constructive delivery, there is strong evidence that they acted in a way which was inconsistent with the right to reject. The Sale of Goods Act, 1893, s. 35, provides:

H “The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller . . .”

When the defendants’ representative intimated to the plaintiffs that he would take 10 tons of the article offered, 5 tons to be delivered then and 5 tons later, and asked the plaintiffs if they would send the goods direct to the buyer and the plaintiffs agreed to do so, the defendants’ representative was taking delivery

constructively at the plaintiffs' premises. He was asking the plaintiffs to act for him in giving the goods to the carrier to take direct to the defendants' sub-purchaser. In his letter of June 17, he said: "We should like you to reserve for us 10 tons of this," *i.e.*, in accordance with his conversation on the telephone, and he continued: "We should like to know whether you can send the 5 tons direct for us." In other words, he asked whether the plaintiffs would act for the defendants in the sending of the goods, which were the defendants' goods, to the defendants' buyer. That, in my opinion, shows that he had taken constructive delivery at the plaintiffs' premises when the plaintiffs set aside goods against the contract, and thereafter the plaintiffs were acting for him as his agents in dispatching the goods on their journey to Skelmersdale Shoe Co., Ltd. If that were so, then, as ATKIN, L.J., pointed out ([1923] 2 K.B. 498) in *E. Hardy & Co. (London) v. Hillerns & Fowler* (1):

"... we have here to face the problem whether the act of the buyers in re-selling and dispatching the goods was inconsistent with the ownership of the sellers. If it was, they must be deemed to have accepted them."

In reference to the Sale of Goods Act, 1893, s. 35, ATKIN, L.J., said (*ibid.*):

"... all the words of the section must have effect given to them. The words are: 'When the goods have been delivered to him'—that is to the buyer—'and he does any act' of the kind specified. That means that the buyer must have got delivery before he does the act."

In the present case, the defendants took delivery at the plaintiffs' premises of the goods when they were set aside against the contract, and, thereafter, the handling of the goods by passing them on to the carrier was an act done by the plaintiffs on behalf of the defendants with the defendants' goods. That being so, it appears to me that the defendants lost their right to reject, and must be driven to their plea of breach of warranty.

Having found, as I have, that the contract was for the goods which were offered by the plaintiffs, namely, Linatex in 41 ft. rolls, 5 ft. wide, at 1s. 9d. a lb, as per the small sample, I am satisfied that the goods were in rolls, in as much as they were rolled up in lengths, but they were not according to the measurements that were specified when the goods were described, and there is no doubt that the measurements given in this case were words of description. The goods were not in accordance with the description, but it is said that they were in accordance with the sample, although they were crinkly and folded in some cases, while the sample was flat and soft. The hardness of some of the pieces seems to me to be a matter which is incidental to the article, it being a rubber sheet article. A difference in temperature will cause it to go hard or relatively hard, and I am not satisfied that anyone in the trade who was dealing with a piece of this sheet rubber material would not expect there to be some variation in the nature of the hardness or pliability between sheets as they were when delivered to him rolled up and the sample, because the mere handling of the small sample piece, carrying it in, perhaps, warm conditions, will make it soft or extra soft, or pliable, but the folding of the material is a matter of considerable importance because, if the material is to be used by shoe manufacturers, as this article was, the flatness of the sheet is essential if it is to be put in a cutting machine and not into a clipping machine, because in a cutting machine, the sheet has to be lifted and brought up against the knives which are fixed, and the material has to be flat to make the cuts correct. It was unfortunate that so small a sample was used, because it was a perfectly flat sample, and the goods delivered were not flat.

In regard to the fact that the goods showed signs of folding, and were, in some respects, crinkly, it is said that that could have been corrected by warming them and pressing out the crinkles when the rubber was warm. It is not in compliance with a contractual obligation if an article is delivered which

is not in accordance with the sample, but which can, by some simple process—no matter how simple the process is—be turned into an article which will be in accordance with the sample on which the contract was made. In the circumstances, I think that the goods were not in accordance with the description, nor were they according to the sample. While I think that the defendants did intend to convey to the plaintiffs that they rejected the goods, and the plaintiffs understood that the defendants were rejecting the goods, none the less I think, A for the reasons I have given, that the defendants have lost their right to reject and must treat the matter on the basis of breach of warranty. Therefore, on the claim, subject to the counterclaim and to the set-off of any amount that is due on the counterclaim, there must be judgment for the plaintiffs, and I think that the counterclaim can be dealt with, when particulars of the alleged damage B have been given, either by arrangement between the parties or by a master in the King's Bench Division.

Judgment for the plaintiffs on the claim with costs. Leave to the defendants to amend the counterclaim to ask for damages for breach of warranty and liberty to apply after damages determined. Costs on the counterclaim reserved.

Solicitors: *Saunders, Sobell, Greenbury & Leigh* (for the plaintiffs); *McKenna & Co.* (for the defendants).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

DAY v. WILLIAM HILL (PARK LANE), LTD.

[COURT OF APPEAL (Bucknill and Singleton, L.JJ.), December 20, 21, 1948.]

D *Practice—Pleading—Striking out—Affidavit evidence—R.S.C., Ord. 25, r. 4. Gaming—Recovery of gambling debt—Competence of action—Account stated—Bookmakers' weekly statement—Balance in plaintiff's favour.*

The plaintiff laid bets with the defendants, who were bookmakers, and on Feb. 7, 1948, he received from them a statement of his winnings and losses over a period of one week, showing a balance in his favour of £49 5s. 3d. which was described as being "carried forward." The plaintiff issued a writ against the defendants claiming (*inter alia*) payment of this amount. The statement of claim referred to the bookmakers' weekly statement of Feb. 7, 1948, as being an account stated, and the claim was based only on this document. On an application by the defendants for the statement of claim to be struck out under R.S.C., F Ord. 25, r. 4, the master accepted affidavit evidence in support of the defendants' contention, copies of documents referred to in the statement of claim being exhibited to the affidavit. On an appeal by the plaintiff to the Court of Appeal from an order of the judge confirming the master's order for the statement of claim to be struck out and the action to be dismissed, objection was taken by the plaintiff to the admission of affidavit evidence on a summons under R.S.C., Ord. 25, r. 4, and the Court of Appeal G gave leave to the defendants to amend the summons by striking out the words "under R.S.C., Ord. 25, r. 4."

HELD: (i) if documents were referred to in a pleading, they became part of the pleading, and it was open to the court to look at them without the necessity for any affidavit exhibiting them.

H (ii) although the affidavit evidence was not admissible under R.S.C., Ord. 25, r. 4, the court could accept it in the exercise of its inherent jurisdiction to strike out a pleading, or part of a pleading, as being an abuse of the process of the court.

(iii) the bookmakers' weekly statement, which showed a balance to be carried forward, was not such an absolute acknowledgment of indebtedness as was required to constitute an account stated; no cause of action was shown by the pleadings; and the statement of claim should be struck out.

[AS TO STRIKING OUT PLEADINGS, see HALSBURY, Hailsham Edn., Vol. 25, pp. 253-256, paras. 419, 420; and FOR CASES, see DIGEST, Pleading, pp. 71-82, Nos. 623-687.]

Cases referred to :

- (1) *Siqueira v. Noronha*, [1934] A.C. 332; 103 L.J.P.C. 63; 151 L.T. 6; Digest Supp.
- (2) *Gugenheim v. Ladbrooke & Co., Ltd.*, [1947] 1 All E.R. 292; 177 L.T. 74; A 2nd Digest Supp.
- (3) *Hyams v. Stuart King*, [1908] 2 K.B. 696; 77 L.J.K.B. 794; 99 L.T. 424; 25 Digest 401, 58.
- (4) *Evans (Joseph) & Co. v. Heathcote*, [1918] 1 K.B. 418; 87 L.J.K.B. 593; 118 L.T. 556; 12 Digest 289, 2375.
- (5) *Alberg v. Chandler*, (1948), 64 T.L.R. 394.
- (6) *Goodson v. Grierson*, [1908] 1 K.B. 761; 77 L.J.K.B. 507; 98 L.T. 740; 25 Digest 402, 68.

INTERLOCUTORY APPEAL by the plaintiff from an order of PRITCHARD, J., made in chambers and dated Nov. 24, 1948, confirming an order of the master striking out the plaintiff's statement of claim and ordering the action to be dismissed.

By the statement of claim the plaintiff claimed from the defendants (a) £49 5s. 3d., alleged to be due on an account stated, and (b) £695, alleged to be due under an agreement. The Court of Appeal now held (a) that the account referred to in the statement of claim in regard to the sum of £49 5s. 3d., was not an account stated, and (b) that no agreement was proved in regard to the sum of £695, and they dismissed the plaintiff's appeal. The facts appear in the judgment of SINGLETON, L.J.

Caplan for the plaintiff.

Barry, K.C., and *Wingate-Saul* for the defendants.

BUCKNILL, L.J. : I will ask SINGLETON, L.J., to give the first judgment.

SINGLETON, L.J. : This is the plaintiff's appeal from a judgment of PRITCHARD, J., in chambers. By the statement of claim the plaintiff claims from the defendants, who are bookmakers, (i) £49 5s. 3d., said to be due to him on an account stated and settled between the parties, and (ii) £695 15s., claimed to be due to him under an agreement between the parties contained in a letter written by the plaintiff and dated Feb. 9, 1948, accepting an offer made by the defendants dated Dec. 8, 1947, and a printed inclosure therewith. The defendants moved to strike out the statement of claim, and on Nov. 11, 1948, the master ordered that the action be dismissed with costs. The plaintiff appealed, and PRITCHARD, J., dismissed the appeal. Later, application was made by counsel for the plaintiff for leave to appeal to this court, and leave was granted.

Before considering the various points which are raised, it is well to look at the record before the court. The writ was issued on June 28, 1948. By it the plaintiff claimed the sum of £754 18s. 7d. "being the amount due and payable to the plaintiff by the defendants under and by virtue of an agreement made on Feb. 9, 1948." Then, by way of particulars : "Feb. 9, 1948. To amount due under and by virtue of an agreement aforesaid. £754 18s. 7d." The defendants asked for further and better particulars of that claim as follows :

"Of the alleged agreement, stating whether the same was oral or in writing. If oral, give the names of the parties thereto and the time and place of the making of such agreement, particularly the terms thereof. If in writing, identify the document and state as to how the sum of £754 18s. 7d. is arrived at."

The particulars given were these :

"The said agreement was in writing. It was contained in two documents received by the defendants on, respectively, Feb. 10 and 13, 1948, and the sum of £754 18s. 7d. is arrived at as to £695 in respect of the transaction referred to in the first of the said documents and as to the balance in respect of the transaction referred to in the second of the said documents."

- A At a later stage a statement of claim was delivered, in para. 1 there appears the first mention of a claim on an account stated. When the defendants applied to strike out the statement of claim, they supported their application by an affidavit sworn by the secretary of the company and with that affidavit were exhibited copies of the documents referred to in the statement of claim.
- B Some objection appears to have been taken to the admission of affidavit evidence on a summons under R.S.C., Ord. 25, r. 4, it being rightly contended that on such a summons one can only look at the statement of claim itself. It was pointed out by the master that, apart from the jurisdiction under R.S.C., Ord. 25, r. 4, there was inherent jurisdiction in the court to strike out a pleading or part of a pleading as an abuse of the process of the court, and in such cases affidavit evidence could be received. I am not sure that there was any necessity
- C for the affidavit sworn on behalf of the defendants. All that that affidavit did was to exhibit the documents referred to in the statement of claim. It should be clear that, if documents are referred to in a pleading, they become part of the pleading, and it is open to the court to look at them without the need of any affidavit exhibiting them. There is nothing to show that the summons was amended, but the indorsement of the master leads one to believe
- D that he intended to treat it as amended because he dealt with the application under the inherent jurisdiction of the court and ordered that it be dismissed with costs. Assuming it was necessary to make any amendment, I cannot see that anyone was prejudiced by that in any way. There was an appeal to PRITCHARD, J., who upheld the decision of the master.

- E A point was taken in this court that, both before the master and the learned judge, this was an application under R.S.C., Ord. 25, r. 4. Counsel for the defendants accordingly applied, in case it be necessary, to amend the summons by striking out the words "under R.S.C., Ord. 25, r. 4," and to add the further ground that the statement of claim was an abuse of the process of the court. That amendment was allowed, counsel for the plaintiff not raising any objection, but reserving questions which might arise thereon.

- F Paragraph 1 of the statement of claim alleges a debt of, or sets up a claim for, £49 5s. 3d., which was said to be "found to be due from the defendants to the plaintiff on accounts stated and settled between them and"—and I emphasise this—"contained in a written account to the plaintiff from the defendants upon their printed letterhead which was dated Feb. 7, 1948." It is on that document alone—a document which is said to be dated Feb. 7,
- G 1948, but which is, in fact, a bookmakers' account for the week ending Feb. 7, 1948—that the plaintiff bases his claim under para. 1. I propose to deal with that claim a little later. In para. 2 the debt of £695 15s. is said to arise under an agreement between the parties contained in letters of Dec. 8, 1947, and Feb. 9, 1948. Copies of those documents are before the court. That of Dec. 8, 1947, is a letter from the defendants, the bookmakers, to the plaintiff,
- H and it begins in this way :

"Dear Sir, We have pleasure in advising you that we have now added your name to our clients' register for a deposit account. We thank you for your remittance of £25, which has been placed to the credit of your account, and you are, therefore, now entitled to invest up to this or any amount which might be standing to your credit at the time of placing your commission."

In other words, the bookmakers accepted the plaintiff as a client who could

and would make bets with them up to a certain amount. The other document has at the bottom of it "Date of races, Feb. 9, 1948," and there is another date upon it—"Feb. 10, 1948"—which is post-marked. At the bottom of it, too, there is "Total amount invested £10." The document itself has five columns, of which the three middle columns contained entries. The second column—"Stake"—shows the bets, the total stake being £10. The third column—"Name of selection"—gives these names: "Salvaged, Secret Service, Laurel Crown"—names of horses or dogs doubled and trebled. The "track or meeting" was Leicester, and the document is alleged to show that on these bets the plaintiff on that day won £718 8s. 9d. I cannot read into those documents an enforceable agreement by the defendants to pay to the plaintiff either £718 8s. 9d. or £695 15s., which is the amount sued. How the difference arises, we have not been told. The arrangement to accept bets or commissions was made, and the document of Feb. 9 appears to show the result of some bets made on one day. I regard this claim put forward in this way as an abuse of the process of the court, and the plaintiff's claim on this head should be rejected. Equally, para. 2 of the statement of claim, as it stands and read with the documents which are mentioned, discloses no cause of action.

It is said that para. 1 of the statement of claim shows what is *prima facie* a good claim on an account stated, and, that being so, the plaintiff is entitled to go to trial, and, further, that under R.S.C., Ord. 25, r. 4, either the whole statement of claim must be struck out or none of it. Attention, however, was drawn to the notes under R.S.C., Ord. 25, r. 4, in *THE ANNUAL PRACTICE*, 1948, p. 457, and it is clear that under the inherent jurisdiction of the court there is power to strike out part of an indorsement of a writ, and counsel for the plaintiff accepted that position this morning. Therefore, it is clear now that under the inherent jurisdiction of the court para. 2 of the statement of claim can be struck out, even if para. 1 stands.

I shall now deal with para. 1 itself. Can it be said that the document which is headed "For the week ending Feb. 7, 1948" constitutes an account stated between the parties? The document is headed "J. J. Day, Esq. Account of William Hill (Park Lane), Ltd. For the week ending Feb. 7, 1948." There are a number of entries which clearly are in respect of bets on either horses or dogs. No one seemed to know which! At the bottom of the account there is the figure of "£49 5s. 3d." with the letters "c.f." before it, which means "carried forward." That is a document between the parties which would appear to show that in respect of some bets in the week ending Feb. 7, 1948, the plaintiff was in credit to the extent of £49 5s. 3d., and that that amount was carried forward. Carried forward to what place, or to what account? Apparently, to some account which may have been in credit or may have been in debit. There is nothing to show. Can it be said that this, of itself, shows the balance actually due between the parties, or that it is an account stated in the sense in which that expression is normally used? We were referred to several authorities on this matter, and, in particular, to *Siqueira v. Noronha* (1) in which LORD ATKIN, in a case before the Privy Council, dealt with the question of accounts stated and said ([1934] A.C. 337):

"But on the other hand, there is another form of account stated which is a very usual form as between merchants in business in which the account stated is an account which contains entries on both sides, and in which the parties who have stated the account between them have agreed that the items on one side should be set against the items upon the other side and the balance only should be paid; the items on the smaller side are set off and deemed to be paid by the items on the larger side, and there is a promise for good consideration to pay the balance arising from the fact that the items have been so set off and paid in the way described."

Counsel for the plaintiff submitted that this account—a bookmakers' account

showing some winning bets and some losing bets—was a good account stated within these words of LORD ATKIN, and he referred to *Gugenheim v. Ladbrooke & Co., Ltd.* (2) on which he relied in support of his argument that in circumstances such as these the court ought not to strike out the statement of claim or order that the action be dismissed.

A It is necessary to consider precisely what an account stated is. I take these words from the notes on p. 52 of BULLEN & LEAKE'S PRECEDENTS OF PLEADINGS, 3rd ed. :

B “An account stated is an admission of a sum of money being due from the defendant to the plaintiff, and may be charged in the above count as a distinct cause of action. The count lies upon an absolute acknowledgment made by the defendant to the plaintiff of a debt due from him to the plaintiff and payable at the time of action brought.”

C This is a bookmakers' weekly account which shows £49 5s. 3d. carried forward to some other place. Can it be said that that is an absolute acknowledgment made by the defendants to the plaintiff of a debt due from them to him and payable at the time of action brought? I think not. There is nothing to show what was to happen to the £49 5s. 3d. It is not an account stated in the ordinary sense, and, that being so, I am of opinion that the plaintiff's claim under para. 1 of the statement of claim is misconceived, and no cause of action is shown, and in those circumstances I do not think that it is right that the plaintiff should be allowed to proceed with this action.

D Counsel for the defendants submitted that, even if the weekly bookmakers' account could be said to be an account stated, still it was something on which an action could not succeed, and he referred us to certain words of FARWELL, L.J. ([1908] 2 K.B. 724) in the well-known case of *Hyams v. Stuart King* (3), and also to the judgment of PICKFORD, L.J. ([1918] 1 K.B. 426, 427) in *Evans v. Heathcote* (4) and to the words of the other Lords Justices in the same case. He also referred us to *Alberg v. Chandler* (5), a recent decision of STREATFIELD, J., on the subject. I do not think it is necessary to consider this submission in relation to this appeal. I am satisfied, for the reasons I have given, that E the appeal ought to be dismissed.

BUCKNILL, L.J. : I agree. The question which we have to decide is whether this is an action which is frivolous or vexatious or an abuse of the F process of the court. Counsel for the plaintiff referred us to *Goodson v. Grierson* (6). That was a case in the Court of Appeal, in an action commenced by a bookmaker issuing a specially indorsed writ for the sum alleged to be due on a stated account. The defendant pleaded in his defence that the debts were gambling debts. The plaintiff admitted that, but set up in his answer other considerations, namely, the plaintiff's forbearance to sue and his giving G time to the defendant, at the latter's request. The defendant then applied to have the action dismissed as frivolous and vexatious. The master and the judge dismissed the action, but the Court of Appeal reversed the decision, and on this point, FLETCHER MOULTON, L.J., said ([1908] 1 K.B. 764) :

H “In order to support an application of this kind the defendant has to show that under no possibility could there be a good cause of action consistently with the pleadings and the facts in the case. But in this case counsel for the defendant is obliged to admit that there are cases where it has been held that, having regard to the serious social consequences which would ensue from an unsatisfied demand for a debt of this kind, there may be good consideration in such forbearance.”

I mention this because it seems to me clear that, when one is considering whether an action is frivolous or vexatious, one must look at the pleadings

and nothing else. One cannot assume that possibly, when the case comes to trial, the plaintiff may be able to put forward some other and better reason for succeeding. *Prima facie*, these transactions are betting transactions pure and simple and, therefore, null and void under the Gaming Act, 1845, and the only way in which the plaintiff seeks to get out of that is by alleging that document No. 2 in the affidavit of the defendants' secretary, which was disclosed by the defendants, is an account stated. The letter of Dec. 8, 1947, from the defendants to the plaintiff, under which the plaintiff starting betting with the defendants and deposited £25, states:

"A statement of account will be rendered to you each week and a cheque inclosed for any amount over and above your deposit."

This so-called account rendered is merely a weekly statement made in accordance with that letter, and I notice, among other things, that, though it is said to be a complete statement of account, there is no reference to the £25 which has been deposited. "C.f." indicates "carried forward," and, in my view refers to its being carried forward to the next week. Counsel for the plaintiff was compelled to admit that, if the plaintiff had made one bet only in respect of any particular week and had received a weekly account showing that he had won, say, £100 on that bet, that could not be said to be an account stated on which an action would lie, but, on the other hand, he argued that, if he made two bets, won on the first bet and lost on the second, and the weekly account shows that there was a balance due to him, that would be an account stated and he could recover on it. That seems to me to be making the Gaming Act, 1845, valueless. This is an obvious attempt to get round that Act. In my view, it ought not to succeed and the order of the learned judge was right.

Appeal dismissed with costs.

Solicitors: *William Foux & Co.* (for the plaintiff); *Hardcastle Sanders & Co.* (for the defendants).

[*Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.*]

JOHN LAING AND SON, LTD. v. KINGSWOOD ASSESSMENT COMMITTEE AND OTHERS.

[COURT OF APPEAL (Tucker and Asquith, L.JJ., and Jenkins, J.), November 30, December 1, 2, 20, 1948.]

Rating—Beneficial occupation—Site occupied for purpose of carrying out works contract—Temporary structures erected, and used, by contractors on site of aerodrome under construction.

By the general conditions of a contract for the construction of an aerodrome the work was to be carried out under the instructions and to the satisfaction of the superintending officer of the Secretary of State for Air who was empowered to inspect the works and any materials thereon and from time to time to issue further instructions in regard (*inter alia*) (a) removal from the site of materials brought there by the contractors, (b) removal or re-execution of any work, (c) hours of work, and (d) dismissal of any foreman or workman of lower grade. The issue of passes for admission to the site was under his control. Obligations in regard to (a) watching, lighting and protecting the works, (b) removing rubbish, and (c) preventing nuisance were on the contractors. The Secretary of State for Air was empowered to determine the contract at any time by notice in writing and to give directions for the removal of all plant, temporary buildings and equipment from the site. For the purpose of carrying out the contract the contractors erected on a part of the site a number of buildings and other structures, comprising office accom-

modation for a supervisory staff of 75-100 persons, a workmen's canteen (erected in compliance with the requirements of the contract), garages, carpenters' shop, transport and weigh-bridge huts and concrete mixing plants. The construction of the aerodrome started in June, 1946, and was not expected to be finished before March, 1948. The structures in question were erected in June to October, 1946, and were in use. It was contended by the contractors that, by reason of the extensive powers conferred on the superintending officer, they were not in rateable occupation of the hereditament comprised of the structures :—

HELD : the control exercised by the Secretary of State for Air was in regard to the performance of the contract and did not interfere with the exclusive occupation of the hereditament by the contractors for the purposes of their work ; the possession being for the purposes of their business, was beneficial to them, and, having lasted for over 2 years, it was not of too transient a nature ; and, therefore, the contractors were in rateable occupation of the hereditament.

Principles in Westminster Corpn. v. Southern Ry. Co., Railway Assess. ment Authority and Smith & Son, Ltd. ([1936] 2 All E.R. 322 ; [1936] A.C. 511), *sub nom. Southern Ry. Co.'s Appeals*, (155 L.T. 33), *applied*.

Decision of the DIVISIONAL COURT ([1948] 1 All E.R. 943 ; [1948] 2 K.B. 116), *affirmed*.

[AS TO RATEABLE OCCUPATION, see HALSBURY, Hailsham Edn., Vol. 27, pp. 351-353, para. 782 ; and FOR CASES, see DIGEST, Vol. 38, pp. 426-450, Nos. 10-173.]

D Cases referred to :

(1) *Westminster Corpn. v. Southern Ry. Co., Railway Assessment Authority and Smith & Son, Ltd., Westminster Corpn. & Kent Valuation Committee v. Southern Ry. Co., Railway Assessment Authority & Pullman Car Co., Ltd.*, [1936] 2 All E.R. 322 ; [1936] A.C. 511 ; 105 L.J.K.B. 537 ; *sub nom. Re Southern Ry. Co.'s Appeals*, 155 L.T. 33 ; 100 J.P. 327 ; Digest Supp.

(2) *Cory v. Bristow*, (1877), 2 App. Cas. 262 ; 46 L.J.M.C. 273 ; 36 L.T. 594 ; 41 J.P. 709 ; 38 Digest 451, 178.

(3) *Holywell Union and Halkyn Parish v. Halkyn Drainage Co.*, [1895] A.C. 117 ; 64 L.J.M.C. 113 ; 71 L.T. 818 ; 59 J.P. 566 ; 38 Digest 424, 7.

(4) *Cleveland Bridge & Engineering Co., Ltd. v. Darlington Union Assessment Committee*, (1923), 21 L.G.R. 511 ; 38 Digest 443, 138.

(5) *Smith v. Lambeth Assessment Committee*, (1882), 10 Q.B.D. 327 ; 52 L.J.M.C. 1 ; 48 L.T. 57 ; 47 J.P. 244 ; 38 Digest 446, 157.

APPEAL by the ratepayers from a decision of the Divisional Court (LORD GODDARD, C.J., HUMPHREYS and PRITCHARD, JJ.), dated Apr. 29, 1948, and reported ([1948] 1 All E.R. 943), on a Case stated by Gloucestershire Quarter Sessions.

On Feb. 21, 1947, Thornbury Rural District Council, as rating authority for their area, made a proposal for the amendment of the valuation list by adding a hereditament described as "contractors' offices, canteens, huts, structures, land, etc." to be assessed at £484 gross and £400 rateable value. The ratepayers, who were the contractors referred to, objected to the proposal, and on Mar. 21, 1947, Kingswood Assessment Committee considered the proposal and the objection and allowed the amendment to the valuation list. The contractors appealed to quarter sessions who, by consent of the parties and by order of BIRKETT, J., dated Mar. 5, 1948, stated a Case under the Quarter Sessions Act, 1849, s. 11.

By a written contract, dated June 21, 1946, between the contractors and the Secretary of State for Air, the contractors undertook to execute works involving the strengthening, widening and lengthening of a runway, the

preparation of the landing ground, and the demolition of buildings at Filton Aerodrome, Gloucestershire. The contract sum was, approximately, £1,250,000, and the work needed involved 850,000 cubic yards of excavation, 500,000 cubic yards of hardcore filling, 180,000 cubic yards of concrete paving, demolition of 24 separate properties, the preparation of 235 acres of landing ground, and the laying of 9 miles of storm water drainage. On June 26, 1946, a part of the site was handed over to the contractors for the assembly of plant and offices, and the remainder of the site, on which constructional work was to be carried out, was handed over in sections as it became available. The contract date for completion was May 26, 1947, but circumstances had arisen which entitled the contractors to an extension of time and at the time of the hearing by quarter sessions it was not expected that the works would be completed before the end of March, 1948, though sections might be handed over to the Secretary of State before then. The hereditament comprised the following structures: (a) office accommodation for a supervisory staff of 75-100 persons; (b) garages, erected in October, 1946, of tubular steel frame let into the ground; (c) weigh-bridge huts; (d) workmen's canteen; (e) carpenters' shop; (f) transport hut; and (g) concrete mixing plant. The office accommodation, which was provided for in the contract, included (a) a main building which had been requisitioned and handed over to the contractors and was constructed of 8 in. cavity walls, asbestos roof, and concrete floors, with water, electric lighting, main drainage and central heating, and (b) offices, erected by the contractors in August and September, 1946, of sectional wood frame bolted together, with concrete floors, electric light and stove heating. The workmen's canteen, also provided for in the contract, and erected by the contractors in July and August, 1946, was a temporary building in sectional form with electricity and water laid on and heating by coke stoves. The contractors were obliged to carry out and complete the execution of the work to the satisfaction of the superintending officer of the Secretary of State for Air who was empowered from time to time to issue further instructions in regard (*inter alia*) to (a) the addition, omission or substitution of any work, (b) the removal or re-execution of any work, (c) removal from the site of any materials brought there by the contractors, (d) the order of the execution of the work, (e) hours of work, (f) suspension of work, and (g) dismissal of any foreman or workman of lower grade. The Secretary of State for Air had not used any part of the site handed over to the contractors for any purpose except the execution of works by the contractors.

The question for the opinion of the Divisional Court was whether or not the contractors were in rateable occupation of all or any of the structures comprised in the hereditament. The contractors contended (i) that they were not the occupiers of the premises in that their use thereof was subject to the control and directions of the superintending officer and they had not paramount occupation; (ii) that, if they were the occupiers, the occupation was not beneficial because (a) land forming part of a site on which building and engineering works were being carried out was struck with sterility, (b) no benefit was derived from the occupation of the land for the purpose of carrying out such work, (c) payments received by the contractors in respect of carrying out of works were not a benefit derived from the occupation of the land, and (d) the premises were not capable of separate occupation apart from the carrying out of the works under the contract. The Divisional Court held that the contractors were in rateable occupation. The contractors appealed from this decision, but the Court of Appeal now dismissed their appeal.

Harold Williams, K.C., and *Stewart-Brown* for the ratepayers (the contractors).

Rowe, K.C., and *Squibb* for the assessment committee, the rating authority and Gloucestershire County Valuation Committee.

Cur. adv. vult.

TUCKER, L.J.: This is an appeal from a judgment of the Divisional Court on a Special Case stated under the Quarter Sessions Act, 1849 (Baines' Act) with regard to the rateability of certain hereditaments which were being used by the contractors, John Laing & Son, Ltd., for the purposes of and in the course of the carrying out of a contract into which they had entered for the making and extension of certain works at Filton Aerodrome for the Air Ministry. The Divisional Court decided that the contractors were in rateable occupation of these hereditaments, and, accordingly, the Case was remitted to quarter sessions with the opinion of the court so expressed. **LORD GODDARD, C.J.,** in the course of his judgment described the matter as follows ([1948] 1 All E.R. 945):

"The ratepayers, Messrs. John Laing & Son, Ltd., who are public works contractors, have undertaken a contract with the Secretary of State for Air for the construction of a runway, landing ground and other works at Filton aerodrome. The provisions of the contract require them to do certain things which necessitate the putting up of buildings. Whether these are huts, or whether they are made of breeze or brick, seems to me to be immaterial. No one suggests that the buildings are likely to be permanent, in the sense that they will remain after the work of construction has been done. The contract provides that at the end of the work of construction these buildings and other erections, some of which are foundations for mounting heavy machinery, are to be taken away, and, indeed, the supervising officer, who is in the service of the Crown, can order them to be taken away at any minute."

In para. 5 the Case sets out that the work, the nature of which is specified in the conditions of contract, the specification, and bills of quantities, involved:

"... the strengthening, widening and lengthening of the east-west runway and the preparation of the landing ground and demolition of buildings at Filton Aerodrome, in the county of Gloucester."

Paragraph 6 states:

"On June 26, 1946, a part of the site was handed over to the contractors for the assembly of plant and offices, and the remainder of the site on which constructional work is to be carried out under the said contract was handed over in sections as it became available. The contract date for completion was May 26, 1947 (being 11 months from June 26, 1946), but circumstances have arisen which entitled the contractors to an extension of time under the said contract and it is not expected that the works will be completed until the end of March, 1948, though sections of completed work may be handed over to the authority before that date."

Paragraph 7 describes the hereditaments in question. I need not refer to them all, but Reference Nos. 1, 2, 10, 12, 13 and 14 relate to offices, and No. 3 to garages, Nos. 4 and 11 are weigh-bridge huts, No. 5 is the workmen's canteen, No. 6 is the carpenters' shop, and Nos. 8, 9, 15, 16, 17, 19, 21, 18, 20, 23 and 22 are all to do with foundations or erections of some kind in connection with the concrete mixing plant.

The whole Case, as I read it, is stated on the assumption that these hereditaments are rateable hereditaments. There is nothing in it which would entitle us to draw any distinction between any one of them and another, except in so far as any distinction can be obtained from the contract. It may be open in other similar cases to argue that some of the hereditaments are of such a nature that, whatever their occupation, they are not capable of being rated, but no point is taken in the present case with regard to that. Nothing that I am deciding can be quoted as an authority for the proposition

that anything which answers the description of some of the places or erections described in para. 7 is, as a matter of law, rateable in all circumstances.

The decision in this case primarily depends on the proper construction to be put on the general conditions (General Conditions of Government Contracts for Building and Civil Engineering Works) which form the contract between the parties. The point taken before us for the contractors is that which appears in para. 19(A) of the Case, *viz.* :

“They are not the occupiers of the said premises in that their use of the same is subject to the control and directions of the said superintending officer and they have not paramount occupation thereof.”

It would appear that that point had not figured, at any rate, prominently, in the argument in the court below, which had primarily been directed to the contentions which appear in para. 19(B), *viz.* :

“If they are occupiers of the said premises or any of them, such occupation is not beneficial”

for the reasons which are then set out.

Counsel for the rating authorities has said that there are four necessary ingredients in rateable occupation, and I do not think there is any controversy with regard to those ingredients. First, there must be actual occupation; secondly, it must be exclusive for the particular purposes of the possessor; thirdly, the possession must be of some value or benefit to the possessor; and, fourthly, the possession must not be for too transient a period. The primary question here is whether the contractors are in actual and exclusive occupation of these hereditaments.

Counsel for the contractors argues that, on examination of the contract between the parties, it will be found that they are not in exclusive possession. Although at the outset this case was presented rather as one in which there were competing occupants, or persons who could be regarded as competing occupants, and the question was whose was the paramount occupancy, I think that the point is more accurately stated in the way in which counsel for the contractors put it in his final address, *i.e.*, the question is not whether there are competing occupants, but whether there is any real occupation by the contractors, or whether the true position is not that they are really in occupation on behalf of someone else, *viz.*, the Crown, for whose purpose (counsel says) they are on the site, carrying out the works in question. Counsel for the contractors says that this case is similar to the occupation of a servant rather than to that in such cases as *Westminster Corpn. v. Southern Ry. Co., Railway Assessment Authority and Smith & Son, Ltd.* (1) where the railway company were admittedly in occupation of the whole of Victoria Station, but certain portions of it were held to be in rateable occupation of other persons, either as tenants or licencees.

To solve this question it is necessary to look with care and in some detail at the contract. I do not propose to read all the conditions relied on, but in the abstract of particulars (in appendix I to the Case) which are to be read in conjunction with the general conditions of contract, it is provided :

“Date for completion shall be the date of the day after the expiration of a period of 11 months from the date on which possession of the site is given to the contractor.”

Paragraph 1 of the general conditions, the definition paragraph, provides :

“(2) (b) ‘The site’ shall mean the lands and/or other places on, into or through which work is to be executed under the contract or any adjacent land, path or street which may be allotted or used for the purpose of carrying out the contract.”

Condition 3 provides that all materials and equipment brought on to the site

in connection with the contract, "shall become the property of and vest in the authority" [the Secretary of State for Air]. That condition, of course, deals with property, whereas we are concerned with occupation. Condition 6 provides :

- A "Possession of the site or the order to commence shall be given to the contractor by notice in writing, and the contractor shall thereupon commence the execution of the works and shall proceed with diligence . . ."

By condition 7 :

- B "(1) The contractor shall carry out and complete the execution of the works to the satisfaction of the superintending officer who may from time to time issue further drawings details and/or instructions directions and explanations (all of which are hereafter collectively referred to as 'the superintending officer's instructions')." "

Then there are enumerated a number of matters with regard to which he can give those instructions. They include :

- C "(c) The removal from the site of any materials . . . (d) The removal and/or re-execution of any work . . . (h) The dismissal of any foreman or person below that grade employed in connection with the contract . . . (l) The use of materials obtained from excavations on the site. (m) Any other matter as to which it is necessary or expedient for the superintending officer to give instructions, directions or explanations."

Condition 7 also provides :

- D "The decision of the superintending officer that any such instructions are necessary or expedient shall be final and conclusive . . ."

Condition 13 deals with materials and workmanship and provides :

- E "The superintending officer and his representative shall have power at any time to inspect and examine any part of the works or any materials intended to be used in or on the works either on the site or at any factory or workshop or other place where such parts or materials are being constructed or manufactured or at any place where the same are lying or from which they are being obtained, and the contractor shall give all such facilities as the superintending officer may require to be given for such inspection and examination."

- F Condition 16 deals with the hours of work and provides that they shall be subject to the approval of the superintending officer. Conditions 17, 18 and 19 deal with watching, lighting and protection of works, precautions to prevent nuisance, and the removal of rubbish. Those are all obligations put on the contractor. He is to provide all watchmen necessary for the protection of the site, take reasonable precautions to prevent nuisance or inconvenience to the owners, tenants or occupiers of other premises, and keep the site free from rubbish.

G Condition 26 provides :

- H "(1) All plant, temporary buildings, equipment and things on the site provided by or on behalf of the contractor for the construction of but not for incorporation in the works shall stand at the risk and be in the sole charge of the contractor, and the contractor shall be responsible for, and with all possible speed make good, any loss or damage thereto arising from any cause whatsoever, including the accepted risks."

By condition 33 :

"The contractor shall employ a competent agent to whom directions may be given by the superintending officer. The agent shall superintend the execution of the works generally with such assistance in each trade as the superintending officer may consider necessary."

Condition 36 gives the superintending officer power to require the contractor :

" . . . immediately to cease to employ . . . any foreman or person below that grade whose continued employment thereon is in the opinion of the superintending officer undesirable."

By condition 44 (1) the authority is empowered to determine the contract at any time by notice in writing, and condition 44 (2) (A), which is relied on, provides that the authority shall :

" . . . as soon as practicable, and in any case not later than the expiration of 3 months from the date of such notice or of the period up to the date for completion, whichever is the shorter, give directions (with which the contractor shall comply with all reasonable dispatch) as to all or any of the following matters . . . (iii) the removal of all plant, temporary buildings and equipment from the site."

It is to be observed, however, that this condition is dealing with something which is to happen on the determination of the contract and, in my view, accordingly, is not so material as some of the other conditions. Finally, condition 56 provides :

" The contractor shall take all reasonable steps to ensure that no alien, or person of dual nationality, unless the prior permission in writing of the authority has been obtained, shall be admitted to the site. The superintending officer shall have power to exclude from the site any person whose admission thereto may in his opinion be undesirable for any reason whatsoever."

Condition 57 deals with the issuing of passes, which is in the hands and under the authority of the superintending officer.

It is said by counsel for the contractors that the very extensive powers conferred on the superintending officer are such that the contractors cannot be regarded as being in exclusive occupation of this hereditament. He seeks to distinguish this case on its facts from the *Southern Railway* case (1). It is common ground that the principles to be applied to these facts are to be found in the *Southern Railway* case (1). Those principles were stated by LORD RUSSELL OF KILLOWEN ([1936] 2 All E.R. 326) :

" In the next place I would make a few general observations upon rateable occupation. Subject to special enactments, people are rated as occupiers of land, land being understood as including not only the surface of the earth but all strata above or below. The occupier, not the land, is rateable ; but, the occupier is rateable in respect of the land which he occupies. Occupation, however, is not synonymous with legal possession : the owner of an empty house has the legal possession, but he is not in rateable occupation. Rateable occupation, however, must include actual possession, and it must have some degree of permanence : a mere temporary holding of land will not constitute rateable occupation. Where there is no rival claimant to the occupancy, no difficulty can arise ; but in certain cases there may be a rival occupancy in some person who, to some extent, may have occupancy rights over the premises. The question in every such case must be one of fact, *viz.*, whose position in relation to occupation is paramount, and whose position in relation to occupation is subordinate ; but, in my opinion, the question must be considered and answered in regard to the position and rights of the parties in the premises in question, and in regard to the purpose of the occupation of those premises. In other words, in the present case, the question must be, not who is in paramount occupation of the station, within whose confines the premises in question are situate, but who is in paramount occupation of the particular premises in question."

LORD RUSSELL OF KILLOWEN continued (*ibid.*, 328) :

A "In truth the effect of the alleged control upon the question of rateable occupation must depend upon the facts in every case; and in my opinion in each case the degree of the control must be examined, and the examination must be directed to the extent to which its exercise would interfere with the enjoyment by the occupant of the premises in his possession for the purposes for which he occupies them, or would be inconsistent with his enjoyment of them to the substantial exclusion of all other persons."

I emphasise the words "would interfere with the enjoyment by the occupant of the premises in his possession for the purposes for which he occupies them." Later, LORD RUSSELL said (*ibid.*, 329):

B "In my opinion the crucial question must always be what in fact is the occupation in respect of which someone is alleged to be rateable, and it is immaterial whether the title to occupy is attributable to a lease, a licence, or an easement."

LORD WRIGHT, M.R., referring to *Cory v. Bristow* (2) said ([1936] 2 All E.R. 343):

C "The decision is important as showing that a person no less occupies in the rating sense because he does so subject to regulations or by-laws or is liable to be turned out on short notice."

After quoting from *Cory v. Bristow* (2), LORD WRIGHT said (*ibid.*):

D "And further, LORD CAIRNS also refers to the fact that Messrs. Cory were to work to the satisfaction of the conservators under the inspection of the harbour master: he points out that Messrs. Cory were none the less in rateable occupation because they were required to obey the conservators' by-laws, and were to work to the satisfaction of the conservators and subject to definite limitations, and were liable to be ejected on notice."

LORD WRIGHT continued (*ibid.*, 344):

E "The railway company have no doubt quite properly imposed such restrictions as seemed necessary for the proper working of the station as a whole. They have reserved the right to close the station each night, and also a special right to close temporarily in cases of emergency: but these are merely restrictions on the tenants' user and enjoyment, and do not change their character or make the occupation other than a sole and exclusive occupation. The tenant is still in sole occupation of his premises, and has full use of them to carry on his business. As one indication of this I may refer to the terms of the agreements which give the railway company limited rights of entering for specific purposes, *e.g.*, to view the state of repair, and so forth. These terms indicate a possession in the tenant adverse to the landlord."

G After quoting from *Holywell Union and Halkyn Parish v. Halkyn Drainage Co.* (3) LORD WRIGHT said (*ibid.*):

H "As to the closing of the station at night, this is done outside business hours and as MACKINNON, J., shrewdly observes, is rather an advantage to the tenants, because it tends to obviate the risk of burglary to which lock-up shops in public thoroughfares are peculiarly exposed. It is obvious that the tenant's occupation is continuous, because at night he occupies by his goods. The tenant is the person entitled to exclude trespassers, *e.g.*, from the bank or Boots' shop, or to bring ejectionment."

Those are the general principles which we have to endeavour to apply to the facts of this case. We have to ascertain what is the quality of the occupation. If the contractors are occupying these hereditaments for the sole purposes of their business and if the measure of control retained by the authority is not such as to alter the character and quality of their occupation,

then, in my view, they are in rateable occupation. The measure of control by the authority in carrying out the contract is a different thing from a control interfering with the exclusive occupation of the hereditament. On reading the conditions in this contract and comparing this case with the *Southern Railway* case (1) and the principles there enunciated, the conclusion I have arrived at is that in this case the authority had not such control as to render the occupation of the contractors an occupation which is not rateable. In other words, I think the real control exercised by the authority was a control with regard to the performance of the contract and not a control which interfered with the exclusive occupation of the hereditament by the contractors for the purposes of their work.

Before passing from the *Southern Railway* case (1) it is necessary to say a word about the decision of the Divisional Court in *Cleveland Bridge & Engineering Co., Ltd. v. Darlington Union Assessment Committee* (4). That case was in many respects very similar to the present, but, when the judgments are examined, it is clear, I think, that they (or two of them, at any rate) are based, entirely, on the decision in *Smith v. Lambeth Assessment Committee* (5) which can no longer be regarded as binding since the decision of the House of Lords in the *Southern Railway* case (1). In the *Darlington* case (4) BRANSON, J., although he spoke of the undisputed principle of law which applied to that case—that undisputed principle appearing to be that laid down in *Smith v. Lambeth Assessment Committee* (5)—none the less based his judgment on the *Holywell Union* case (3), putting it on the basis of paramount and subordinate occupation. However that may be, the *Darlington* case (4) was cited to their Lordships in the *Southern Railway* case (1) and I think can no longer be regarded as good law. For these reasons, this appeal fails and must be dismissed.

ASQUITH, L.J. : I entirely agree and have nothing to add.

JENKINS, J. : Adopting the four factors or ingredients of rateability, as submitted by counsel for the rating authority, it is obvious on the facts here that the first is satisfied because the contractors were clearly in actual possession of the hereditaments claimed to be rateable. Secondly, I think that their possession was exclusively for the particular purpose for which they occupied the premises, *viz.*, the carrying out of the contract. I think that the exclusive character of their possession appears if the distinction is kept clearly in mind between general control exercised by the superintending officer over the site as a whole and the general carrying out of the contract, on the one hand, and the position with regard to particular parts of the site alleged to be in the occupation of the contractors, on the other hand. So far as those particular parts of the site were concerned, it seems to me that their possession was none the less exclusive because they were subject to the general controlling authority of the superintending officer. Thirdly, it is said that the possession must be of some use or value or benefit to the possessor, but as to that it seems to me enough to say that the contractors occupied those premises for the purposes of their business and it is immaterial that their business consisted of the carrying out for reward of a particular constructional project. Fourthly, it is said that the possession must not be for too transient a period. I think that fourth requirement is met by the fact that the work has taken a matter of two years to carry out. All four tests, therefore, being satisfied, I agree that the appeal fails and should be dismissed.

Appeal dismissed with costs.

Solicitors : *R. L. Mason* (for the ratepayers) ; *Field, Roscoe & Co.*, agents for *Crossman & Co.*, Thornby (for the assessment committee and the rating authority), and for *G. H. Davis*, Gloucester (for the valuation committee).

[*Reported by C. St.J. NICHOLSON, Esq., Barrister-at-Law.*]

R. v. SEMINI.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Lewis and Pritchard, JJ.), December 20, 1948, January 11, 1949.]

Criminal Law—Murder—Manslaughter—Chance-medley—Provocation—Offences against the Person Act, 1861 (c. 100), s. 7.

A While walking with a woman, the applicant passed three men, one of whom made a remark about the woman which the applicant resented. He went back, knocked down one of the men, and, in the scuffle which followed, he killed another of them by stabbing him through the heart with a knife which he was carrying. On being charged with the murder of the deceased, he pleaded that the killing was by chance-medley and amounted to manslaughter and not to murder.

B HELD: (i) the doctrine of chance-medley had no longer any place in the law of homicide, having been finally abolished by the Offences against the Person Act, 1828, s. 10 (repealed and re-enacted by the Offences against the Person Act, 1861, s. 7).

C (ii) the rules to be followed in deciding whether there had been sufficient provocation to reduce a crime from murder to manslaughter were now laid down in *Holmes v. Director of Public Prosecutions* ([1946] 2 All E.R. 124; [1946] A.C. 588; 175 L.T. 327).

(iii) on the facts, the applicant was guilty of murder.

D [AS TO JUSTIFIABLE AND EXCUSABLE HOMICIDE, see HALSBURY, Hailsham Edn., Vol. 9, pp. 447, 448, paras. 763-766; and FOR CASES, see DIGEST, Vol. 15, pp. 812-814, Nos. 8814-8862.]

Cases referred to:

- (1) *R. v. Taylor*, (1771), 5 Burr. 2793; 98 E.R. 466; 15 Digest 779, 8345.
 (2) *R. v. Snow*, (1776), 1 Leach, 151; 1 East, P.C. 244; 15 Digest 783, 8426.
 (3) *R. v. Smith*, (1837), 8 C. & P. 160; 15 Digest 783, 8408.
 E (4) *Holmes v. Public Prosecutions Director*, [1946] 2 All E.R. 124; [1946] A.C. 588; 115 L.J.K.B. 417; 175 L.T. 327; 2nd Digest Supp.
 (5) *Mancini v. Public Prosecutions Director*, [1941] 3 All E.R. 272; [1942] A.C. 1; 111 L.J.K.B. 84; 165 L.T. 353; 2nd Digest Supp.

APPLICATION for leave to appeal against a conviction, at Stafford Assizes, before HALLETT, J., of murder.

F The applicant pleaded that the killing was by chance-medley, and he applied for leave to appeal on the ground of misdirection by the judge (a) on the subject of chance-medley, and (b) in regard to the evidence. The Court of Appeal held that there had been no misdirection and dismissed the application. The facts appear in the judgment of the court delivered by LORD GODDARD, C.J.

G *Cartwright Sharp, K.C.*, and *E. B. Gibbens* for the applicant.
Sachs, K.C., and *Norman Carr* for the Crown.

Cur. adv. vult.

Jan. 11. LORD GODDARD C.J., read the following judgment of the court. The applicant, George Semini, was convicted before HALLETT, J., at the Stafford Assizes of the murder of Joseph Gibbons and was sentenced to death. On Dec. 20, 1948, this court dismissed the application for leave to H appeal, and we now proceed to give our reasons for so doing.

According to the evidence, the applicant, on the late evening of Friday, Oct. 10, 1948, was walking with a young woman, named Sheila Seabridge, past the Talbot Hotel at Newcastle-under-Lyme, when one of three men standing there made an observation about Miss Seabridge which the applicant resented. The three men were the deceased (Gibbons), Charles Stanley, and Robert Woodyatt. The applicant and Miss Seabridge had passed the three men when the observation was made, but the applicant went back to them and struck

Robert Woodyatt with his hand or fist, causing him to fall to the ground. The applicant admitted that this blow was the first to be struck. Thereafter, the order in which events followed is not easy to ascertain from the evidence, but it appears to be reasonably certain that the deceased incited Woodyatt to fight the applicant and that Woodyatt got up from the ground and began to take his coat off as though preparing for a fight. It is also clear that two unidentified by-standers restrained the applicant by holding his arms, and that the applicant, so held, was uttering threats to the deceased and Woodyatt. Then the applicant broke away from those who held him and, producing a knife, advanced on Woodyatt and the deceased, saying: "I'll get the two of them." In the scuffle which followed the deceased was stabbed through the heart, Woodyatt and Stanley also being wounded by the applicant's knife, which was not found after the killing. No one other than the applicant had any knife at any time during the affray. There was evidence that about three weeks prior to the affray the applicant showed to a man named Ashley a knife with a blade about 8 ins. long and said that he would use it if more than one person attacked him. There was medical evidence that the mortal wound inflicted on the deceased could have been caused by such a blade. The applicant was a native of Malta and had had some experience as a sparring partner to a professional boxer.

The first and main contention of counsel for the applicant was that there was here, on the facts, a case of killing by chance-medley, and that there was no proper direction and, indeed, actual misdirection on this subject. He contended that the summing-up amounted to a direction that, before the defence of chance-medley could be established, it must be proved that the provocation was such as would cause a reasonable man to lose control and that the act which caused the death was commensurate with the provocation received. This, he contended, does not apply to chance-medley, to which (he contended) the doctrines relating to provocation have no application.

The first and most important thing, then, is to understand what the expression "death by chance-medley" means. The contention was that, if two men quarrel and fight, and either or both of them are armed with a lethal weapon, and in the heat of the quarrel one draws and uses the weapon with fatal results, that is causing death by chance-medley and amounts to manslaughter, unless, and only unless, the jury find that, all along, the one intended to cause the death of the other and was armed for that purpose. In truth, this is not what was ever meant by the expression "death by chance-medley." If the finding of the jury established that the death was caused by chance-medley, the prisoner escaped any corporal penalty and was not convicted of manslaughter, but the expression, as we hope to show, has now no place or importance in the law relating to homicide. A reference to BLACKSTONE'S COMMENTARIES, bk. IV, p. 184, HALE'S PLEAS OF THE CROWN, vol. 1, p. 471, and HAWKINS'S PLEAS OF THE CROWN, 8th ed. (1824), pp. 83 and 89, makes it clear that this expression applied only where the killing was *se defendendo*, i.e., in defence of a man's person or property on some sudden affray, and, probably, also where the killing was *per infortunium*, and, in either case, where the law would attach some degree of blame for the killing but would excuse it. It was excusable, as opposed to justifiable, homicide. The latter includes cases of unavoidable necessity, such as a householder, attacked by an armed burglar, killing the latter as the only means of protection against the attack. It includes also killing in execution of sentence of death pronounced by a lawful court, or of rioters, if the riot cannot otherwise be suppressed, or in arresting a felon where resistance cannot otherwise be overcome. Where, however, the killing was the outcome of a quarrel or fight, it was excusable, though not justifiable, if the killer had not begun but had taken part in the fight, or if, having begun it, he endeavoured to decline any further struggle and retreated, but, being closely pressed, killed his antagonist to avoid himself being killed or maimed. This,

in our opinion, is the result of the authorities to which we have referred. The expression seems also to have been applied to cases where the killing was due to misadventure in the performance of a lawful act and where there was no such negligence in its performance as would amount to manslaughter, but we need not explore the refinements of the old law regarding death *per infortunium*. The result was the same as in case of death *se defendendo*. It is obvious that at the present day there would, in such cases, be no room for any verdict but one of Not Guilty. Indeed, the Offences against the Person Act, 1861, s. 7, expressly provides :

“No punishment or forfeiture shall be incurred by any person who shall kill another by misfortune or in his own defence, or in any other manner without felony.”

- B This section replaces and re-enacts the Offences against the Person Act, 1828, s. 10, and the appearance of the word “forfeiture” helps to solve any difficulty that may be felt in regard to the distinction which formerly existed between justifiable and excusable homicide. Some degree of blame attached to the man who killed another with whom he was fighting, though the killing was in his own defence, for he ought not to have engaged in a fight. He was excused
- C from suffering a penalty, but his goods were liable to be forfeited to the king, and, both in the case of death caused *se defendendo* and *per infortunium*, the thing by which the death was caused was forfeited as a deodand. It seems that where there was room for a verdict of chance-medley, the court directed the jury to find a special verdict, and, if on the facts found the court decided that it was a case of death by chance-medley, no corporal sentence on the
- D prisoner was passed, but forfeiture of his goods and the deodand was ordered. SIR JAMES FITZJAMES STEPHEN, who was the greatest and most authoritative writer on the criminal law of the last century, nowhere in his HISTORY OF THE CRIMINAL LAW OF ENGLAND or in his DIGEST OF THE CRIMINAL LAW refers to death by chance-medley as such. In his HISTORY OF THE CRIMINAL LAW OF ENGLAND, vol. III, he deals at length with death *per infortunium* and *se*
- E *defendendo* and gives a full review (*ibid.*, 73-77) of FOSTER’S CROWN LAW, DISCOURSE OF HOMICIDE, as it refers to this matter. STEPHEN points out (*ibid.*, 76, 77) that FOSTER implies that by his time—and his work was published in 1762—special verdicts finding justifiable or excusable homicide had fallen into disuse and the judges were taking general verdicts of acquittal in plain
- F cases of *per infortunium* and *se defendendo*. The learned author goes on to say (*ibid.*, 77) that the law on this subject may be considered to have fallen into desuetude in the course of the 18th century, and it was finally abolished in 1828 by the Offences against the Person Act, 1828, to which we have already referred. Deodands, indeed, retained their legal existence till 1846 when they
- G were abolished by 9 and 10 Vict., c. 62. As a matter of some historical interest, it is probable that what led to the passing of the latter Act was that the London and Birmingham Railway Company had a year or two earlier been amerced in the sum of £2,000, representing the value of a railway engine that had run over and killed a man, thus becoming a deodand. It was, accordingly, necessary to adapt the law to modern conditions, and, as the law on the subject was too firmly established to be modified by judicial decision, the change had to be effected by statute.
- H Counsel for the applicant drew our attention to *R. v. Taylor* (1), *R. v. Snow* (2), and *R. v. Smith* (3), in support of his argument. In none of these cases was chance-medley mentioned by any of the judges who decided them. They are all cases which turn on whether there had been provocation enough to reduce the crime to manslaughter. No one doubts that blows, and, probably, threatening gestures, if near enough and serious enough to cause loss of control, may justify and, indeed, require the killing to be regarded as manslaughter only. At a time when society was less secure and less settled in its habits, when the

carrying of swords was as common as the use of a walking stick at the present day, and when duelling was regarded as involving no moral stigma if fairly conducted, it is not surprising that the courts took a view more lenient towards provocation than is taken to-day when life and property are guarded by an efficient police force and social habits have changed. It is enough to say that *Holmes v. Director of Public Prosecutions* (4), affirming the decision of this court, lays down rules on the subject which are authoritative and are to be followed by all courts when the question of provocation becomes an issue in relation to killing as the outcome of a quarrel or a fight. The old learning, such as it was, with regard to chance-medley has long been obsolete and was finally laid to rest by the Offences against the Person Act, 1828. The doctrine has no longer any place in the law of homicide, and we may express the hope that it will no longer appear in ARCHBOLD'S CRIMINAL PLEADING, EVIDENCE AND PRACTICE as though it were an existing doctrine. The cases cited under that heading are to be regarded as illustrations of what the courts have accepted as sufficient to reduce a killing from murder to manslaughter and all of them must now be read in the light of *Holmes'* case (4) and *Mancini v. Director of Public Prosecutions* (5), which preceded it.

The other matter on which counsel for the applicant relied as misdirection was that he contended that the learned judge on three or four occasions in his summing-up directed the jury that there was no evidence that the applicant had ever been struck. There are, no doubt, passages which do suggest that, in his opinion, the evidence did not disclose that any blows had actually been inflicted on the applicant before he stabbed the deceased. The evidence on that point, as generally is the case when there is a disturbance or brawl in a street, was somewhat obscure, but the direction on the law was both adequate and correct and the learned judge, not once, but twice, read the material evidence to the jury. What does seem to be beyond controversy is that the applicant struck the first blow, knocking down Woodyatt, and then struck the dead man in the face when he went to Woodyatt's assistance; that thereupon bystanders seized and held the applicant in an endeavour to prevent further trouble; that the applicant, who is, undoubtedly, a powerful man and a pugilist, wrenched himself free, drew his knife, and, saying, "I will get the two of them," made after Gibbons. Assuming that the latter turned and closed with the applicant, what possible excuse could there be for the applicant to use the terrible and deadly weapon that he had drawn and with which he stabbed Gibbons through the heart? It was a dreadful and cowardly act of revenge on a man who had assisted the applicant's first victim and was prepared to repel an attack on himself. There was no misdirection and, if there had been, there was only one verdict that a reasonable jury could have returned—the one they did return.

Application dismissed.

Solicitors: Registrar of the Court of Criminal Appeal (for the applicant); Director of Public Prosecutions (for the Crown).

[Reported by H. McL. MORRISON, ESQ., Barrister-at-Law.]

STONE v. BOLTON AND OTHERS.

[MANCHESTER MICHAELMAS ASSIZES (Oliver, J.), December 15, 20, 1948.]

Nuisance—Negligence—Sport—Cricket—Injury from ball hit from ground into highway.

A During a cricket match a batsman hit a ball which struck and injured the plaintiff who was standing on the adjoining highway. At the point at which the ball left it the cricket field was protected by a fence rising to 17ft. above the cricket pitch, the distance from the striker to the fence being about 90yds. and that to the place where the plaintiff was hit being nearly 100yds. Matches had been regularly played on the ground since 1864 and no one had been injured before, and there was evidence that only very rarely was a ball hit over the fence during a match. The road on which the plaintiff was standing had been constructed in 1910. In an action against the cricket club for damages for negligence and nuisance,

B HELD : (i) there was no evidence of negligence.

(ii) the playing of cricket was not a non-natural user of the land, and, therefore, the principle laid down in *Rylands v. Fletcher* (1868) (L.R. 3 H.L. 330; 19 L.T. 220) did not apply.

C (iii) to constitute a nuisance, there must be a state of affairs, however temporary, and not merely an isolated happening, and the facts of the present case did not establish a nuisance.

D *Quaere*, whether, since the cricket ground was in constant use before the construction of the road on which the plaintiff was standing, she was in any better position than would have been users of the land as it originally was, and was subject to such obstructions and dangers as existed at the time of dedication.

[AS TO CIRCUMSTANCES IN WHICH AN ACT MAY CONSTITUTE A NUISANCE, see HALSBURY, *Hailsham Edn.*, Vol. 24, p. 22, para. 38; and FOR CASES, see DIGEST, Vol. 36, p. 159, Nos. 25-31.]

Cases referred to :

E (1) *Rylands v. Fletcher*, (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70; 36 Digest 187, 311.

(2) *Castle v. St. Augustine's Links, Ltd.*, (1922), 38 T.L.R. 615; 36 Digest 186, 300.

(3) *Dollman v. Hillman, Ltd.*, [1941] 1 All E.R. 355; 2nd Digest Supp.

F ACTION for damages for negligence and nuisance.

The plaintiff claimed damages for injuries received when she was struck by a cricket ball while standing in a road adjoining a cricket field occupied by the defendants. OLIVER, J., held that there was no evidence of negligence and that nuisance had not been established. The facts appear in the judgment.

H. Burton for the plaintiff.

G F. H. Dean for the defendants.

Cur. adv. vult.

Dec. 20, 1948. OLIVER, J. : On Aug. 9, 1947, Miss Stone, the plaintiff, was struck and injured by a cricket ball while she was standing on the highway outside her house, 10, Beckenham Road, Cheetham Hill, Manchester. The ball was hit by a batsman playing in a match on the adjacent Cheetham Cricket Ground. She brings an action for damages against the committee and members of the club. The striker of the ball is not a defendant.

H The club has been in existence, and matches have been regularly played on this ground, since about 1864. Beckenham Road was constructed and built up in 1910. For the purpose of this work the contractors arranged with the club that a small strip of land at the Beckenham Road end of the ground should be exchanged for a strip at the other end. The match pitches have always been, and still are, kept along a line opposite the pavilion, *i.e.*, along

the midline of the original ground. The effect of the exchange in 1910 is that in the case of a straight drive—the hit in the case before me—Beckenham Road for some years has been a few yards nearer the batsmen than the opposite end. At the point at which the ball left it the cricket field is protected by a fence 7ft. high, but the upward slope of the ground towards the fence results in the top of the fence being some 17ft. above the cricket pitch. The distance from the striker to the fence is about 90yds., and to the place where the plaintiff was hit just under 100yds. The witness, Brownson, who lives in a house which is one of six at the end nearest the ground and opposite to the plaintiff, said that on five or six occasions during the last few years he had known balls hit his house or come into the yard, but it has to be observed that his house is substantially nearer the ground than the plaintiff's. Two members of the club, of over 30 years' standing, agreed that the hit with which we are here concerned was altogether exceptional and greater than anything previously seen on the ground. They also said—and I believe it—that it was only very rarely that a ball was hit over the fence during a match.

The case for the plaintiff is put on the ground (i) of negligence, and (ii) of nuisance. On the evidence before me I cannot find the defendants were negligent. In my opinion, this ground is quite large enough for all practical purposes of safety, particularly having regard to the height of the fence above the pitch. In 38 years' experience no-one has ever been injured before. Therefore, I acquit the defendants of negligence.

Some discussion took place on the doctrine of *Rylands v. Fletcher* (1). The short answer is that that doctrine only applies where land has been used in a non-natural manner. I hope it will never be said of cricket in this country that it is a non-natural use of land. Counsel for the plaintiff said the shortness of the boundary made the game non-natural, but I do not think that is compatible with the evidence which has been given.

Secondly, nuisance. An isolated act of hitting a cricket ball on to a road cannot, of course, amount to a nuisance. The very word connotes some continuity, some invasion of public as opposed to individual right. It seems strange, having regard to the prevalence of sport in this country, to find such a dearth of authority. The only case cited coming anywhere near the present case is *Castle v. St. Augustine's Links, Ltd.* (2), which was decided in 1922 by SANKEY, J. In that case, damages were awarded against a golf club at the suit of the user of a road who was injured by a golf ball. The decision was founded on nuisance, but there the facts were utterly different from the present. The tee in question was quite close to a much-frequented highway running nearly parallel with the course, and was so placed that any ball sliced or hit substantially off the line to the right passed on or over the highway. Such occurrences must have taken place every day, and many times a day. Such study of the cases as I have been able to make satisfies me that a nuisance must be a state of affairs, however temporary, and not merely an isolated happening. In *Dollman v. Hillman, Ltd.* (3) a piece of fat outside a butcher's shop, which caused damage to a passer-by, was held to be a nuisance. That was a state of affairs existing for the time being. Another example would be continual endangering of the public on a highway by splinters from a quarry. Cases could be multiplied. The matter has been accurately stated in HALSBURY, LAWS OF ENGLAND, Hailsham ed., vol. 24, p. 22, para. 38, where the text runs as follows :

"Whether such an act does constitute a nuisance must be determined, not merely by an abstract consideration of the act itself, but by reference to all the circumstances of the particular case, including, for example, the time of the commission of the act complained of; the place of its commission; the manner of committing it, that is, whether it is done wantonly or in the reasonable exercise of rights; and the effect of its commission,

that is, whether those effects are transitory or permanent, occasional or continuous ; so that the question of nuisance or no nuisance is one of fact."

Applying those considerations to this case, in my opinion, no nuisance has been established.

A One more argument was put forward by counsel for the defendants. It is that the cricket-ground was in constant use before the construction of Beckenham Road in 1910, and, that being the case, those using the highway are in no better position than would have been the users of the land as it originally was, but are subject to such obstructions and dangers as existed at the time of dedication. This is another ground on which the defendants are, in my view, entitled to judgment.

Judgment for the defendants with costs.

B Solicitors : *Linder, Myers & Pariser*, Manchester (for the plaintiff) ; *Hall, Brydon & Chapman*, Manchester (for the defendants).

[*Reported by* MISS M. D. CHORLTON, *Barrister-at-Law.*]

C RIPPINGTON v. HICKS & SON (OXFORD), LTD.
AND ANOTHER.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Finnemore, JJ.), January 13, 1949.]

D *Summary Jurisdiction—Appeal—Case Stated—Case stated out of time—Illness of appellant's solicitor—Summary Jurisdiction Rules, 1915 (S.R. & O., 1915, No. 200), r. 52.*

E By the Summary Jurisdiction Rules, 1915, r. 52, on an application to justices to state a Special Case : " The Case shall be stated within three . . . months after the date of the application . . ." On Feb. 17, 1948, the appellant applied to the justices to state a Case, but, owing to delay on the appellant's side caused by illness in the office of his solicitor, the Case was not stated until Sept. 9, 1948. No application was made for an extension of time.

F HELD : if the appellant was unable, for some good reason, to have the Case stated within the time required by r. 52, it was his duty to ask the court for an extension of time, and, as there had been a complete disregard of the rules, the Case would not be heard.

[AS TO LIMITATION OF TIME FOR SPECIAL CASE, see HALSBURY, Hailsham Edn., Vol. 21, pp. 725, 726, para. 1256 ; and FOR CASES, see DIGEST, Vol. 33, p. 414, No. 1241, and Supp.]

Case referred to :

G (1) *Moore v. Hewitt*, [1947] 2 All E.R. 270 ; [1947] K.B. 831 ; [1947] L.J.R. 1276 ; 177 L.T. 576 ; 111 J.P. 483 ; 2nd Digest Supp.

CASE STATED by City of Oxford justices.

H On Feb. 10, 1948, an information preferred by the appellant against the respondents was dismissed. The appellant applied to the justices to state a Case, but, owing to delay on the appellant's side due to the illness of a solicitor, the Case was not stated until Sept. 9, 1948. The respondents took a preliminary objection before the Divisional Court that the Case was not stated within the time limited by the Summary Jurisdiction Rules, 1915, r. 52. The Divisional Court allowed the objection and dismissed the appeal. The facts appear in the judgment of LORD GODDARD, C.J.

Milmo for the appellant.

Fox-Andrews, K.C., and *King-Hamilton* for the respondents.

LORD GODDARD, C.J. : This is a Case stated by justices of Oxfordshire at the instance of the appellant, who is an inspector of the Ministry of Food. The justices gave their decision dismissing the information on Feb. 10, 1948. An application to state a Case was made to the justices by Feb. 17 or 18, *i.e.*, within the time limited by the Summary Jurisdiction Rules, 1915, r. 52, and the justices were willing to do so. The Case was not sent by the appellant's solicitor, the Treasury Solicitor, to the respondents for agreement until May 1, the delay being due to the fact that the official of the Treasury Solicitor who was in charge of the matter was ill. The Summary Jurisdiction Rules, 1915, r. 52, provides that an application to a court of summary jurisdiction to state a Case shall be made in writing within seven days from the date of the proceedings to be questioned and

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"The Case shall be stated within three calendar months after the date of the application and after the recognisance shall have been entered into."

B

Therefore, the time limit laid down by the rules of 1915 had by then nearly expired. Considerable correspondence then took place, as usually happens in these matters, and the Case passed backwards and forwards between counsel. The Case was finally agreed by counsel by June 16, by which time the three months allowed by r. 52 had expired. It was then sent to the justices, who did not return the Case Stated until Sept. 9.

C

If the delay had been caused entirely by the action of the justices, a very different state of affairs would have arisen. In those circumstances, as this court said in *Moore v. Hewitt* (1), the court would regard the rule as directory and as giving them a discretion to enlarge the time. In this case, no application was made to enlarge the time and no step whatever was taken. It is said that the respondents ought to have told the appellant that they were going to object. I do not see why they should. If the appellant wants a Case Stated, it is for the appellant to abide by the rules of court. These rules of court are meant to be observed, and, if the time limit cannot be observed for some good reason, the duty of the appellant is to come before the court and ask for an extension of time. I attach importance to the observance of the rules because it is highly desirable that these cases, which are of a criminal nature, should be disposed of as promptly as possible. For the last two years or more, this court has been doing everything in its power to see that there is no undue delay in the hearing of these cases. Whether it be that an appellant is asking that the respondent should be convicted or whether he is asking that his conviction should be set aside, it is most desirable that criminal cases should be disposed of promptly and not left in abeyance and suspense for a long period. As a result of what has happened in this case, we are being asked to hear it more than eleven months after the conviction. The court is not going to do it. There has been a complete disregard of the rules of court, which ought to be observed, and, as the Case has not been stated within three months, this court is not going to hear it.

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HUMPHREYS, J. : I agree.

FINNEMORE, J. : I also agree.

Preliminary objection allowed. Appeal dismissed with costs.

Solicitors : *Treasury Solicitor* (for the appellant) ; *Trower, Still & Keeling*, agents for *Thomas Mallam, Grimsdale & Co.*, Oxford (for the respondents).

H

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

GREENLY *v.* LAWRENCE.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Finnemore, JJ.), January 12, 1949.]

Firearms—Certificate—Appeal to quarter sessions against refusal of police to grant or renew—Discretion of quarter sessions—Firearms Act, 1937 (c. 12), s. 2 (8).

A On an appeal under s. 2 (8) of the Firearms Act, 1937, against the refusal of a chief officer of police to grant a firearm certificate under s. 2 (2) of the Act quarter sessions must consider whether the applicant for the certificate has a good reason for having a firearm or ammunition in his possession and can be permitted to have it in his possession without danger to the public safety or to the peace. The question whether the certificate shall be granted is a matter solely for the discretion of quarter sessions, whose decision will not be set aside unless there is some error in law.

B [AS TO THE ISSUE OF FIREARM CERTIFICATES, see HALSBURY, Hailsham Edn., Vol. 32, pp. 361-363, paras. 591-593.

C For THE FIREARMS ACT, 1937, s. 2 (2) and (8), see HALSBURY'S STATUTES, Vol. 30, pp. 909, 910.]

CASE STATED by the Recorder of Reading.

At the general quarter sessions for the borough of Reading held on Jan. 29, 1948, Sir John Greenly, the owner of a pistol appealed under the Firearms Act, 1937, s. 2 (8), against the refusal of the chief constable of Reading to grant a renewal of a firearm certificate under s. 2 (2) of the Act authorising him to have in his possession 50 rounds of ammunition for a .25 Colt automatic pistol. The recorder found as a fact that the applicant for the certificate was not in any way unfitted to be entrusted with a firearm and that he had been a good shot with both rifles and revolvers. His residence stood in its own grounds and could easily be approached by an intruder from the south and west. He was aged 63 and kept a large number of valuable articles in his house. He wished to possess ammunition for the pistol to protect himself and his property by shooting if that became necessary in the event of attack by an armed intruder. The recorder held that this was a good reason for his having possession of the 50 rounds of ammunition and allowed the appeal.

E The Divisional Court dismissed the chief constable's appeal against this decision on the ground that it was a question for the recorder's discretion.

F Glazebrook for the appellants.

J. C. B. W. Leonard for the respondent.

LORD GODDARD, C.J. : Under the Firearms Act, 1937, s. 2, it is provided that a person may apply to the chief officer of police for the grant of a certificate enabling him to have in his possession a firearm and ammunition for it. By G s. 2 (2) :

H "The certificate shall be granted by the chief officer of police if he is satisfied that the applicant has a good reason for purchasing, acquiring, or having in his possession the firearm or ammunition in respect of which the application is made, and can be permitted to have in his possession that firearm or ammunition without danger to the public safety or to the peace . . ."

By sub-s. (8) :

"Any person aggrieved by a refusal of a chief officer of police to grant him a certificate under this section or to vary or renew a firearm certificate, or by the revocation of a firearm certificate under para. (a) of the last foregoing sub-section, may appeal—(a) in England, in accordance with so much of the provisions of sched. I to this Act as relates to appeals,

to the court of quarter sessions having jurisdiction in the county, borough or place in which he resides . . .”

If the applicant does appeal, the recorder, if it is in a borough, as in this case (or a court of quarter sessions, if it is a county) must consider whether the applicant has a good reason for having in his possession a firearm or ammunition without danger to the public safety or to the peace. If quarter sessions comes to the conclusion that the reason advanced by the applicant is a good reason, the court is to grant him a licence. It is a mere matter for discretion. We do not sit in this matter as a court of appeal. We only sit to decide whether the recorder has gone wrong in law. We can find no reason for saying that he has gone wrong, and, therefore, this appeal fails and must be dismissed with costs.

HUMPHREYS, J. : I agree.

FINNEMORE, J. : I also agree.

Appeal dismissed with costs.

Solicitors : *Reaxworthy, Bonser & Wadkin*, agents for *Sheppard & Fullbrook*, Reading (for the appellant) ; *Crawley, Arnold & Co.* (for the respondent).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

Applied. R. v. O./C. DEPOT BATTALION R.A.S.C., COLCHESTER. *Ex parte* ELLIOTT. *Post*, p. 373.

R. v. SECRETARY OF STATE FOR WAR. *Ex parte* MARTYN.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Finnemore, JJ.), January 11, 1949.]

Court Martial—Breach of procedural military law—Power of High Court—Non-compliance with rules of procedure—Certiorari—Rules of Procedure, 1926 (S.R. & O., 1926, No. 989), r. 34 (c).

On Oct. 27, 1948, the applicant was brought before a court martial on a charge of desertion. He pleaded that he had never received calling-up papers. The plea was allowed, and on Nov. 29, 1948, a new court was convened. It was then proved that calling-up papers had been posted to the applicant, and he was convicted and sentenced. It was now admitted that at the material time the applicant was a soldier, but it was contended that the second court had no jurisdiction to deal with him because it was not convened “forthwith” in accordance with the Rules of Procedure, 1926, r. 34 (c).

HELD : the High Court could only interfere with military courts and matters of military law in so far as the civil rights of the soldier or other person with whom they dealt might be affected, and, therefore, if the court martial had not been convened in accordance with the Rules of Procedure, which was a matter of military law and procedure, the High Court had no jurisdiction to interfere.

[AS TO JURISDICTION OF MILITARY COURTS MARTIAL, see HALSBURY, Hailsham Edn., Vol. 8, pp. 641-643, paras. 1397-1400.]

Case referred to :

(1) *Lee v. Thomas*, (1946), unreported.

MOTION for *certiorari* to quash a decision of a district court martial on the ground that the court was not properly convened. The application was refused. The facts appear in the judgment of LORD GODDARD, C.J.

Flowers, K.C., and *Jellinek (Pensotti with them)* for the applicant.

H. L. Parker for the respondent.

LORD GODDARD, C.J. : This is an application made by leave of SLADE, J., for an order of *certiorari* to bring up and quash the decision of a district court martial which adjudged the applicant, James Martyn, to be a deserter and sentenced him to nine months' detention. There is a further

application, which will only become material if the order for *certiorari* is granted, for a writ of habeas corpus.

A On Oct. 4, 1948, the applicant was arrested as an absentee or deserter from His Majesty's Forces, and he was brought before a court martial on Oct. 27. When before the court martial, he alleged that he had never received any calling-up papers. There being no evidence on the other side, the court held that the applicant was not subject to military law because he had not enlisted as a soldier and decided that the plea in bar, which had been raised to their jurisdiction, was good. By the Rules of Procedure, 1926, r. 34 (c) it is provided :

B "If the court allow the special plea, they shall record their decision and the reasons for it, and report it to the convening authority and adjourn; such a decision shall not require any confirmation, and the convening authority shall either forthwith convene another court for the trial of the accused, or order the accused to be released."

C Another court was convened, but not until more than a month had elapsed, and the point was then taken, before the members of the court were sworn and, therefore, before the court had become duly constituted, that they had no jurisdiction to try the case, because, it was said, the court had not been duly convened as it had not been convened "forthwith."

D On a consideration of the Rules of Procedure, it is clear that that plea was taken at the wrong time. It ought not to have been taken until the applicant had been brought before the court in accordance with r. 24, and when he was arraigned. It seems that this matter was discussed at some length, no evidence being given, and, as the judge advocate properly said, no evidence could then be given, because the members of the court, not yet being sworn, were not a court. Certain things were told the officers who would form the court, and they decided that they had jurisdiction. Thereupon, the applicant was arraigned before them and pleaded Not Guilty. Again his defence was that he had not received any calling-up papers, but it was then proved that those papers had been posted to him, and according to the National Service (Armed Forces) Act, 1939, s. 18, and the decision of this court in *Lee v. Thomas* (1), if papers have been sent to a man's last known place of abode he is deemed to be duly enlisted although he may never physically have received them. The court, therefore, found that he was a soldier and proceeded to find him guilty and sentence him.

F It is now suggested that we ought to bring up the order of this court martial and quash it on the ground that the court had no jurisdiction to try the applicant. Once it is conceded, as it has been in this case, that he was a soldier, a court martial had jurisdiction to try him. If the court martial in the present case has not observed the proper rules of procedure, that is a matter for the convening officer, and, if necessary, the Judge Advocate General to deal with, but it is not a matter for this court, which can only interfere with military courts and matters of military law in so far as the civil rights of the soldier or other person with whom they deal may be affected. This application really amounts to asking us to decide that the members of the court martial were wrong in holding that they had been convened in accordance with the Rules of Procedure, but that is purely a matter of military law and procedure and not one to interfere with which this court has any jurisdiction. In my opinion, therefore, this application is wholly misconceived, and must be dismissed.

H HUMPHREYS, J. : I agree.

FINNEMORE, J. : I also agree.

Motion dismissed with costs.

Solicitors : *Joseph Mayorcas* (for the applicant); *Treasury Solicitor* (for the respondents).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

NOTE.

ROUYER GUILLET ET COMPAGNIE *v.* ROUYER GUILLET & CO., LTD. ROUYER GUILLET *v.* JACKSON KNOWLAND & CO.

[COURT OF APPEAL (Lord Greene, M.R., Somervell and Evershed, L.J.J.), November 30, December 1, 2, 3, 1948.]

Evidence — Foreign law — Foreign statute — Foreign private document — A Construction.

APPEALS by the applicants from orders of JENKINS, J., dated June 25, 1948, dismissing three interlocutory applications.

Each application had as its object the stopping of an action by a French company against an English one in which the plaintiffs alleged that the defendants had passed-off goods as those of the plaintiffs which did not originate from the plaintiffs and claimed damages and an injunction. The applications turned on the construction of a French statute of Mar. 7, 1925, and of a document which was, in effect, the articles of association of the French company. The evidence given by the expert witnesses was conflicting, and, accordingly, the court, both as regards the private document and the statute, construed the text, deriving such assistance as it could from the evidence, and, in particular, from a decision of a French court. The appeals were dismissed. B C

The case only calls for report in respect of the statement made by LORD GREENE, M.R., with regard to the law relating to these matters (*infra*).

Rink for the applicants (the English company and Albert and William Rouyer Rouyer Guillet).

Arthian Davies, K.C., Milner Holland, K.C., and Rosselli for the French company and Louis Rouyer Guillet. D

J. A. Wolfe for the solicitors for the plaintiffs at the date of the issue of the writ.

LORD GREENE, M.R., in the course of his judgment, said: I must make it clear that the evidence of French law is subject to a certain differentiation as between the evidence of the meaning of the law of 1925 and the evidence of the meaning of the articles. As I understand the law of England, evidence as to the meaning of the statute is to be obtained from the evidence of expert French witnesses and the decisions of the French courts. On a matter of French law the decision of a French court would be most persuasive. On the other hand, evidence on the construction of a private document, such as articles of association, is admissible so far as it deals with French rules of construction or French rules of law or the explanation of French technical terms, but evidence as to its meaning after those aids have been taken into account is not admissible. It is for the court to construe the document, having fortified itself with the permissible evidence. I would add that when you come to the statute law itself, although it is right that *prima facie* what must be considered is the evidence of the experts and not the text of the law, when the experts differ as to its meaning an English court is entitled and, if it is to perform its function properly, is, indeed, bound, to apply its own mind, fortified by the opinion of the witnesses and giving what weight it thinks ought to be given to it, to the text itself and to examine it in order to make up its mind on the question of interpretation as between the two sets of witnesses. E F G

SOMERVELL, L.J., and EVERSLED, L.J., agreed, and in the result the appeals were dismissed. H

Appeals dismissed with costs.

Solicitors: *Dehn & Lauderdale* (for the English company and Albert and William Rouyer Rouyer Guillet); *Daybell, Watts-Jones & Co.* (for the French company and Louis Rouyer Guillet); *Churchill, Clapham & Co.*

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

WHITEHEAD v. JAMES STOTT, LTD.

[COURT OF APPEAL (Lord Greene, M.R., Somervell and Singleton, L.JJ.), January 11, 1949.]

Factory—Lift—Construction of “sound material”—Latent defect—Absolute duty of occupiers—Factories Act, 1937 (c. 67), s. 22 (1).

A The Factories Act, 1937, s. 22, provides: “(1) Every hoist or lift shall be of good mechanical construction, sound material and adequate strength, and be properly maintained.”

B A lift-operator at a factory was injured by a blow on the head from falling metal when the lift in which he was travelling fell from a height owing to the breaking of shafting at the top of the lift shaft. The lift had been in operation for 25 years, and the accident was caused by a defect in the shafting which, though latent on ordinary inspection, could have been detected by modern methods.

C HELD: it was not sufficient for the purposes of s. 22 (1) that the lift should be of material which appeared to be sound for its purpose on reasonable inspection; the requirement of the section was an absolute one of soundness; and, therefore, the occupiers of the factory were in breach of the duty imposed on them by the sub-section.

[FOR THE FACTORIES ACT, 1937 (c. 67), s. 22, see HALSBURY'S STATUTES, Vol. 30, pp. 217-219.]

Case referred to:

D (1) *Davies v. Owen (Thomas) & Co.*, [1919] 2 K.B. 39; 88 L.J.K.B. 887; 121 L.T. 156; 83 J.P. 193; 24 Digest 908, 68.

E APPEAL by the occupiers of a factory from a judgment of MR. COMMISSIONER ORMEROD, at Salford Assizes, dated Mar. 8, 1948, in which he held them to be in breach of the duty imposed on them by the Factories Act, 1937, s. 22 (1), under which “Every hoist or lift shall be of . . . sound material.” The Court of Appeal dismissed the appeal. The facts appear in the judgment of LORD GREENE, M.R.

Nield, K.C., and *C. M. W. Elliott* for the occupiers.
Gerrard, K.C., and *Nahm* for the workman.

F LORD GREENE, M.R.: The question raised by this appeal resolves itself into one of the true ambit of the Factories Act, 1937, s. 22 (1). The provisions of that section are new provisions making more rigorous the obligations of the occupiers of a factory in regard to lifts or hoists. The sub-section provides:

“Every hoist or lift shall be of good mechanical construction, sound material and adequate strength, and be properly maintained.”

G The workman, respondent in this appeal, whose duty it was to work the lift, met with an accident because the lift fell from a height in the lift shaft, and a piece of metal came down at the same time and hit him on the head. According to the findings of the learned commissioner, the electrical controls and safety devices were not out of order or inefficient, nor did they fail to operate, but a mechanical part of the apparatus consisting of a shafting at the top of
H the lift shaft which carried the pulley wheels had broken. It broke owing to a latent defect which was not obvious from the outside, but which we are told could have been detected by modern means of testing by X-rays and so forth. The learned commissioner accepted the evidence that when this mechanism was installed it had this hidden defect in it. The lift worked satisfactorily for a great many years without the defect producing any ill results, but on this occasion the defect, so to speak, matured, the shafting broke, and the lift fell. That did not in itself cause the injury of which the workman

complained. He was injured by the fall of metal from above owing to the fracture.

On that it is argued for the factory occupiers that the sub-section of the Factories Act which I have read did not impose any liability on them in respect of this accident. The sub-section imposes a liability to see that every hoist or lift shall be of sound material and adequate strength and properly maintained, but it is said generally that, in approaching the construction of that section, authorities which have found in other provisions of the Factories Act an absolute obligation to take this or that precaution must be construed as based on the presence of such phrases as "take effective measures to prevent," and that in the absence of some such phrase as that an absolute obligation must not be read into words such as we have here. At the outset (and this, of course, does not involve rejecting the appeal) I may say that I am completely unconvinced by that argument. No case has been cited to us which justifies the view that it is necessary to have some special form of words to create what has so frequently been referred to in these Factories Act cases as an absolute obligation. The well known decision of *SALTER, J., in Davies v. Thomas Owen & Co., Ltd.* (1), was referred to, but I see nothing in that judgment which suggests that the learned judge, in finding that there was an absolute obligation, relied on any special language. Here I can see no reason *prima facie* for limiting the construction of the words "sound material" to anything but sound material. The obligation is clearly expressed—"shall be of sound material."

That, however, is only on the threshold of the argument, because it is really to this effect. This shaft, it is said, complied with the obligation to provide sound material in that, when it was installed, it was sound for its purpose. Counsel for the occupiers explained that his argument involved that the material would be sound material if it appeared on reasonable inspection to be sound for its purpose. It is to be observed that that introduces a different test from the test of soundness in fact. It is appearance on reasonable inspection, and, therefore, may be consistent with unsoundness in fact. That appears to me to be the only logical way in which he could put his case, but I ask myself what justification there is for introducing that gloss on perfectly plain English words: "Every hoist or lift shall be of sound material." I can see no reason for writing on them a gloss which would, in my view, be quite inconsistent with the general objects of the Factories Act as explained in a great number of cases. It was argued that the sub-section fell into two parts, one relating to the original installation, and one to its maintenance. It was said that as regards the original installation it would be sufficient that the material appeared on reasonable inspection to be sound for its purpose. "Its purpose," when one starts to examine it, is a complex conception. It is partly composed of what I may call a mechanical factor—that is to say, its ability to raise or support the lift—and partly of a time factor—its ability to do it for some contemplated period of time. There is no evidence here of the contemplated life of a lift of this kind, but the factory occupiers used it for, it is said, 25 years, and at the end of that period this defect appeared.

My real reason for rejecting the formula put forward on behalf of the occupiers is that it introduces a qualification on the basis of reasonable inspection in the place of an absolute qualification of soundness. I cannot read the sub-section as referring to anything but an absolute test of soundness. I need not say anything on the subject of the meaning of "properly maintained." It was suggested that that merely imported the absence of negligence, a duty of reasonable care. I may say at once that I must not be taken as accepting that argument, but I do not find it necessary to discuss it. In my opinion, the learned commissioner was right when he decided that on the facts the material when the lift was installed was not sound material, and he properly

instructed himself on the law when he held that that fact constituted an infringement of the provisions of the sub-section. The appeal must be dismissed.

SOMERVELL, L.J. : I agree.

SINGLETON, L.J. : I agree.

Appeal dismissed with costs.

A Solicitors : *Gregory, Rowcliffe & Co.*, agents for *John Taylor & Co.*, Manchester (for the factory occupiers) ; *Gibson & Weldon*, agents for *John Whittle, Robinson & Bailey*, Manchester (for the workman).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

Dictum of HODSON, J., at p. 250,
explained. EDWARDS v. EDWARDS.
[1949] 2 All E.R. 145.

B **BARKER v. BARKER.**

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Hodson, J.), December 14, 15, 1948.]

C *Cruelty—Persistent cruelty—Summary proceedings by wife—Degree of cruelty necessary to be proved—Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 4.*

D At least the same degree of cruelty must be proved to justify the making of a maintenance order by a court of summary jurisdiction in favour of a wife under the Summary Jurisdiction (Married Women) Act, 1895, s. 4, as is required to substantiate a charge of cruelty in the Divorce Division of the High Court. On the facts, *held*, that a finding of cruelty was not justified, and the wife was not entitled to a maintenance order.

Observations of DENNING, J., in *Perks v. Perks* ([1945] 2 All E.R. 492), *not approved.*

E [AS TO PERSISTENT CRUELTY, see HALSBURY, Hailsham Edn., Vol. 10, p. 838, para. 1339 ; and FOR CASES, see DIGEST, Vol. 27, pp. 556, 557, Nos. 6120-6123.]

Cases referred to :

(1) *Perks v. Perks*, [1945] 2 All E.R. 491 ; 109 J.P. 276 ; *revsd. on other grounds*, [1945] 2 All E.R. 580 ; [1946] P. 1 ; 115 L.J.P. 7 ; 173 L.T. 349 ; 110 J.P. 94 ; 2nd Digest Supp.

F (2) *Russell v. Russell*, [1897] A.C. 395 ; 66 L.J.P. 122 ; 77 L.T. 249 ; 61 J.P. 771 ; 27 Digest 291, 2661.

(3) *Cornall v. Cornall*, (1910), 74 J.P. 379 ; 27 Digest 557, 6123.

(4) *S.S. Hontestroom v. S.S. Sagaporack*, *S.S. Hontestroom v. S.S. Durham Castle*, [1927] A.C. 37 ; 95 L.J.P. 153 ; 136 L.T. 33 ; Digest Supp.

G (5) *Watt (or Thomas) v. Thomas*, [1947] 1 All E.R. 582 ; [1947] A.C. 484 ; 176 L.T. 498 ; 2nd Digest Supp.

H APPEAL by the husband from a decision of Tunstead and Happing (Norfolk) justices who had found the husband guilty of persistent cruelty and of wilful neglect to maintain his wife and made an order in her favour for payment of £1 a week. The Divisional Court found that there was insufficient evidence to justify a finding of cruelty and allowed the appeal.

H. S. Law for the husband.

Sleeman for the wife.

LORD MERRIMAN, P. : This is a husband's appeal from a decision of the justices for the Tunstead and Happing petty sessional division of Norfolk sitting at North Walsham, whereby, on Aug. 20, 1948, they found that the husband had been guilty of persistent cruelty and of wilful neglect to maintain his wife, and made an order in her favour for £1 a week. I only wish to say

one other thing before dealing with what is, to my mind, the real point of this case. There was also, as I have said, included in the summons a charge of wilful neglect to maintain. The justices have not dealt specifically with that in their reasons, but, apparently, the order was based on both grounds. A question has arisen whether it is possible to separate these two grounds, so that, even if the wife does not succeed on the charge of persistent cruelty, she may, nevertheless, succeed on the ground of wilful neglect to maintain. I think that on the facts of this case no such distinction falls to be drawn and the case stands or falls as a whole on the finding of persistent cruelty, and so I propose to deal with it on that basis.

This court is always impressed with the necessity of paying strict attention to the principles that have been laid down by the highest authority as to the impropriety of an appellate tribunal reversing those who have seen and heard the witnesses except on some real ground, and it is quite legitimate for counsel for the wife to press that point on us, as he has done. In the present case, no witness was called on either side except the wife and the husband. The wife called none of that evidence in corroboration of the charge of cruelty which courts are accustomed to demand, but I should not be prepared to dispose of the case on that ground, because the husband himself, in some slight decree, provided corroboration in respect of, at any rate, two incidents. The substance of the matter was that the husband alleged that the trouble which had arisen between himself and his wife was due to her preference for the society of another man, and the last two assaults, one only of which, as he admitted, was within the six months period of limitation in courts of summary jurisdiction, were both admittedly referable to his objection to her association with this man. He, in turn, called no evidence to bring this matter home to her, and, therefore, there was a conflict of evidence between these two spouses.

Our attention has been called to *Perks v. Perks* (1), in which it was held by DENNING, J., that "a court of summary jurisdiction sometimes acted on a lesser degree of cruelty than that required by the High Court since the relief granted might be temporary only and could be discharged subsequently on cause being shown," but, "on the facts there was a lesser degree of cruelty which was also found by the Divisional Court when the order was varied by deletion of the non-cohabitation clause. Therefore, the order of the justices for maintenance should be discharged." It is of the utmost importance that it should be understood beyond the slightest possibility of misapprehension that at least the same degree of cruelty is required to justify an order in the magistrate's court as in this Division. I use the words "at least" advisedly, because it is possible in the Divorce Division to pronounce a decree of divorce on a single act of cruelty, if that act comes within the well-known description of cruelty contained in *Russell v. Russell* (2), but in a court of summary jurisdiction the epithet "persistent" precedes the word "cruelty," and that epithet necessarily implies some degree of repetition. With that difference let it be plainly understood that this court has never given the slightest countenance to the suggestion that justices are entitled to find cruelty on anything less than proof of conduct satisfying the description of cruelty contained in *Russell v. Russell* (2), namely, conduct of such a nature as to cause danger to life, limb, or health, bodily or mental, or as to give rise to a reasonable apprehension of such danger. I do not think that DENNING, J., in *Perks v. Perks* (1) meant to lay down any different test, but there is a passage of the report which lends some colour to the passage in the headnote to which I have called attention. He said ([1945] 2 All E.R. 492):

"So the court of summary jurisdiction is dealing, so to speak, with temporary relief whereas the High Court is dealing with permanent relief, and this difference does sometimes result in a court of summary jurisdiction acting on a lesser degree of cruelty than the High Court would."

If he was intending to say that that was legitimate I should profoundly dissent from it, but at the end of his judgment he said (*ibid.*, 493) :

“I desire to add that in these cases, on the wording of the statutes, I see no reason why the courts of summary jurisdiction should not require cruelty to be proved of the same gravity and degree as the High Court does.”

- A While agreeing with that statement, I would prefer to put it the other way and to say that I see every reason why they should, and, indeed, in *Cornall v. Cornall* (3), which was cited in the argument for another purpose, SIR SAMUEL EVANS, P., said that, in his opinion, the word “cruelty” in s. 4 of the Summary Jurisdiction (Married Women) Act, 1895, meant the same thing as cruelty had always meant in the Divorce Court, but there had been inserted into the
- B section the word “persistent,” and “persistent cruelty” meant something more than “cruelty.” I have not troubled to turn up more recent cases, but I am quite satisfied that in them the same sort of language has been used. I remember very well that there was a time, not so very long ago, when it was highly necessary to remind magistrates how serious an issue was raised by the charge of cruelty.
- C I propose to approach the present case from the point of view of an enquiry whether there is evidence which justifies a finding of conduct on the part of the husband of such a nature as to have caused danger to life, limb or health, bodily or mental, or to have given rise to a reasonable apprehension of such danger. I have referred to the principles on which appellate tribunals, considering evidence on paper, should be guided. I do not propose to read out at length
- D the statement of that principle by LORD SUMNER in *S.S. Hontestroom v. S.S. Sagaporack* (4), or the more recent pronouncement by LORD THANKERTON in *Watt (or Thomas) v. Thomas* (5), in which he said that divorce cases, or consistorial cases as they are called in Scotland, were a particularly clear example of the principle, but it is plain that, if the inferior court has misdirected itself (and in that I include a misdirection as to the nature of the evidence required
- E to constitute the particular offence), or if it has acted on evidence which the appellate court does not think justifies the finding, the appellate court is, not merely entitled, but bound to interfere. That does not involve any estimate of the credibility of the witnesses by those who have not seen the witnesses. It assumes that everything which the justices have found is to be upheld, while at the same time considering whether that ought to have been held to satisfy
- F the legal test.

- [HIS LORDSHIP referred to the various acts of cruelty alleged and continued :] If there is what may be fairly described as a course of conduct of cruelty extending over years, the mere fact that only one comparatively slight incident occurs within the statutory six months is irrelevant. It is enough to give the justices jurisdiction. A much more important point is whether there is anything
- G here which could satisfy a court that anything which the husband did caused the wife danger to life, limb, or health, bodily or mental, or gave rise to a reasonable apprehension of such danger. Taking this evidence at its full value, giving all possible weight to the fact that the justices have seen these parties, and accepting as the basis of my judgment that the justices have preferred the wife's account to the husband's account, I cannot bring myself to hold that there
- H is anything here which justifies a finding of cruelty. There was not a shred of evidence that the wife suffered injury or reasonable apprehension of injury. The justices have not properly directed their minds to the elements which it is necessary to find before they are justified in arriving at the serious finding of cruelty, and I think this appeal must be allowed and the order set aside.

HODSON, J.: The decision of the justices was based not only on persistent cruelty, but also on wilful neglect to maintain, and it has been argued that something less than the degree of cruelty required in the Divorce Court may be

sufficient to support a charge before justices on one or other footing. I think that is wrong. It is clear that the word "cruelty," which has been used in many statutes, always carries the same meaning. As my Lord has said, it has been judicially determined in many cases, including *Cornall v. Cornall* (3), to which he referred. I do not think that there can be any doubt that cruelty, whether dealt with by justices or by the High Court, is always the same, namely, conduct of the nature which falls within the definition in *Russell v. Russell* (2). A footnote in *STONE'S JUSTICES' MANUAL*, 80th ed., vol. 1, p. 1041, contains references to a large number of cases under the heading of persistent cruelty, and in nearly all those cases decisions of the High Court are referred to as illustrating actions or classes of conduct which have from time to time been held to be cruelty. The observations of DENNING, J., in *Perks v. Perks* (1), although they were calculated to lead the learned reporter to state in the headnote that a court of summary jurisdiction sometimes acts on a lesser degree of cruelty than that required by the High Court since the relief granted might be temporary only and might be discharged subsequently on cause being shown, do not, I think, justify that conclusion. His judgment was not a considered judgment, and if that case was intended to be authority for the proposition that it is sufficient for a lesser standard of cruelty to be proved before justices than before the High Court, I confess I cannot think it is consistent with established authority. As my Lord has pointed out, DENNING, J., did, at the end of his judgment, whatever he may have said in the earlier part, express the view that he could see no reason why courts of summary jurisdiction should not require cruelty to be proved with the same gravity of degree as the High Court. So it appears that by the time the judgment was concluded, at any rate, that was the opinion of DENNING, J., as it has been of all other judges who have, so far as I know, dealt with this particular topic.

On the other branch of this case, namely, wilful neglect to maintain, counsel for the wife argued that something less than cruelty would justify a wife remaining apart from her husband. I think that is an unsound proposition. It will not do to say that because a grave and weighty matter will justify one spouse in leaving the other, therefore something less than cruelty will do. The grave and weighty matter which justifies one spouse in leaving the other is very often something different from cruelty, something which may even be regarded as more calculated to disrupt family life, such as the persistence in a false allegation of a criminal charge which was the subject of the decision in *Russell v. Russell* (2). Many people might regard this as something worse than cruelty involving the mere infliction of a physical injury causing injury to health. The existence of cruelty depends not on the magnitude but rather on the consequence of the offence, actual or apprehended, and, dealing with conduct which is either cruelty or not cruelty, it is, in my view, not open to any court to say: "This is not cruelty, but it is so near it that it amounts to a grave and weighty matter justifying separation." There being, in my opinion, no other matter apart from persistent cruelty which justifies the wife in remaining away from her husband in this case so as to put her in a position to claim separate maintenance, that ground of the order also fails, and the husband's appeal should succeed.

Appeal allowed with costs.

Solicitors: *Peacock & Goddard*, agents for *Hill & Perks*, Norwich (for the husband); *Butt & Bowyer*, agents for *Daynes, Keefe & Co.*, Norwich (for the wife).

[Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.]

BARCOCK v. BRIGHTON CORPORATION.

[KING'S BENCH DIVISION (Hilbery, J.), December 8, 9, 1948.]

Master and Servant—Safe system of working—Delegation of duty to servant—Servant's attention drawn to statutory regulations—Contributory negligence—Electricity (Factories Act) Special Regulations, 1908 (S.R. & O., 1908, No. 1312), reg. 18 (d) (as amended by Electricity (Factories Act) Special Regulations, 1944 (S.R. & O., 1944, No. 739)).

The workman entered the employment of the defendant electricity undertakers as a labourer and after about 4 years became a fitter. He acquired a certain amount of knowledge in electrical matters, but was not given any training or tuition. In 1935 he became the assistant of a skilled electrician, the superintendent in the sub-station department of the employers' undertaking, and helped to prepare the equipment for the tests which the superintendent performed at sub-stations. In carrying out these tests the superintendent did not follow the instructions laid down by the Electricity (Factories Act) Special Regulations, 1908, reg. 18 (d) (as amended by the Electricity (Factories Act) Special Regulations, 1944). He adopted a method which involved some danger, but, he considered, was more expeditious. By a departmental letter, dated Oct. 21, 1944, the workman was appointed an "authorised person" within the meaning of the Electricity Regulations to carry out without supervision the duties performed by the superintendent, and he was instructed to make himself conversant with a memorandum on the Electricity Regulations. On Nov. 21, 1946, while the workman was carrying out a test at the switchboard, an explosion occurred and he was injured. He brought an action against the employers claiming damages (a) at common law, for failure to provide and maintain a safe system of work, and (b) for breach of statutory duty in failing to comply with the Electricity (Factories Act) Special Regulations, 1908 and 1944. The employers denied negligence and pleaded that they had complied with the regulations by providing a safe system of work and that they had expressly delegated their statutory duty to the workman. They also pleaded contributory negligence.

HELD : (i) the workman was not entitled to recover damages for breach of statutory duty since the duty of doing the test without supervision had been expressly delegated to him and he himself had committed a breach of the regulations.

Smith v. Baveystock & Co., Ltd. ([1945] 1 All E.R. 531), *applied*.

(ii) the employers had not discharged their common law duty to provide a safe system of work by merely instructing the workman to read and comply with the requirements specified in the regulations as disclosed by the memorandum, and, further, if they had at one time provided a safe system, it had been disregarded by long usage.

(iii) as the workman was not a skilled electrician and had never been instructed in the correct way of doing the work, but had always seen his superior officers doing it in a manner that involved some risk, he was not guilty of contributory negligence in carrying out the work in the same manner.

[AS TO MASTER'S DUTY TO PROVIDE A SAFE SYSTEM OF WORK, see HALSBURY, Hailsham Edn., Vol. 22, pp. 187, 188, para. 314, and p. 190, para. 318; and FOR CASES, see DIGEST, Vol. 34, pp. 196-198, Nos. 1602-1623.]

Cases referred to :

- (1) *Smith v. Baveystock & Co., Ltd.*, [1945] 1 All E.R. 531; 2nd Digest Supp.
- (2) *Vincent v. Southern Ry. Co.*, [1927] A.C. 430; 96 L.J.K.B. 597; 136 L.T. 513; Digest Supp.

(3) *Cakebread v. Hopping Bros. (Whetstone), Ltd.*, [1947] 1 All E.R. 389; [1947] K.B. 641; 177 L.T. 92; 2nd Digest Supp.

ACTION to recover damages for personal injuries.

The plaintiff, an electrical fitter employed by the defendants, electricity undertakers, was injured in an explosion which occurred while he was about to carry out a test at a switchboard in connection with the high-pressure electrical system at one of the defendants' sub-stations. Following the example of his superior officers, the plaintiff, before starting to carry out the test, removed a safety device in the shape of a permanent screen, consisting of a lid with shutters, which, in compliance with the Electricity (Factories Act) Special Regulations, 1908, reg. 18 (*d*) (as amended by the Electricity (Factories Act) Special Regulations, 1944), separated the part of the apparatus on which he would be working from the parts of the apparatus that were "live." The plaintiff claimed that the defendants were liable (i) at common law, and (ii) for breach of statutory duty. The defendants denied negligence and claimed that the duty of complying with the regulations had been delegated to the plaintiff, and they pleaded contributory negligence on his part. **HILBERY, J.**, gave judgment for the plaintiff on his claim at common law and held that he was not guilty of contributory negligence.

Beney, K.C., and *Marven Everett* for the workman.

Granville Sharp, K.C., and *Michael Maxwell* for the employers.

HILBERY, J. : In this case a workman, injured in the course of his employment, is claiming damages at common law and for breach of statutory duty by the employers in respect of accidental injuries sustained by him in the course of his work. [After reciting the facts, **HIS LORDSHIP** proceeded :] The workman alleges that there was a breach by the employers of the Electricity (Factories Act) Special Regulations, 1908 (S.R. & O., 1908, No. 1312), made under the Factory and Workshop Act, 1901, and amended by the Electricity (Factories Act) Special Regulations, 1944 (S.R. & O., 1944, No. 739), governing the places where there takes place the generation, transformation, distribution and use of electrical energy in premises under the Factory and Workshop Acts. The opening words of the regulations of 1908, under the heading "Duties," are :

"It shall be the duty of the occupier to comply with these regulations. And it shall be the duty of all agents, workmen, and persons employed to conduct their work in accordance with these regulations."

The workman relies on regs. 1 and 3, which provide :

"1. All apparatus and conductors shall be sufficient in size and power for the work they are called upon to do, and so constructed, installed, protected, worked and maintained as to prevent danger so far as is reasonably practicable. 3. Every switch, switch fuse, circuit-breaker, and isolating link shall be :—(a) so constructed, placed, or protected as to prevent danger . . ."

He also relies on reg. 18 (*d*), as amended by the regulations of 1944 :

"When any work is done on any switchboard for high pressure or extra high pressure the switchboard shall be made dead unless (1) the section of the switchboard on which the work is done (hereinafter referred to as 'the relevant section') is made dead and every other section which is live is either (i) so separated from the relevant section by permanent or removable divisions or screens as not to be a source of danger to persons working on the relevant section, or (ii) in such a position or of such construction as to be as safe as if so separated as aforesaid . . ."

In this case the section of the switchboard on which the work was to be done,

viz., the feeder socket, was made dead, but it is to be observed that the regulation goes on to say :

“ . . . and every other section which is live is either (i) so separated from the relevant section by permanent or removable divisions or screens as not to be a source of danger to persons working on the relevant section . . . ”

A [His LORDSHIP dealt with the evidence and found (a) that the “ relevant section,” *i.e.*, the section on which the workman was engaged at the time of the accident, was provided with a permanent screen (consisting of a lid with shutters) which, had it been kept in place as, to the workman's knowledge, it was intended to be, would have been in compliance with reg. 18 (d) (1) (i), and (b) that the apparatus as a whole, thus fitted, complied with reg. 1.

B His LORDSHIP continued:] The workman contends that the employers were responsible for the fact that the screen was not in place at the time of the accident, and, therefore, they were liable for non-compliance with reg. 18 (d).

The employers contend that there was a compliance with the regulation when the safety device of the shuttered lid was in place, and, if it was not in place at the time, it was because the workman had removed it by his own deliberate act; he was the person to whom they had delegated the duty of performing this test; and he had been expressly ordered to make himself acquainted with the regulations at the time and by the terms of his appointment as their delegate to do this piece of work. That contention gives rise to the question what the situation is where an experienced man is supposed to have had expressly delegated to him the statutory duty which it is incumbent on the employer to perform, and he sustains an accident by reason of his not performing the duty. It is not easy to reconcile the judgment of LORD GODDARD

D in *Smith v. Bayestock & Co., Ltd.* (1) and the decision in the House of Lords in *Vincent v. Southern Railway Co.* (2) with the decision in *Cakebread v. Hopping Bros. (Whetstone), Ltd.* (3), but that they are reconcilable, I am sure. In *Smith v. Bayestock & Co., Ltd.* (1), which was a case of an accident with a circular saw, LORD GODDARD said ([1945] 1 All E.R. 534):

“ The plaintiff adjusted the guard at what he considered was a suitable height to enable him to cut through this plank which was of varying or irregular thickness without stopping the machine. For myself I should have thought, provided, of course, that he had not left a wholly unnecessary gap, that he would put an adjustment on the guard which, in the circumstances, was practicable. But in any case it seems to me that the delegated duty had been put on him to adjust this guard and if he did not adjust the guard in such a way as was safe, it seems to be pretty clear—and that was the foundation of the decision in *Vincent v. Southern Ry.* (2)—that he cannot complain of it. He cannot take advantage of his own wrong and say to his employer ‘ Although you left me to adjust it and I did not adjust it, therefore I am going to claim damages against you ’.”

It is that judgment in those terms which the employers say should be applied in this case as against the workman.

There are one or two other facts and circumstances which I think must be looked at in considering this matter. The workman joined the employers as a labourer after leaving the navy, where he had received some instruction in the electrical work and apparatus which commonly is to be found in one of His Majesty's ships, but otherwise he had no skill or experience as an electrician. After being in the navy for 12 years, he joined the firm of Metropolitan-Vickers after his demobilisation and there became a fitter's mate and learned a certain amount about wiring. He then went as a labourer to the electricity undertaking of the Brighton Corporation (the employers). After being a labourer for about six months, he became a fitter's mate, and

after three or four years he became a fitter. He was not given any training or tuition, but he picked up a certain amount of knowledge. About 1935 he became an assistant to Mr. Bousfield, a skilled electrician, who was the superintendent in the sub-station department. The workman acted as the assistant to Mr. Bousfield in getting ready all the equipment when Mr. Bousfield did the same sort of test as the workman was doing at the time he met with his accident. He used to see Mr. Bousfield doing the test, and Mr. Bousfield invariably facilitated the doing of it by the removal altogether of this safety device which was part and parcel of the apparatus, namely, this lid with its shutters, by unscrewing the four screws and taking it away so that the whole of the porcelain block in which were the two rows of sockets was exposed for him to work on. The first time the workman saw that done, he said to Mr. Bousfield: "Is not that rather dangerous?" or some words to that effect. Mr. Bousfield, he says, replied: "Yes, but if you did not take the risks, you would never get anything done." From that time onwards the workman attended this skilled superior, who represented the employers as head of the workman's department, and was accustomed to seeing this superior do this particular test in the same way. When Mr. Bousfield had to retire on the ground of ill-health, a Mr. Tidy succeeded to his position. The workman performed the same duties as assistant to Mr. Tidey, and Mr. Tidey continued to do the work in the same way. On Oct. 21, 1944, the workman was handed a paper called a "departmental letter," addressed to him from the engineer and manager, and headed: "Authorisation for Switching." The letter was in these terms:

"Until further notice you will be required to carry out, without supervision, the routine testing of switchgear, protective and earthing systems, together with oil sampling and testing and in respect of these additional responsibilities you will be paid 1½d. per hour above the rate for that of electrical fitter and this increase will be retrospective to Aug. 22, 1944. For the purpose of the duties which will be required of you in connection with switching operations on the high voltage system you will be considered an authorised person within the meaning of the Electricity Regulations issued in accordance with the provisions of the Factories Act, 1937. You must make yourself conversant with the memorandum by the Senior Electrical Inspector of Factories on the Electricity Regulations, a copy of which will be made available to you on application to your superintendent, Mr. Carr. Will you please observe that any switching you undertake on the high voltage system (a) at the power station, must be done only with the authority of the power station charge engineers; (b) on any part of the system outside the power station, only with the authority of the North Road charge engineers."

The workman was acting on those instructions in doing the work that he was doing on the day of his accident, and he had with him a Mr. Wingham to perform the duties which he had formerly fulfilled for Mr. Bousfield and Mr. Tidey.

It is said with great force that, so far as any breach of the regulations is concerned, this case is similar to *Smith v. Baveystock & Co., Ltd.* (1), because by the authorisation of Oct. 21, 1944, the workman was told that until further notice he would be required to carry out the routine testing of switchgear without supervision, i.e., he would be the person responsible for the doing of that work, and must make himself conversant with the memorandum by the Senior Electrical Inspector of Factories on the Electricity Regulations. The workman said that he could not remember having asked for that memorandum, but he felt sure that he had seen it at some time and read it so as to make himself conversant with the regulations, but he could not actually say that he recalled it.

It seems to me that it is very difficult to say in these circumstances that,

so far as there was a breach of the regulations, the breach was not committed by the workman himself as the person to whom the duty of doing the test without supervision was expressly delegated. In the face of the decisions and the facts, I should feel very great difficulty in finding in the workman's favour if his case rested solely on breach of the statutory regulations, but I do not think that his case does depend entirely on breach of the statutory regulations. His case is also put on the common law duty of the employers, and, in my

- A opinion, he has established a breach of common law duty by the employers, unless he is wholly or partly answered by the plea of contributory negligence. I ask myself: What system of work had the employers provided for doing this work? The employers had 70 sub-stations, and the test was done almost daily. It was, therefore, a matter which called for some system of work devised and decided on by the employers. They had a duty to provide a
- B reasonably safe system of work. The employers contend that they had provided a safe system of work by ordering the workman to read and follow the memorandum on the regulations, but I do not think that one devises a system of work by saying to a workman: "Read the regulations, and do not break them." In my view, that is not devising a system of work. I think also that in this case no responsible person on behalf of the employers
- C had devised any system for doing this work, and it is the particular work which is in hand for which a reasonably safe system has to be devised and used. If, however, it is contended that the employers had devised a system, then, in my opinion, by a long usage that system had in practice been utterly disregarded, and it seems to me to be no use for a master to attempt to say in a court: "I discharged my common law duty because I put down on paper
- D a safe system and gave it into the workman's hands," if for years they showed him, by the action of those who were his superiors, that the work was not done in the specified way, need not be done in that way, and could be done in another way which involved danger. Those are the circumstances here. I should have thought that, instead of providing a safe system of work, the employers had, in fact, provided throughout the years an unsafe system of
- E work as the system which it was expected should be employed, notwithstanding that it involved risk, because, in the view as expressed by Mr. Bousfield, "If you did not take risks, you would never get anything done."

The last question is: Is the workman's common law claim answered by the allegation that he was guilty in the circumstances of contributory negligence?

- F The bare statement that he removed the safety device that was there to prevent an accident, and did so as an experienced man in charge of the work, looks, barely stated, a formidable proposition, but I have already related the circumstances which led to his doing the work in this way. In considering whether he was negligent in doing the work in this way, I think it is highly appropriate to bear in mind, first holding, as I do, that the employers provided
- G no system for doing this particular work, that the workman was left to his own devices as to how it should be done. He himself had had no tuition or instruction. He joined this undertaking as a labourer, advancing himself by his intelligence and, I suppose, his diligence to the higher grades, until at last he became what is called "an authorised person" under this appointment, but during all that time there was no interference by the higher authorities in his course of conduct. He had seen all his superiors whom he had worked
- H under do the work in this way, treating the matter as one which could and should be so done, and regarding it, although some risk was involved, as a negligible risk which should be undertaken to get the work done. In view of these circumstances, the question is: Was the workman guilty of contributory negligence because he did not break away from that system and devise some other system for himself? I find myself incapable of so holding. As a matter of justice and common sense, trying to put myself in his position, I can only think that I should not have considered myself wanting in reasonable

care if I accepted to a certain extent such risk as there seemed to be in doing the work in the way in which I had always seen it done. I do not think that that is contributory negligence which would debar him of his remedy or make him fractionally responsible for it under the Law Reform (Contributory Negligence) Act, 1945. That he did not use another device, *e.g.*, rubber gloves, is not pleaded as an act of contributory negligence. That he did not use a covered copper bar instead of an uncovered one is certainly an act of contributory negligence, but, in my view, it was never brought to his notice that such a covered or insulated bar was available. In the circumstances, I think he recovers at common law.

[HIS LORDSHIP then dealt with the question of damages, and awarded the workman £3,000 as compensation for the loss of his hand and £767 for loss of earnings, etc.]

Judgment for the plaintiff for £3,767 and costs.

Solicitors: *Rowley, Ashworth & Co.* (for the workman); *William Charles Crocker* (for the employers).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

STEPNEY BOROUGH COUNCIL *v.* JOFFE AND OTHERS.

[KING'S BENCH DIVISION (Lord Goddard, C.J., and Humphreys, J.), January 14 1949.]

Street Trading—Licence—Revocation—Appeal—Powers of magistrate—London County Council (General Powers) Act, 1947 (c. xlvii), s. 25 (1).

By s. 25 (1) of the London County Council (General Powers) Act, 1947: "Any person aggrieved by the refusal of a borough council to . . . grant or renew an annual [street trader's] licence . . . or by the revocation or variation by a borough council of an annual licence . . . may appeal to a petty sessional court and on any such appeal the court may confirm reverse or vary the decision of the borough council and may award costs."

The respondents were street traders who had been granted annual licences to engage in street trading in various foodstuffs in the metropolitan borough of S. All three respondents having been convicted of acquiring or selling food contrary to the Defence (General) Regulations, 1939, the borough council decided that they were unsuitable to hold licences and the licences were revoked. A metropolitan magistrate allowed appeals, by the respondents. The borough council now appealed against his decision contending that he was not empowered to substitute his opinion for that of the borough council in deciding whether or not the respondents were unsuitable to hold licences, but that his jurisdiction was limited to considering whether there was evidence on which the council could come to that conclusion.

HELD: appeals under s. 25 (1) were unrestricted and not confined to considerations of questions of law, and, therefore, the magistrate came to a right conclusion in holding that he had jurisdiction to entertain the appeal on any ground that seemed right to him.

[AS TO LICENCING OF STREET TRADERS IN THE METROPOLIS, see HALSBURY, Hailsham Edn., Vol. 31, p. 693, para. 1019; and FOR CASES, see DIGEST Supplement, Vol. 26, pp. 36, 37, Nos. 1435a-1435k.]

Case referred to:

(1) *Fulham Borough Council v. Santilli*, [1933] 2 K.B. 357; 102 L.J.K.B. 728; 149 L.T. 452; 97 J.P. 174; Digest Supp.

CASES STATED by a metropolitan magistrate.

At a court of summary jurisdiction sitting at the Thames Magistrate's Court, the three respondents, who were street traders, appealed under the London County Council (General Powers) Act, 1947, s. 25 (1), against decisions of the Stepney Borough Council who had revoked their licences to engage in street trading on the ground that, in the opinion of the council, they were unsuitable to hold such licences. The council now appealed, contending that the magistrate was not empowered to review the merits of the cases generally, but was limited to considering whether there was any material on which the council could reasonably have arrived at their decisions. The Divisional Court held that the magistrate had power to act as he did and dismissed the appeals.

Havers, K.C., and Sebah Shaw for the borough council.

Ahern for the respondent Joffe.

Lester for the respondents, Diamond and White.

LORD GODDARD, C.J. : These are three Cases stated by a metropolitan magistrate who reversed on appeal three decisions of the Stepney Borough Council revoking the licences of certain street traders, the respondents. The question is obviously one of importance.

Under the London County Council (General Powers) Act, 1947, s. 21, it is provided :

“(1) A person requiring an annual [street trader's] licence or the renewal of an annual licence shall make application in writing to the borough council and shall in such application state . . . (2) As soon as reasonably practicable after the receipt of an application under this section the borough council shall . . . grant or renew an annual licence to the applicant. (3) A borough council may refuse to grant or renew an annual licence or may at any time revoke or vary an annual licence granted by them if—(a) the applicant or the licensee is on account of misconduct or for any other sufficient reason in their opinion unsuitable to hold such licence; or (b) the space available in the street or streets to which the application relates or which is or are prescribed by the licence is at the date of such application or becomes at any time after the grant of such licence insufficient to permit of the applicant or licensee engaging therein in any street trading or in the particular street trading proposed to be or actually carried on by him without causing undue interference with or inconvenience to traffic in such street or streets; or (c) the street or streets to which the application relates is or are not a designated street or designated streets . . .”

Paragraph (d) relates to :

“. . . a designated street or designated streets in relation to which the borough council have by resolution specified a class or classes of articles or things which or other than which they will not prescribe in any street trading licences granted by them in respect of that street or those streets . . .”

In other words, the borough council can say to an applicant in respect of certain streets: “We can grant you a licence to carry on street trading in certain articles, but not in other articles.” By para. (e) the borough council may revoke a licence if

“. . . the applicant or licensee has persistently refused or neglected to pay any charges due from him to the borough council under this Part of this Act or the byelaws made thereunder”;

and para. (f) supplies another ground—if

“. . . the licensee has for a period of not less than four weeks not exercised or not fully exercised his rights under the licence.”

By s. 25 (1) :

"Any person aggrieved by the refusal of a borough council to register him as a registered street trader or to grant or renew an annual licence or by the cancellation by a borough council of his registration as a registered street trader or by the revocation or variation by a borough council of an annual licence or by any prescription made by a borough council under s. 21 (5) (annual licences) of this Act may appeal to a petty sessional court and on any such appeal the court may confirm reverse or vary the decision of the borough council and may award costs."

A proviso regulates the time within which an appeal is to be brought, and another proviso prohibits an appeal if the licence has been refused or revoked under s. 21 (3) (c) and (d). Parliament has recognised that in those matters the opinion of the borough council is to be final.

It is said that the reason why the borough council refused licences to these street traders was because they had been convicted under the regulations which deal with the sale of food at maximum prices of charging too much and the council took the view that persons who had been convicted of those offences were unsuitable to hold such licences. It is argued that on an appeal against a refusal on the ground of misconduct or for any other sufficient reason rendering the applicant unsuitable to hold such a licence, the magistrate is not entitled to substitute his opinion for that of the borough council, but all he can decide is whether there was evidence on which the council could come to that conclusion. I find myself unable to accept that argument. If it be right, the right of appeal which is given, at any rate against a refusal on any ground mentioned in s. 21 (3) (a), would be purely illusory. It would, I suppose, as HUMPHREYS, J., pointed out during the argument, really be an appeal on the question of law whether there was any evidence on which the borough council could form an opinion. If their decision is to be a mere matter of opinion and their opinion is to be conclusive, I do not know what evidence the council would be obliged to have. They could simply say : "In our opinion, this man or this woman is unsuitable for holding a licence," and give any reason they liked. I do not know how a court could say on appeal whether that was a sufficient reason. If the reason is to be one which is sufficient in their opinion, it is difficult to see how any court of appeal could set aside their decision.

On the other hand, there is given here an unrestricted right of appeal, and, if there is an unrestricted right of appeal, it is for the court of appeal, in this case the metropolitan magistrate, to substitute its opinion for the opinion of the borough council. That does not mean to say that the court of appeal ought not to pay great attention to the fact that the duly constituted and elected local authority have come to an opinion on the matter and ought not lightly to reverse their opinion. It is constantly said (although I am not sure that it is always sufficiently remembered) that the function of a court of appeal is to exercise its powers where it is satisfied that the judgment below is wrong, not merely because it is not satisfied that the judgment was right. In the present case the words are very wide. The magistrate is given power to "confirm reverse or vary the decision of the borough council," and it seems to me that once the applicant appeals to him, he is bound to form an opinion on the matter and "confirm reverse or vary the decision of the borough council" according to the judgment which he forms. There is no doubt that the magistrate had power to do what he did.

My opinion is fortified by the decision in *Fulham Borough Council v. Santilli* (1). It is true that the provisions of the London County Council (General Powers) Act, 1927, which were under consideration there have been to some extent modified because the Act of 1947 has taken away the particular right of appeal which was then in question. That shows that this question of appeal was before

Parliament when the Act of 1947 was passed. If Parliament had intended that the very wide appeal, which is *prima facie* given by s. 25, should be limited in the way which it is now contended it ought to be limited, without doubt they would have put in words so limiting it. It is, perhaps, not without importance to notice that by s. 64 of the Act from the magistrate's decision a further appeal is given to quarter sessions, which would certainly enable the trader, though not, I think, the borough council, to appeal. Therefore it seems that Parliament attaches great importance to the right of a trader, whose livelihood may be taken away by the action of the borough council, to have not merely one appeal but two appeals. For the reasons I have endeavoured to express, I think the magistrate came to a right conclusion.

HUMPHREYS, J. : I am of the same opinion. Considerable weight must be given to the fact, if it be a fact, that the argument of counsel for the borough council, if accepted, would result in our deciding that the only appeal to the magistrate given by s. 25 is an appeal on a question of law. Not only is there nothing in the section itself to indicate that such is the intention of Parliament, but it seems to me that that construction would be quite contrary to the language of the section. I see no reason to withdraw or to differ from what was said by the court, including myself, in *Fulham Borough Council v. Santilli* (1), namely, that it is a matter of common knowledge that a right of appeal is a right to a re-hearing of the whole matter in dispute unless there are words to the contrary, and the appellate tribunal is not confined to the reasons which have been given by the court below as the ground of its decision. I think the fact that "on any such appeal the court may confirm reverse or vary the decision of the borough council" indicates, as strongly as possible, that the court has the fullest possible power to deal with the appeal from every point of view. Why should it be given a power to vary the language of the decision if the only matter before it is the question of law whether there was any evidence on which the council could come to the conclusion at which it arrived. I think the words "on account of misconduct or for any other sufficient reason in their opinion" are not nearly strong enough to take away the general right of appeal which is given to a person who has been refused what, in effect, under this section means a right to carry on his living in the way that he has been accustomed and to substitute merely a right to appeal to a magistrate on a question of law. Further, as my Lord has pointed out, there is a further right of appeal. Why should there be a right of appeal to quarter sessions on a pure question of law from the magistrate? If a right of appeal is given on a question of law, it is generally to the High Court by means of a Case Stated as in the present case. I feel no doubt that the decision of the magistrate was one to which he had power to come.

Appeal dismissed with costs.

Solicitors: *J. E. Arnold James*, town clerk, Stepney (for the borough council); *Scott & Son* (for the respondent Joffe); *Harry Baker* (for the respondent Diamond); *Conway & Conway* (for the respondent White).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

R. v. KINGSTON-UPON-HULL RENT TRIBUNAL.**Ex parte BLACK.**

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Finnemore, JJ.), January 13, 1949.]

Certiorari—Costs—Payment by rent tribunal—Application for certiorari opposed by tribunal—Tribunal appearing by counsel.

An application by a landlord for an order of *certiorari* to bring up and quash an order of a rent tribunal reducing the rent of certain premises without hearing evidence on behalf of the landlord was resisted by the tribunal, who appeared by counsel to oppose the application. On the order being granted, the landlord asked for costs against the tribunal.

HELD: as the tribunal had appeared by counsel and contested the case, the landlord should be awarded costs against the tribunal.

MOTION by the landlord for an order of *certiorari* to bring up and quash an order of the Kingston-upon Hull Rent Tribunal whereby they reduced the rent of certain premises without hearing evidence on the point. The Divisional Court held that there had been a complete failure of justice and granted the order.

Peter Lewis, for the landlord: I ask for costs against the tribunal. By the Furnished Houses (Rent Control) Act, 1946, s. 1, and the schedule, the tribunal are paid out of moneys provided by Parliament.

LORD GODDARD, C.J.: In the absence of misconduct on the part of the tribunal I do not think we can order the members of the tribunal to pay the costs.

Lewis: It will work great hardship on my client, who is a very poor woman. This is the only property she has. She is an old woman and she exists almost entirely on the rent from this property. The tribunal is represented here by counsel.

LORD GODDARD, C.J.: In cases where justices appear and oppose, costs are sometimes given against them. They can file an affidavit, and, if they only file an affidavit and do not appear, we do not give costs against them. In this case, however, the tribunal has appeared and made itself a party to this *lis*.

J. H. L. Royle for the tribunal. That is so, my Lord, but in unreported cases the principle has been laid down that there must be perverseness on the part of the tribunal. It is submitted that there has been no perverseness here.

Lewis: My friend need not have been instructed to appear here. The tribunal might have read our affidavit and not opposed our application.

LORD GODDARD, C.J.: We decide this case on the ground that the landlord had to come here, at considerable expense to herself, to have the decision of the tribunal quashed, and the tribunal have appeared by counsel and have disputed her right to have an order for *certiorari*. On the whole, as the tribunal have appeared here and have contested this case, we think the landlord ought to have her costs.

Royle: The Solicitor to the Ministry of Health acts in these cases as a matter of convenience. He is not instructed by the Minister.

LORD GODDARD, C.J.: I suppose he has a retainer from somebody.

Royle: From the tribunal.

LORD GODDARD, C.J.: Then there is all the more reason why the tribunal should pay. If there had been no appearance by the tribunal, of course, we should not have given costs in this case.

Certiorari granted, with costs against the tribunal.

Solicitors: *Smith & Hudson*, agents for *Gosschalk & Austin*, Hull (for the landlord); *Solicitor, Ministry of Health* (for the tribunal).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

**TOOTAL BROADHURST LEE CO., LTD. v. INLAND
REVENUE COMMISSIONERS.**

[HOUSE OF LORDS (Lord Simonds, Lord Normand, Lord Morton of Henryton, Lord MacDermott and Lord Reid), November 29, 30, 1948, January 20, 1949.]

A *Excess Profits Tax*—"Income received from investments"—*Royalty received from licence of patented invention—Finance (No. 2) Act, 1939 (c. 109), sched. VII, pt. I, para. 6 (1).*

B A company, trading as manufacturers and merchants of cotton, linen, woollen and other goods, in the course of manufacture used patents covering inventions and processes which had for the most part been developed in its own research department. From time to time the company granted non-exclusive licences of a number of these patents to other manufacturers, and royalties in respect thereof were received by the company both in the standard period for excess profits tax purposes and during the chargeable accounting period, July 1, 1939, to June 30, 1940. The Crown claimed excess profits tax in respect of the royalties received in that accounting period from licences granted in respect of three patents :—(1) a crease resisting process developed in the company's research department. The company did not itself employ this process, but the cloth produced by the company was treated in accordance with the process either by a subsidiary of its own or by licensee finishers. (2) A process to prevent felting in woollen goods, the patent rights in respect of which the company bought in 1939 from the original patentees, taking over the burden and benefit of existing licences. The company had granted further licences, and the process was used in the manufacture of its own goods. (3) Controlling devices on stentering machines, invented by a person connected with the company. A joint application for a patent in respect of this device was made by the company and the inventor at the same time as an application by a second company which had produced a similar device. The company and the inventor assigned their interest to the second company in return for a royalty. On the question whether the patent royalties were "income received from investments" within the meaning of the Finance (No. 2) Act, 1939, sched. VII, pt. I, para. 6 (1), for the purposes of excess profits tax,

F **HELD** : the income in question arose from a series of commercial agreements, exploiting certain proprietary rights or claims, which were entered into by the company in the active prosecution of its trade or business, and, therefore, was not "income received from investments" for the purpose of para. 6 (1).

G *Inland Revenue Comrs. v. Desoutter Bros., Ltd.* ([1946] 1 All E.R. 58; 174 L.T. 162) and *Inland Revenue Comrs. v. Broadway Car Co. (Wimbledon) Ltd.* ([1946] 2 All E.R. 609), approved.

Decision of COURT OF APPEAL ([1947] 2 All E.R. 409), affirmed.

[FOR THE FINANCE (No. 2) ACT, 1939, sched. VII, pt. I, para. 6 (1), see HALSBURY'S STATUTES, Vol. 32, p. 1220.]

Cases referred to :

- H (1) *Inland Revenue Comrs. v. Desoutter Bros., Ltd.*, [1946] 1 All E.R. 58; 174 L.T. 162; 2nd Digest Supp.
(2) *Gas Lighting Improvement Co., Ltd. v. Inland Revenue Comrs.*, [1923] A.C. 723; 92 L.J.K.B. 665; *sub nom.*, *Inland Revenue Comrs. v. Gas Lighting Improvement Co., Ltd.*, 129 L.T. 481; 12 Tax Cas. 503; Digest Supp.
(3) *Inland Revenue Comrs. v. Rolls-Royce, Ltd.*, [1944] 2 All E.R. 340; 171 L.T. 238; 2nd Digest Supp.

(4) *Inland Revenue Comrs. v. Broadway Car Co. (Wimbledon), Ltd.*, [1946] 2 All E.R. 609; 2nd Digest Supp.

APPEAL by the taxpayers, Tootal Broadhurst Lee Co., Ltd., from a decision of the Court of Appeal ([1947] 2 All E.R. 409), who held that no part of the royalties received in respect of three patents was "income received from investments" within the Finance (No. 2) Act, 1939, sched. VII, pt. I, para. 6 (1), and that the royalties should, therefore, be included in the computation of the taxpayers' profits for the purpose of excess profits tax.

The Special Commissioners of Income Tax decided that the income arising was entirely income from investments, but stated a Case which was heard by ATKINSON, J., who held that the royalties in respect of the first two patents were not income from investments, but affirmed the Special Commissioners as regards the third. The Court of Appeal dismissed the appeal of the taxpayers as regards the first two patents and allowed the cross-appeal of the Crown in respect of the third patent. The House of Lords now dismissed the taxpayers' appeal. The facts appear in the opinion of LORD SIMONDS and are summarised in the headnote.

J. Millard Tucker, K.C., *Donovan, K.C.*, and *Graham-Dixon* for the taxpayers. *Cyril King, K.C.*, and *R. P. Hills* for the Crown.

The House took time for consideration.

Jan. 20. LORD SIMONDS: My Lords, the question raised in this appeal relates to an assessment to excess profits tax made on the appellants for the chargeable accounting period ending on June 30, 1940, in respect of the profits of their trade or business. Shortly stated, it is whether in the computation of those profits certain sums received in respect of so-called patent rights belonging to the appellants, or in which they were interested, ought to be included. If, as the appellants contend, such sums were "income" from investments received within the meaning of the Finance (No. 2) Act, 1939, sched. VII, para. 6, then they ought not to be included. Excess profits tax was first imposed by the Finance (No. 2) Act, 1939, pt. III, in respect of a certain excess of the profits arising from a trade or business over the standard profits as therein defined. It is in this context that your Lordships have to consider the meaning of the words "income received from investments."

It is convenient to set out, or state the effect of, the relevant sections of the Act that I have mentioned. By s. 12 (2) of the Act, the trades and businesses to which the tax applies are all trades or businesses of any description carried on in the United Kingdom, or carried on, whether personally or through an agent, by persons ordinarily resident in the United Kingdom. Section 12 (4) of the Act is as follows:—

"Where the functions of a company or society incorporated by or under any enactment consist wholly or mainly in the holding of investments or other property, the holding of the investments or property shall be deemed for the purpose of this section to be a business carried on by the company or society."

By s. 14 of the Act it is provided that the profits from a trade or business shall be computed on income tax principles as adapted in accordance with the provisions of pt. I of sched. VII to the Act. Part I of sched. VII to the Act is headed "Adaptations of income tax principles as to computation of profits" and it is provided in para. 6 thereof as follows:—

"(1) Income received from investments shall be included in the profits in the cases and to the extent provided in sub-para. (2) of this paragraph and not otherwise. (2) In the case of the business of a building society, or of a banking business, assurance business or business consisting wholly or mainly in the dealing in or holding of investments, the profits shall include all

income received from investments, being income to which the persons carrying on the business are beneficially entitled."

The appellants do not carry on any of the businesses mentioned in para. 6 (2).

The facts, so far as they are material, are succinctly set out in three paragraphs of the Case stated by the commissioners. They are thus stated:—

A "3.—The company carries on trade as manufacturers and merchants of
cotton, linen, woollen and other goods. In the course of manufacture the
company (together with its subsidiaries) uses patents covering inventions
B and processes which have been mostly developed in its own research department which has been in operation for 20 years. The staff of this research department is permanent and is employed largely for the purpose of perfecting old processes and devising new. The company has from time to time granted non-exclusive licences of a number of such patents to other manufacturers and finishers both in the United Kingdom and abroad at a royalty. Royalties from such licences were received by the company in the standard period and in the chargeable accounting period in question.

C 4.—The royalties the subject of this appeal were received in respect of three groups of patents:—(A) *Crease-resisting Process*. This process was developed by the company's research department, and is patented in many countries abroad. The company itself does not employ this process, but the cloth it produces is treated either by a subsidiary of its own or by licensee finishers. A specimen of the licences granted is annexed hereto, marked "A" and forms part of this Case. (B) *Process to Prevent Felting in Woollen Goods*. In 1939 the company bought the patent rights in respect of this process from the original patentees taking over the benefit and burden of existing licences. The company has since granted further licences, and the process is also used in the manufacture of its own goods. A specimen of the licences granted is annexed hereto marked "B" and forms part of this Case. (C) *Controlling Devices on Stentering Machines*. These devices govern the transit of cloth on conveyor belts on drying machines. They were invented by a person connected with the company; a joint application by the company and this person was made almost simultaneously with an application by another company (hereinafter called "the assignees") which had produced a somewhat similar device. By an agreement made on Mar. 12, 1940, the company and the person connected with it transferred their interest to the assignees in return for a royalty, and the assignees took out a consolidated patent under the two applications. The royalties received under this agreement in the year in question amounted to about £150; the royalties received under (A) and (B) of this paragraph in the year in question amounted to about £100,000. The agreement made on Mar. 12, 1940, is annexed hereto marked 'C' and forms part of this Case.

G 5.—None of the licences granted as referred to in para. 4 above is exclusive, nor for the whole term of the patent. The company owns patents other than those mentioned in para. 4 hereof, but no licences have been granted in respect of them. The negotiation of the licences gives the company a fairly substantial amount of trouble and expense, but once a licence is granted little is involved except collecting the royalty."

H On the form of the licences and the agreement of Mar. 12, 1940, I will make some observations at a later stage. For the licences originally annexed to the Case others were afterwards substituted, but nothing turns on this.

On these facts, the commissioners expressed the opinion that "patents which had been exploited by licensing them out at a royalty fall within the term 'investments'" and that the sums in question should, therefore, be excluded from the assessment. From this determination the Crown appealed by way

of Case Stated to the High Court, and, after some interlocutory proceedings to which I need not refer, ATKINSON, J., decided that the patents in groups (A) and (B) were not, but that the patents in group (c) were, investments. There was an appeal and cross appeal from his decision, and the Court of Appeal unanimously held that none of the patents was an investment, and, accordingly, that the whole of the sums in question must be included in the computation of profits for the purpose of assessment.

My Lords, I entertain no doubt that the decision of the Court of Appeal, which was founded on and followed an earlier decision of the same court, *Inland Revenue Comrs. v. Desoutter Bros., Ltd.* (1), was correct. I do not propose to attempt an exhaustive definition of the word "investments." It is a word of which the meaning may vary according to its context. I hesitate to say, as was said by MACKINNON, L.J., in the *Desoutter* case (1) ([1946] 1 All E.R. 63), that it is to be construed as "a word of current vernacular." It is, for instance, a popular use of the word to say that a good education is a good investment. Here the meaning is limited by the context, and the context is one in which a distinction has to be made between the income of investments and the other profits of a trade or business. This does not mean that, if the assets (to use a neutral word), as to which the question arises, would necessarily be described as investments in any context, they can be anything but investments for the purpose of para. 6. This was long since determined in *Gas Lighting Improvement Co., Ltd. v. Inland Revenue Comrs.* (2), a case decided on the strictly comparable language of the Finance (No. 2) Act, 1915, sched. IV, pt. I, para. 8, which was much pressed on this House. There the question was whether certain shares, which were admittedly investments, were investments within the paragraph, the then appellant company contending for an implied qualification to the effect that to be within the paragraph the investment must be made outside the operations for which the business of the company was constituted, but, as VISCOUNT CAVE, L.C., said ([1943] A.C. 730), there was nothing in the Act which compelled or admitted of such a limitation of the meaning of the word. Your Lordships will, I think, get no assistance from this case and I mention it only because, first and last, learned counsel for the taxpayers asserted its relevance.

The problem, my Lords, is a different one—whether these assets, being investments, are within the paragraph, but whether they are "investments" at all, and, as I have already said, that is a word whose scope will depend on its context. It appears to me that the problem may be solved in this way. I would take a schedule of the assets of the trading company concerned and, omitting assets such as stocks and shares to which, in view of the decision in the *Gas Lighting Improvement Co.* case (2), the title of investments can in no circumstances be denied, would ask of each other asset: "Is this an asset which the company has acquired and holds for the purpose of earning profits in, or otherwise for the promotion of, its particular trade or business?" There might be borderline cases in which the answer would be uncertain, but I do not doubt that in the vast majority of cases the answer would be clear cut. If it was in the affirmative, the asset would not be an investment within the paragraph. It is possible, as was pointed out in the *Desoutter* case (1) by LORD GREENE, M.R., that a particular kind of asset might in the hands of one trader be, and in the hands of another not be, an investment, though a less likely form of investment for any trader to make than a patent cannot readily be imagined.

Applying this test to the facts of the present appeal, I cannot believe that any business man (who may be regarded as the touchstone in such a case) would describe the patent rights here in question as investments of the taxpayers or the payments received by them under the licences or agreement as income of their investments. On the contrary, the elaborate character of the so-called licences, which are designed to further the commercial interests of the taxpayers

and are directly related to their own particular trade, indicates clearly enough that these are assets of a kind which a trader carrying on such a business as that of the taxpayers might be expected to own, but are assets such as no company carrying on a different trade would be likely to acquire. The agreement of March, 1940, need not be particularly examined. It serves to emphasise the distinction that I have made. It is not from such a source as this that a trader would seek to derive an income, unless it was an integral part of, or at least, closely associated with, the trade he carried on.

I should finally say a word about the cases that were cited to this House. I need say no more about the *Gas Lighting Improvement Co., Ltd.* case (2). I have, I hope, given full weight to it in the opinion that I have formed. In *Inland Revenue Comrs. v. Rolls-Royce, Ltd.* (3) MACNAGHTEN, J., decided that income derived from the patent licences there in question was not income from an investment. He partly, at least, founded his decision on the view that, before there can be anything properly called an investment, money must be laid out to acquire it or bring it into existence. This test, though it was not accepted by LORD GREENE, M.R., in the *Desoutter* case (1), may, I think, have an element of considerable value. It is not decisive, but it would, at least, be easier to describe an asset as an investment if it had been purchased out of funds not needed for the immediate purposes of the business. In *Desoutter's* case (1), to which I have more than once referred, the facts were similar to those in the present case, and it was held that the royalties derived from certain patents were not income from investments. The judgment of LORD GREENE, M.R., in that case, which has been followed and applied in the courts below in the present case, is, in effect, now under review. I shrink, as he did, from attempting to lay down any general rule. The question is, as he pointed out, largely one of fact in each case. If for the purpose of drawing the right inference of fact I have suggested a certain test, I do not seek to depart from or to qualify what he said. Finally, reference was made to *Inland Revenue Comrs. v. Broadway Car Co. (Wimbledon), Ltd.* (4). There the court held that, applying the principle of *Desoutter's* case (1), it was impossible to say that the commissioners had erred in law in concluding that the transaction there in question had resulted in an investment. I am content without further investigation to accept the case as correctly decided on that ground. In the result, my Lords, I am satisfied that the decision of the Court of Appeal was correct, and move that the appeal be dismissed with costs.

LORD NORMAND : My Lords, the question in this appeal is whether income described as royalties received by the appellant company under three separate agreements relating to patent rights, and admittedly part of the appellant's business profits, is also "income from investments" within the meaning of the Finance (No. 2) Act, 1939, sched. VII, pt. I, para. 6.

The meaning of "investment" is its meaning, not in the vernacular of the man in the street, but in the vernacular of the business man. It is a form of income yielding property which the business man, looking at the total assets of the company, would single out as an investment. It certainly does not include all the property of the company, and I am unable to accede to the proposition of counsel for the taxpayers that every item of the company's property is an investment, and that while the company uses those items itself the profit it derives from them is a profit of trade, but, if it hands one of them over to others to use in return for a periodic payment, it begins to receive an income from an investment. The business man would not limit income from investments to income from the kinds of securities which are quoted on the stock exchange, and he would, I think, regard as income from investment a profitable rent from a sub-lease of office premises or the like surplus to the company's requirements : *Inland Revenue Comrs. v. Broadway Car Co. (Wimbledon), Ltd.* (4) ; but he would regard income from an asset in which a company might reasonably

have invested its cash reserves in order to have them ready to hand if it needed to employ them in its business as the typical income from an investment. In *Inland Revenue Comrs. v. Desoutter Bros., Ltd.* (1) LORD GREENE, M.R., gave as a possible example of an income from an investment the royalties passively received by a barrister who exploited a patent inherited or acquired by him by granting licences. I think that a business man would find no difficulty in taking the same view. In these cases the investment is made when the lease or licence is granted, and it seems the preferable view that it is the lease or the licence which is the investment. It is conceivable that an ordinary trading company as well as an individual might enjoy an income from investments in the form of royalties under patent licences, but it would be a rare occurrence, and a company claiming to be in the enjoyment of such an income must satisfy the income tax commissioners, or the court on appeal, that it is not merely a profit of the business but truly of the nature of an income from investment.

The taxpayers carry on trade as manufacturers and merchants of cotton, linen, woollen and other goods. The company has for 20 years maintained a research department for the purpose of perfecting old processes and devising new processes used in its business or for finishing the products. It grants from time to time non-exclusive licences to other manufacturers and finishers. Exhibit A1 is an example of an agreement granting a licence to use a patented process developed in the company's research department. The process is used in finishing. The company itself does not finish its own goods, which are, in fact, finished by the other parties to the agreement, who are bound to treat the materials of third parties at prices not less than minimum prices prescribed by the taxpayers, not to sell or allow to be sold materials treated by the process at less than minimum prices fixed by the taxpayers, to keep accounts and to allow the taxpayers' accountants to inspect their books, accounts, receipts and other documents, to mark as prescribed by the taxpayers all materials sold or treated under the licences, and in other respects to conduct their business of finishing goods under the licence in a manner advantageous to the business of the taxpayers. I am of opinion that no business man would classify the royalties received under this agreement as anything but the profits accruing from the company's business of manufacturing, finishing and marketing treated goods. Exhibit B1 is another agreement. It is used when licences are granted by the taxpayers to use a patent purchased by them from the original patentees. The patented invention is for a process to prevent felting in woollen goods, and this process is used by the company in the manufacture of its own goods. The material clauses in this agreement resemble that in A1 to which I have made reference, and no distinction between the two can be drawn. Both are trade agreements entered into as a means of promoting the taxpayers' business and increasing trade profits. Neither is an investment. Exhibit C deals with devices which control the transit of cloth on conveyor belts on drying machines. These devices were invented by Mr. Laurie who is connected with the taxpayers. There had been a joint application for a patent by him and the taxpayers and almost simultaneously an application by another company which had produced a similar invention. The parties came to a compromise agreement, embodied in Exhibit C, by which the taxpayers and Mr. Laurie assigned their rights in their application to the other company in return for royalties. I am unable to find in this compromise arrangement anything that a business man would describe as an investment. I think that it also was a means of promoting the trade and increasing the business profits of the taxpayers, or, to put it no higher, that the taxpayers have failed to show that it was more than that. I am, therefore, for dismissing the appeal.

LORD MORTON OF HENRYTON : My Lords, the royalties to which this appeal relates admittedly form part of the profits arising from the business of the taxpayers, within the Finance (No. 2) Act, 1939, s. 12 (1), and the question

to be decided is whether or not these royalties are "income received from investments" within para. 6 of pt. I of sched. VII to the Act. If they are, they must be excluded from the computation of the taxpayers' profits for the purpose of excess profits tax.

A I agree with the views expressed by LORD GREENE, M.R., in *Inland Revenue Comrs. v. Desoutter Bros., Ltd.* (1) that the word "investment" in this context is not a word of art, and that the question whether or not a particular piece of income is "income received from an investment" must be decided on the facts of each case. I think that the question must be approached from the standpoint of an intelligent man of business, and, in my view, such a man, being informed of the facts set out in paras. 3, 4 (A) and 5 of the Stated Case, and being shown the agreement which is exhibit A, would not think that the royalties received under that agreement were aptly described as "income received from investments." I think he would rightly say that the royalties were income received from a commercial agreement, conferring advantages on each of the parties to it, and entered into as a part of the company's business. By that agreement the taxpayers grant to the finishers a non-exclusive licence, in a specified territory, to make, use and sell certain materials manufactured or treated under the patents therein mentioned, at such factory or factories of the finishers as shall from time to time be nominated by the finishers to the taxpayers and not elsewhere, for the period commencing on Aug. 1, 1937, and terminable at any time by six months' previous notice in writing given by either party to the other. Clause 5 provides for the payment of royalties by the finishers to the taxpayers, and other clauses provide for various commercial advantages to the taxpayers, and for a substantial measure of control to be exercised by the taxpayers over the business of the finishers. It is contended, on behalf of the taxpayers, (i) that the royalties payable under the agreement are income received "from" the patents therein mentioned; (ii) that these patents are an "investment" within para. 6 of pt. I of sched. VII. As to the first contention, I think it can more accurately be said that the royalties are income received "from" the agreement A, but I shall assume for the moment that the taxpayers are right on this point. Making this assumption, I cannot regard the patents described in para. 4 (A) of the Stated Case, used as they were being used at the relevant time, as being an "investment" within para. 6. I need not further elaborate my reasons for this view, as they are in substance the same as the reasons about to be expressed by my noble and learned friend, LORD MACDERMOTT.

F As to the process mentioned in para. 4 (B) of the Stated Case, I do not overlook the fact that the patent rights in respect of this process were bought by the taxpayers, whereas the process mentioned in para. 4 (A) was developed by the taxpayers' own research department, but I do not think that this fact is sufficient to distinguish, for income tax purposes, the royalties payable under the exhibit B from the royalties payable under the exhibit A. The royalties payable under the agreement of Mar. 12, 1940, mentioned in para. 4 (C) of the Stated Case are, in my view, still further removed from being "income received from an investment," and I agree with the comment of SOMERVELL, L.J. ([1947] 2 All E.R. 413): "I am not sure what the suggested investment is." However, I need not pursue this matter, as counsel for the taxpayers felt themselves unable to press his argument under this head. I would dismiss the appeal.

H LORD MACDERMOTT: My Lords, I agree that this appeal should be dismissed and only wish to add a brief statement of the reasoning which has led me to that conclusion.

The income here in question arose under a series of agreements made by the taxpayers in the course of carrying on their business whereby the taxpayers used their rights as proprietors of several patents or (in the case of the agreement of Mar. 12, 1940) their claim to become such proprietors, to obtain certain

advantages, pecuniary and otherwise, in the way of their trade. My Lords, I do not think any business man would describe the income so obtained as "income received from investments." He would be bound to admit that the purpose of the agreements was a trade purpose, but I do not think he would look on this alone as conclusive against so describing the income, and in that, I apprehend, he would be right, having regard to the decision of this House in *Gas Lighting Improvement Co., Ltd. v. Inland Revenue Comrs.* (2). He would, no doubt, find difficulty in giving a precise definition of "investments" as the word is used in the relevant enactment, but I think he would be prepared to go the length of saying something like this: "If, in the course of carrying on my business, I make active use of a business asset—be it my factory building, a piece of machinery, a patent, or my working capital—that asset is not an investment. Whatever else a business investment may have to be, it is an asset for the time being held intentionally aloof from the active work of the business. It is none the less an asset of the business and may have great business value. For instance, it may enable me to survive bad times and take advantage of good, or it may help me to control supplies or competition. And if it produces income that is income of the business. But I do not earn that income by my business efforts. The part I play there is essentially passive. I cannot, of course, afford to neglect my investment. I may have to preserve it and, on occasion, change its form, but normally I just hold it and receive what it brings in." The question then arises whether that view of the matter accords with the use of the word "investments" in the Finance (No. 2) Act, 1939, sched. VII, pt. I, para. 6. In my opinion, it does. The term as there employed obviously relates to investments of the trade or business, for the income therefrom will be part of the profits unless excluded under s. 14 and para. 6, but it does not necessarily extend to all the assets of the trade or business. Section 12 (4), it may be observed, speaks of "investments or other property," a phrase which is studiously avoided in para. 6, and, apart from this, such an extended meaning would undermine the whole purpose of Part III of the Act. It is plain, therefore, that "investments" refers to some assets and not to others. The statute, however, does not lay down any method of segregation for its purposes, and, in the absence of such provision, the proper test must, in my opinion, be related to the limited sphere of trade or business with which the Act is here dealing and founded, accordingly, on the meaning of the word for the man engaged in trade or business rather than for the man in the street. Beyond this broad consideration the language of the enactment affords little help, but I think the special inclusion of "holding" companies and societies by s. 12 (4) and the expression "income received from investments" in para. 6 (1) go to support the distinction which, as it seems to me, a business man would draw. Having arrived at this conclusion it becomes unnecessary to attempt a definition of "investments" or to consider whether particular forms of property, such as patents, are capable of being brought within the term. On the facts of the present case it is enough to say that the income in question cannot be income from investments for the purposes of the statute because it arose from a series of commercial agreements, exploiting certain proprietary rights or claims, which were entered into by the taxpayers *in the active prosecution of their trade or business*. The rights concerned played their part, so to speak, in the arena and not from the grand-stand. For these reasons I am of opinion that the appeal fails and that the income must be included in the computation of profits.

LORD REID : My Lords, I concur with your lordships.

Appeal dismissed with costs.

Solicitors : *Ellis, Peirs & Co.*, agents for *Slater, Heelis & Co.*, Manchester (for the taxpayer); *Solicitor of Inland Revenue* (for the Crown).

[Reported by C. ST.J. NICHOLSON, ESQ., Barrister-at-Law.]

COMPTOIR D'ACHAT ET DE VENTE DU BOERENBOND
BELGE S.A. v. LUIS DE RIDDER, LIMITADA.

[HOUSE OF LORDS (Lord Porter, Lord Simonds, Lord du Parcq, Lord Normand and Lord MacDermott), November 8, 9, 10, 15, 1948, January 19, 1949.]

Contract—Failure of consideration—Recovery of money paid—Sale of goods—
A *Provision for payment against delivery order—Property in the goods remaining*
in the sellers—Delivery rendered impossible owing to enemy occupation of
place of delivery.

By a contract dated Apr. 24, 1940, a Belgian company agreed to buy a quantity of rye to be delivered at Antwerp. The contract, which was expressed to be on c.i.f. terms, provided that payment was to be against
B bill of lading and/or delivery order, and policy and/or certificate and/or letter of insurance, at Antwerp. It further provided (a) that the sellers were to pay for any deficiency in bill of lading weight, (b) that they guaranteed the condition of the grain on arrival, and (c) that all average should be for sellers' account. On Apr. 30, 1940, in accordance with the usual practice between the parties during a long period, the purchase
C price was paid by the buyers on receiving a delivery order addressed to the cargo agents of the sellers by other agents of the sellers at the port of delivery. This delivery order contained, *inter alia*, (a) a statement that the bearer had been given a share in a certificate of insurance covering a certain quantity of rye ("war and S.R. and C.C. risks clause included") and (b) an undertaking by the sellers' agents to
D honour the delivery order according to the terms of the bill of lading.

The goods, however, could not be actually delivered until the captain's release had been obtained, and the property in the goods would not pass to the buyers until such time as the goods should be delivered in Antwerp. Owing to the German invasion of Belgium, the ship carrying the rye did not proceed to Antwerp, but, by arrangement between her owners and the
E sellers, as charterers, and without notice to the buyers, she was diverted while at sea to Lisbon, where the cargo was sold by the sellers. The buyers claimed from the sellers the return of the amount paid by them on the ground that the consideration for the payment had wholly failed. The sellers denied that the consideration had wholly failed.

HELD : the fact that the sellers were entitled to demand payment against presentation of the delivery order did not mean that they had then fully performed their contract, nor was there a part performance of the contract, because the practice between the parties showed that the payment was made, not for the delivery order, but as an advance payment for a contract afterwards to be performed, the delivery order having no effect on the property or possession of the goods which remained in the sellers until delivery
G at Antwerp; there was no evidence that the delivery order tendered to the buyers had any commercial value, it being merely an instruction by one agent of the sellers to another, and the sellers' agents had undertaken no personal liability by their indorsement thereon; and, therefore, on the facts and on a true construction of the terms of the contract, it was not a c.i.f. contract although so described, but was a contract to deliver at
H Antwerp, and there was a frustration of the adventure, the consideration had wholly failed, and the buyers were entitled to recover the money which they had paid.

Decision of the Court of Appeal (LORD GREENE, M.R., and CROOM-JOHNSON, J., ASQUITH, L.J., dissenting), ([1947] 2 All E.R. 443; 177 L.T. 648), reversed.

[AS TO FAILURE OF CONSIDERATION, see HALSBURY, Hailsham Edn.,

Vol. 7, pp. 283, 284, para. 394; and FOR CASES, see DIGEST, Vol. 12, pp. 224-233, Nos. 1859-1925.]

Cases referred to :

- (1) *The Parchim*, [1918] A.C. 157; 87 L.J.P. 18; 117 L.T. 738; 39 Digest 517, 1344.
- (2) *Law & Bonar, Ltd. v. British American Tobacco Co., Ltd.*, [1916] 2 K.B. 605; 85 L.J.K.B. 1714; 115 L.T. 612; 39 Digest 582, 1848. A
- (3) *Inglis v. Stock*, (1885), 10 App. Cas. 263; 54 L.J.Q.B. 582; 52 L.T. 821; 39 Digest 530, 1433.
- (4) *Sterns, Ltd. v. Vickers, Ltd.*, [1923] 1 K.B. 78; 92 L.J.K.B. 331; 128 L.T. 402; 39 Digest 529, 1421.
- (5) *Castle v. Playford*, (1872), L.R. 7 Exch. 98; 41 L.J.Ex. 44; 26 L.T. 315; 39 Digest 528, 1416. B
- (6) *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd.*, [1942] 2 All E.R. 122; [1943] A.C. 32; 111 L.J.K.B. 433; 167 L.T. 101; 2nd Digest Supp.
- (7) *Hansen v. Craig & Rose*, (1859), 21 Dunl. (Ct. of Sess.) 432; 31 Sc. Jur. 236; 39 Digest 391, 263vi.
- (8) *Rowland v. Divall*, [1923] 2 K.B. 500; 92 L.J.K.B. 1041; 129 L.T. 757; 39 Digest 431, 608. C

APPEAL by the buyers from a decision of the Court of Appeal (LORD GREENE, M.R., and CROOM-JOHNSON, J., ASQUITH, L.J., dissenting), dated July 31, 1947, and reported [1947] 2 All E.R. 443, affirming a judgment of MORRIS, J., dated Dec. 13, 1946, and reported [1947] 1 All E.R. 118, on a Special Case stated by an umpire. D

The buyers claimed the refund of the purchase price paid by them under a contract on the ground that the consideration had wholly failed. The sellers denied that the consideration had wholly failed. MORRIS, J., upheld the award of the umpire that the buyers were not entitled to recover the sum paid, and his decision was affirmed by the majority of the Court of Appeal. The House of Lords now held that there had been no part performance of the contract and that the consideration had wholly failed and allowed the buyers' appeal. The facts and the relevant clauses of the contract appear in the opinion of LORD PORTER. E

Sir William McNair, K.C., and *E. W. Roskill* for the buyers.
Le Quesne, K.C., and *Naisby, K.C.*, for the sellers. F

The House took time for consideration.

Jan. 19. **LORD PORTER** : My Lords, this is an appeal from a judgment of the Court of Appeal affirming by a majority the judgment of MORRIS, J., who upheld an award of an umpire stated in the form of a Special Case under the Arbitration Acts, 1889 to 1934. The arbitration arose out of a contract for the sale of rye by the respondents to the appellants. The appellants, who were the claimants in the arbitration, asked for the refund of the purchase price paid by them under the contract on the ground that the consideration had wholly failed. The question for your Lordships' consideration is whether there was such total failure of consideration. G

The appellants were the buyers and the respondents were the sellers under a written contract dated Apr. 24, 1940, the terms of which, so far as material, are as follows : H

"Belgische Boerenbond Antwerp Apr. 24, 1940 Apr. 27, 1940—Antwerpen
 Messrs. Comptoir D'Achat et de Vente du Boerenbond Belge S.A. Antwerp.
 DEAR SIR(s),

"We herewith confirm having sold to you this day
 (quantity) ab. 500 (five hundred) tons of 1000 kilos (description) of Plate rye

Faq rye terms crop 1939/40, of a nat. weight of 72/73 kilos per hect. guar. at disch. as per clause at the back, for shipment per steamer/s &/or power vessel/s 'Julia' afloat as per bill or bills of lading dated or to be dated accordingly at the price of \$4.025 per 100 kilos c.i.f. Antwerp on the terms, conditions and rules contained in Form No. 41 of the London Corn Trade Association, and the details above and on the back given shall be taken as having been written into such form in their appropriate place.

A Any special condition applying hereto shall be treated as if written on such form.

Yours truly,

p.p. LUIS DE RIDDER LIMITADA.

p.p. BELGIAN GRAIN & PRODUCE CO. LTD.

B Payment to be made by nett cash on first presentation of and in exchange for first arriving copy/ies of bill/s of lading and/or delivery order/s and policy/ies and/or certificate/s and/or letter/s of insurance at Antwerp by first rate cable transfer on New York, unless the vessel carrying the goods arrives before the said time, in which case payment is to be made on arrival of vessel at port of discharge. Buyers to remain responsible for the payment of the cable. Insurance: Losses to be paid in currency of this contract.

C War Deviation Clause.—Buyers agree to accept documents containing the Chamber of Shipping War Deviation Clause and/or any other recognised official war risk clause.

Any expenses for covering L.C.T. Association's war risk and strike risk exceeding one half per cent. to be for account of buyers.

D The rate of insurance not to exceed the rate obtainable in London on the date of bill of lading or date of steamer's sailing from last loading port for which bill or bills of lading are issued, whichever may be definitely adopted by underwriters.

E Condition guaranteed on arrival (subject to any country damaged grain in the fair average quality of the season's crop) but in the event of the grain arriving out of condition, due allowance to be made for any delay whatsoever occurring after loading of the goods, any such delay to be taken into consideration by arbitrators.

The natural weight to be ascertained and determined at port of discharge at the *Chambre Arbitrale et de Conciliation pour Grains et Graines* by liter scale within 28 days from discharging. Fees to be divided between buyers and sellers.

F Allowance of 1 per cent. per kilo shortage or fractions in proportion."

According to Form 41 of the London Corn Trade Association, the goods were bought and sold at a price per so many kilos shipped including freight and insurance to the port of destination. The freight was payable on discharge and payment was to be made in

G "... cash in exchange for shipping documents. If shipping documents had not been sighted at time of vessel's arrival at port of discharge seller must provide documents entitling buyer to obtain delivery of the grain and payment must be made in exchange for same, such payment to be made without prejudice to buyer's rights under the contract."

H The seller was to give all policies and/or certificates of insurance for not less than 2 per cent. over the invoice amounts, and, in the event of a certificate being supplied, it was agreed that it should be exchanged by the seller for a duly stamped policy if and when required. The grain was to be weighed and seller and buyer were to have the right of supervision over both weighing and delivery, the seller to pay for any deficiency and the buyer for any overweight. The seller guaranteed the condition on arrival and for that purpose samples were to be taken and sealed by the agents of the shippers and the holders of the bill of lading or shippers' delivery order.

Before they made the contract, the sellers had entered into a charter-party under which the steamer Julia was to load at Bahia Blanca a full cargo of wheat and/or maize and/or rye for carriage to and delivery at Antwerp. That steamer duly loaded a cargo which included about 1,120 tons of rye in bulk, in respect of which the master, on Apr. 18, 1940, signed a bill of lading which acknowledged shipment by the sellers, and provided for delivery at Antwerp to the order of the Belgian Grain and Produce Co., Ltd. (who were the sellers' agents there), on payment of freight in accordance with the charter-party. On Apr. 29, 1940, the Belgian Grain and Produce Co., Ltd., as agents for the sellers, sent to the buyers a provisional invoice (No. 5362) dated, in Antwerp, Apr. 29, 1940, requesting payment by the buyers by cable transfer to New York of the sum of 4,999.33 United States dollars. This sum was arrived at by charging the price of 500,000 kilos at \$4.025 per 100 kilos, deducting the freightage \$15,250, and adding marine insurance for 2 per cent. over the contract price and war risk insurance, amounting in all to \$124.33. By a marginal note to this document it was provided :

"C.I.F. Business

Your share in the insurance is limited to 2 per cent. over the net amount of the invoice."

On Apr. 30, 1940, the same agents sent a delivery order (No. 600) dated, in Antwerp, Apr. 30, 1940, addressed to F. Van Bree S.A. of Antwerp, who were also agents for the sellers there, instructing them to release to the buyers or to the bearer 500,000 kilos rye in bulk ex-bill of lading for 1,120,000 kilos rye in bulk shipped by the sellers in the steamship Julia to be received according to the clauses and conditions of the bill of lading dated Bahia Blanca Apr. 18, 1940. This delivery order was transmitted to the buyers after indorsement by F. Van Bree S.A. with an undertaking to honour it according to the clauses and conditions of the bill of lading and to give to the bearer all rights and obligations of the original document held by F. Van Bree S.A. for his inspection. The delivery order also contained a statement which, as translated, read :

"We give a share to the bearer of the present delivery order of \$4,973 in a certificate of insurance for \$7,117 covering 700,000 kilos rye in bulk (War and S.R. & C.C. Risks Clause included)."

and stated in a footnote that it should be presented on arrival of the steamer at Messrs. F. Van Bree S.A., Antwerp, for signature and release after payment of the freight of \$15,250 (being the amount of freight shown payable by the provisional invoice) at the offices of the Belgian Grain and Produce Co., Ltd. The buyers accepted the provisional invoice and delivery order, and on Apr. 30, 1940, paid the sum of 4,999.33 United States dollars. The sterling equivalent of 4,999.33 United States dollars is £1,243 12s. 2d. and this is the sum claimed by the buyers in the arbitration. On or about the same day, the sellers delivered to F. Van Bree S.A., Antwerp, two certificates of insurance (one in respect of marine risks and the other in respect of war risks) signed by Outshoorn and Landau, insurance brokers, certifying that insurance had been effected for the account of the sellers in the sum of \$7,117 on 700,000 kilos rye in bulk on bill of lading dated Bahia Blanca Apr. 18, 1940, so valued, per S.S. Julia from Bahia Blanca to Antwerp. Each of the certificates stated that it represented the original policies and conveyed all the rights of the original policy holder for the purpose of collecting any loss or claim and that it might be exchanged for a duly stamped policy if and when required. Each certificate also contained a note stating : "This certificate not valid unless countersigned by Belgian Grain and Produce Co., Ltd." There was no evidence that it was, in fact, so countersigned.

On or about May 10, 1940, while the Julia was at sea in the course of her chartered voyage, Belgium was invaded by the Germans and shortly afterwards

Antwerp was occupied by the German forces. Thereupon, by an arrangement made between the owners of the *Julia* and the sellers (as charterers), but without the knowledge or consent of the buyers, the *Julia* was directed to Lisbon and, the bill of lading, covering 700,000 kilos rye, together with the certificates of insurance, having, without the authority of the buyers, been taken from Antwerp to Bordeaux by one of the managers of F. Van Bree A.S., in May, 1940, new bills of lading were signed by the master in respect of the rye, showing Lisbon as the destination. On these new bills of lading the rye was delivered at Lisbon and there sold by the sellers, without informing the buyers, ex ship for a price less than the sum which the buyers had paid. By letter dated Sept. 14, 1940, the sellers offered to account to the buyers for the sum which they had received, but the buyers refused this offer, and claimed re-imbursement in full of the sums paid under the contract. The dispute was thereupon submitted to arbitration.

The buyers alleged that the sellers had wholly failed to deliver or cause to be delivered to them at Antwerp the 500 tons of rye and that in those circumstances the consideration for which they had paid to the sellers the sum of \$4,999.33 had wholly failed. They further alleged that, as, by reason of the occupation of Antwerp by the German forces, it became impossible for the *Julia* to proceed to Antwerp or for the sellers to deliver the rye at Antwerp, the contract was frustrated and the consideration for which the buyers had paid the sum of \$4,999.33 to the sellers had wholly failed. The sellers, on their part, denied that the consideration for which the buyers made the payment of \$4,999.33 had wholly failed, but admitted that, if it was their duty to deliver the goods in Antwerp, the contract was frustrated.

The contract in question was one of a long series of dealings between the parties amounting to about 900 in all, under which, as the arbitrator found, the practice was as follows. On the arrival of the vessel, the buyers would hand the delivery order, together with a cheque for the "freight" shown due by the provisional invoice, to a firm named Carga S.A., who were the buyers' cargo superintendents at Antwerp. Thereupon Carga S.A. would hand the cheque and the delivery order to Belgian Grain and Produce Co., Ltd., who would then sign the note at the foot of the delivery order acknowledging the receipt of the freight. When this was done Carga S.A. would present the delivery order to Van Bree who would retain it and issue against it a release or *laissez suivre* addressed to themselves, authorising the delivery to Carga S.A. of the parcel or the required quantity ex bulk. But, before physical delivery of the goods to Carga S.A. could be obtained, it would be necessary for Van Bree to have received from the ship's agent a further release, known as the "captain's *laissez suivre*." This would not be issued until the chartered freight had been paid by the sellers, as charterers, to the agents of the ship, or until the ship's agents were satisfied that the chartered freight would be paid concurrently with discharge. The captain's *laissez suivre* was the effective document on which Van Bree obtained physical possession of the goods. The umpire further found that, if the *Julia* had arrived at Antwerp and the usual procedure which would have been adopted by the parties in implementing the contract of sale had been followed, the property in the goods would not pass to the buyers until, after its discharge from the ship, it had been weighed in the elevator, until which time the sellers would have retained control of the goods, and at no time would the buyers, or any agent on their behalf, have had in their possession a document of title entitling them to demand delivery of the goods from the ship or an insurance document on which, in the event of any claim having arisen under the policies, they could have sued the underwriters. He found, however, that on two occasions when a ship carrying goods sold by the sellers to the buyers had been torpedoed during the late war, the sellers had collected and paid to the buyers the sum insured which would cover the loss plus 2 per cent., and the buyers had accepted the sum.

In these circumstances the question stated by the umpire for the opinion of the court was :

" Whether upon the facts as found and upon a true construction of the contract the buyers are entitled to recover from the sellers the sum of £1,243 12s. 2d. together with interest thereon at the rate of 4 per cent. per annum from Apr. 30, 1940."

He himself, subject to the decision of the court, answered the question of law A in the negative, but, in para. 19 of the Special Case, made an alternative award in favour of the buyers to take effect should the court decide the question of law set out above in the affirmative. His decision was affirmed by MORRIS, J., and by a majority of the Court of Appeal consisting of LORD GREENE, M.R., and CROOM-JOHNSON, J., ASQUITH, L.J., dissenting. The learned judge, in agreement with the umpire, as I understand him, regarded the contract as a B c.i.f. contract, modified to some extent, but not altered in its essential characteristics. The buyers had, in his view, entered into a contract for the purchase of documents or, more accurately, for the purchase of a parcel of rye, the fulfilment C of which was to be implemented by the handing over of documents. The documents, he considered, might be varied at the option of the sellers who would fulfil their contract if they chose to tender a delivery order instead of a bill of lading and a certificate instead of a policy of insurance. Even the stringency of these obligations he regarded as reduced by the practice of the parties, with the result that delivery order meant an instruction to their own agents (counter-signed, it is true, by those agents) and a certificate of insurance which was never tendered to, or held on behalf or at the disposal of, the buyers. The D delivery order, MORRIS, J., considered ([1947] 1 All E.R. 123), " doubtless possessed commercial value." In other words, the buyers were purchasers of documents and had received that for which they stipulated, *i.e.*, the usual delivery order and a certificate of insurance which would compel or incite the sellers to recover any loss from underwriters and pay it over to the buyers. CROOM-JOHNSON, J., took much the same view, but LORD GREENE, M.R., E thought it unnecessary to decide these points since, in his opinion, the consideration had not wholly failed in as much as Van Bree had, by countersigning the delivery order, added their personal undertaking to the instructions which it contained and to that extent implemented the contract. The dissenting judgment of ASQUITH, L.J., turned largely on a criticism of the action of the sellers in diverting the ship, in their capacity of charterers and bill of lading F holders, to a different port without consulting the buyers. Your Lordships have been told by the sellers that this last criticism is not a matter for your consideration as it was not before the arbitrator and forms no part of the award, and I propose to disregard it as a substantive claim. Nevertheless, the contention that a contract puts it in the power of a seller to change the destination of a vessel containing goods which he has shipped or contracted to sell, thereby G leaving no remedy in the hands of the purchaser either against the ship or against underwriters, is a matter which cannot be neglected in determining whether the contract is, or is not, concluded on c.i.f. terms.

My Lords, the obligation imposed on a seller under a c.i.f. contract are well known, and in the ordinary case include the tender of a bill of lading covering the goods contracted to be sold and no others, coupled with an insurance policy in the normal form and accompanied by an invoice which shows the price and, as in this case, usually contains a deduction of the freight which the buyer H pays before delivery at the port of discharge. Against tender of these documents the purchaser must pay the price. In such a case the property may pass either on shipment or on tender, the risk generally passes on shipment or as from shipment, but possession does not pass until the documents which represent the goods are handed over in exchange for the price. In the result, the buyer, after receipt of the documents, can claim against the ship for breach of the

contract of carriage and against the underwriters for any loss covered by the policy. The strict form of c.i.f. contract may, however, be modified. A provision that a delivery order may be substituted for a bill of lading or a certificate of insurance for a policy would not, I think, make the contract be concluded on something other than c.i.f. terms, but, in deciding whether it comes within that category or not, all the permutations and combinations of provision and circumstance must be taken into consideration. Not every contract which is expressed to be a c.i.f. contract is such. Sometimes, as in *The Parchim* (1), terms are introduced into contracts so described which conflict with c.i.f. provisions. In the present case, therefore, it is not as if a usual form of delivery order had been given and accepted or an insurance certificate covering the parcel was in the hands of Messrs. Van Bree as agents for the buyers, nor can a solution be found in the mere designation of the contract as c.i.f. This is not a case in which the over-riding provision is the term c.i.f., under which antagonistic terms can be neglected on the ground that they are repugnant to the transaction, as was done by ROWLATT, J., in *Law and Bonar, Ltd. v. British American Tobacco Co., Ltd.* (2). The true effect of all its terms must be taken into account, though, of course, the description c.i.f. must not be neglected.

It is true, no doubt, to say that some steps had been taken towards the performance of this contract, e.g., the goods had been shipped, an invoice sent, the customary so-called delivery order had been transmitted and that delivery order, among its provisions, contained a declaration by the sellers' agents, Belgian Grain and Produce Co., Ltd., that they gave a share to the bearer of the present delivery order of \$4,973 in a certificate of insurance. But the taking of steps towards performance is not necessarily a part performance of a contract. The question is whether the purchaser has got what he is entitled to in return for the price. Of course, if the buyers paid the sum claimed in order to obtain the delivery order and the share purported to be given by it in the certificate of insurance, the contract would have been performed in part at least, but I do not so construe the contract even when illuminated by the practice adopted by the parties. That practice seems to me rather to show that the payment was made, not for the documents, but as an advance payment for a contract afterwards to be performed. With all due respect to the learned judge and the MASTER OF THE ROLLS, I can see no sufficient reason for supposing either that the delivery order had some commercial value or that Messrs. Van Bree undertook a personal liability by their indorsement of the document. There was no evidence of commercial value and the document itself was merely an instruction by one agent of the sellers to another. In my view, if the Belgian Grain and Produce Co. were sued on the document, they would rightly, reply that they were acting only as agents and Van Bree could make the same defence. The document appears to me to be no more than an indication that a promise already made by the sellers would be carried out in due course, but it in no way increases their obligations or adds to the security of the buyers.

In my opinion, the method by which the contract was customarily carried out supports this view. No doubt, the contract could have been so performed as to make it subject to the ordinary principles which apply to a c.i.f. contract. The tender of a bill of lading, or even of a delivery order on the ship, at any rate if attorned to by the master, and a policy or a certificate of insurance delivered to or even held for the buyers, might well put it in that category, but the type of delivery order tendered in the present case was a preliminary step only. A complicated procedure had to be followed before the goods would be released. The buyers had to hand the sum due for freight to their agents; those agents would then pay the freight and present the delivery order to the Belgian Grain and Produce Co., who would sign a note on it acknowledging receipt of the freight; the agents, thereupon, would hand the delivery order to Van Bree who

would retain it and issue a *laissez suivre*, or release to themselves, authorising delivery to the agents. Before physical delivery of the goods could take place, however, Van Bree must have received a captain's *laissez suivre* authorising delivery to them. As the umpire says :

"It was thus the effective document upon which Van Bree obtained physical possession of the goods ; it was issued to Van Bree and was never physically in the buyer's hands."

Similarly, the insurance certificates, as the umpire also finds,

"were received by Van Bree from the Belgian Grain and Produce Co. and would not have passed through the hands of or even have been seen by the buyers."

He further finds that Van Bree were

"at no time and in no respect agents of the buyers and that the sellers did not, by delivering the certificates to Van Bree, constructively deliver them to the buyers nor did Van Bree at any time hold the certificates (whether countersigned by the Belgian Grain and Produce Co. or not) at the disposal of the buyers."

In these circumstances, the fact that the sellers twice collected the insurance money for a total loss and handed it to the buyers does not lead very far. It was a convenient method of settling accounts between the parties, and, despite the extra two per cent., is in substance no more than a repayment of the money given for the goods.

My Lords, the object and the result of a c.i.f. contract is to enable sellers and buyers to deal with cargoes or parcels afloat and to transfer them freely from hand to hand by giving constructive possession of the goods which are being dealt with. Undoubtedly, the practice of shipping and insuring produce in bulk is to make the process more difficult, but a ship's delivery order and a certificate of insurance transferred to or held for a buyer still leave it possible for some, though less satisfactory, dealing with the goods while at sea to take place. The practice adopted between buyers and sellers in the present case renders such dealing well nigh impossible. The buyer gets neither property nor possession until the goods are delivered to him at Antwerp, and the certificate of insurance, if it enures to his benefit at all, except on the journey from ship to warehouse, has never been held for or delivered to him. Indeed, it is difficult to see how a parcel is at the buyer's risk when he has neither property nor possession, except in such cases as *Inglis v. Stock* (3) and *Sterns, Ltd. v. Tickers, Ltd.* (4), where the purchaser had an interest in an undivided part of a bulk parcel on board a ship, or elsewhere, obtained by attornment of the bailee to him. The vital question in the present case, as I see it, is whether the buyers paid for the documents as representing the goods or for the delivery of the goods themselves. The time and place of payment are elements to be considered, but are by no means conclusive of the question. Such considerations may, on the one hand, indicate a payment in advance, or, on the other, they may show a payment postponed until the arrival of the ship, though the property in the goods or the risk has passed to the buyer while the goods are still at sea, as in *Castle v. Playford* (5). But the whole circumstances have to be looked at and where, as, in my opinion, is the case here, no further security beyond that contained in the original contract passed to the buyer as a result of payment, where the property and possession both remained in the seller until delivery in Antwerp, where the seller was to pay for deficiency in bill of lading weight, guaranteed condition on arrival, and made himself responsible for all averages, the true view, I think, is that it is not a c.i.f. contract, even in a modified form, but a contract to deliver at Antwerp. Nor do I think it matters that payment is said to be not only on presentation but "in exchange for" documents. There are many ways of carrying out the contract to which that expression would

apply, but, in truth, whether the payment is described as made on presentation of or in exchange for a document, the document was not a fulfilment, or even a partial fulfilment, of the contract. It was but a step on the way. What the buyer wanted was delivery of the goods in Antwerp. What the seller wanted was payment of the price before that date and the delivery of the documents furnished the date for payment, but had no effect on the property or possession of the goods or the buyer's rights against the vendor. If this be the true view, there was plainly a frustration of the adventure—indeed, the sellers admit so much in their pleadings, and no part performance, and the consideration had wholly failed. The buyers are, accordingly, entitled to recover the money which they have paid. I should allow the appeal and pronounce for the alternative award with costs in your Lordships' House and in the courts below.

B LORD SIMONDS: My Lords, the facts relevant to this appeal are fully set out in the Special Case stated by the umpire and have been re-stated by my noble and learned friend on the Woolsack. I will not repeat them. The short question for your Lordships' determination is whether the consideration for which the buyers, on Apr. 30, 1940, paid to the sellers the sum of 4,999.83 United States dollars (the sterling equivalent of which was agreed to be £1,243

C 12s. 2d.) wholly failed so that the buyers are entitled to recover that sum from the sellers. This question was answered by MORRIS, J., in the negative. I hope that I do no injustice to the careful judgment of the learned judge if I summarise it by saying that, in his view, there was not a total failure of consideration because, whatever may have been the legal value of the delivery orders which the buyers were accustomed to accept, such delivery orders **D** possessed some commercial value. This decision was upheld by the Court of Appeal. The learned MASTER OF THE ROLLS took the view ([1947] 2 All E.R. 447) that, by virtue of the handing over of the delivery order, the buyers

"obtained something that they did not have before, namely, the personal obligation of the sellers' local agent [Van Bree]—obviously a thing of value to them."

E He further held, and here, I think, is the crux of the matter, that

"the delivery order was, not a mere piece of machinery, but an implementation of the sellers' obligation to produce what was, in effect, an undertaking and a guarantee of the buyers' rights by Van Bree."

F CROOM-JOHNSON, J., took substantially the same view. He said (*ibid.*, 454):

"The buyers got at least a part of what they contracted to pay for."

ASQUITH, L.J., on the other hand, would have allowed the appeal, accepting the buyers' argument that the consideration had wholly failed and holding that the receipt of the delivery order was not the consideration for the payment, the delivery order being "a mere cog-wheel in the machinery." The argument **G** before your Lordships ranged over a wide field; much of it being directed to considering whether the contract between the parties was, or was to be regarded as, or was of the type of, or partook of the nature of, a c.i.f. contract. I prefer, without giving the contract a label, to see what the parties respectively agreed to do and then to consider what is the legal effect of failure of performance.

H My Lords, it appears to me plain that here there was a contract for the sale of goods, *viz.*, 500 tons of rye, and that that contract could be performed by either the physical or the symbolical delivery of the goods in accordance with its terms. It is common ground that there was not physical delivery. Was there then symbolical delivery? Certainly there was not. Again, it is common ground that the property in the goods did not pass to the buyers. There was not, and, indeed, could not have been, any tender of a bill of lading, and I do not understand it to have been contended that the handing over of the delivery order in this case amounted to symbolical delivery. If it was so contended, the

contention is, in my opinion, baseless. The contract, then, being for the sale of goods and the goods, though paid for, not having been actually or symbolically delivered, how do the sellers justify their contention that the consideration did not wholly fail? Departing, as it appears to me, from the reasoning which found favour with the majority of the Court of Appeal, counsel for the sellers urged in the terms of the second of the formal reasons in their Case that "at the time of payment the sellers had performed all that they were required to do under the contract of sale." My Lords, this seems to me an astonishing proposition. The contract entitled the sellers to require payment on first presentation of and in exchange for first arriving copies of bills of lading and/or delivery orders and policies and/or certificates and/or letters of insurance at Antwerp, etc. Therefore, it was urged, the sellers had done all, and I emphasise the word "all," they were bound to do if and when they handed over a delivery order and certificates of insurance. I do not pause to examine the factual basis of this contention, for it seems to me to be wholly unsound in law. The fact that a seller at a certain stage in the carrying out of his contract is entitled by its terms to demand payment does not mean that at that stage he has fully performed his contract. Confusion, as I think, has arisen from the fact that, had the sellers been in a position and elected to tender shipping documents by virtue of which the property in the goods passed to the buyers, then the latter could not have contended that there had been failure of consideration, but this result would have ensued, not because a clause in the contract provided for payment against documents, but because in law there cannot be failure of consideration if the property has passed. It is, in fact, as ASQUITH, L.J., pointed out, a part of the machinery by which the contract is carried out that payment should be made against, *e.g.*, a delivery order, and it is as little relevant to the question whether there has been failure of consideration as would be a provision that payment should be made, *e.g.*, on notification that the ship had left New York or had arrived at Cherbourg.

But then, it was said, assuming that the sellers did not perform all that they were required to do under the contract, yet they performed at least a part of what they were required to do. This contention had, I think, two slightly different aspects. In the first place, it was said that there could not be total failure of consideration if the sellers had done something towards carrying out this contract and that they had done something, *viz.*, handed over a delivery order. In the second place, it was said that that something was itself of value, and, therefore, there was not a total failure of consideration. In its first aspect this contention appears to suffer from the same fallacy as that which I have already tried to expose. It is a confusion of the consideration for the contract with the mode in which it is to be carried out, but in its second aspect it demands closer attention, for here it has the support of the learned judges in the courts below. My Lords, there is, in my opinion, no finding of fact by the umpire which would justify your Lordships in holding that the delivery order which was handed to the buyers had any commercial value in the ordinary sense. That it was not a document of title by itself entitling the buyers to delivery of the goods was expressly found. It is a matter of conjecture whether in these circumstances it had any commercial value, and your Lordships cannot found on conjecture. The case is, however, put not only on the general commercial value of such a document but on the special value which is said to have accrued to the buyers from its terms. This is the view which was taken by the learned MASTER OF THE ROLLS, whose words I have already cited.

At this stage I would remind your Lordships that, as was pointed out by VISCOUNT SIMON, L.C., in *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd.* (6) ([1943] A.C. 48):

"... when one is considering the law of failure of consideration and of the quasi-contractual right to recover money on that ground, it is, generally

speaking, not the promise which is referred to as the consideration, but the performance of the promise."

To this I would add that the receipt by the promisee of something which the promisor did not promise will not prevent a total failure of consideration. The valuable consideration which the MASTER OF THE ROLLS thought the buyers received was a personal undertaking and guarantee by Van Bree, the local agents at Antwerp of the sellers, which was to be found in their indorsement of the delivery note with the words :

"Nous nous engageons à honorer le présent Delivery Note aux clauses et conditions du connaissance et le porteur a tous les droits et obligations du document original que nous tenons à son inspection."

I cannot accept this view. It is, I think, reasonably clear that the words I have cited can give rise to no independent contractual rights against Van Bree. There is nothing in the umpire's award to suggest that Van Bree were acting in any other capacity than as agents for the sellers. If they were, in fact, acting or purporting to act as principals in respect of their indorsement of the delivery note, then, if, as I assume to be the case in the absence of evidence to the contrary, Belgian law is the same as English law, the buyers acquired against them no enforceable rights, for, so far as they, at least, were concerned there was no consideration for their engagement. But, as I have said, in my view, Van Bree were acting throughout as agents, and, seen in its true perspective, their undertaking indorsed on the delivery note was not "a part of what they (the buyers) contracted to pay for," but a part of the machinery by which the sellers were to carry out their bargain. What the buyers bought was 500 tons of rye, not an indorsement on a piece of paper which brought them not a step nearer their rye until the ship arrived at Antwerp.

I come, then, to the conclusion that the sellers performed neither all nor, in any material sense, a part of what they were required to do under the contract and that the buyers obtained no part of that which they had contracted to buy. There was, therefore, total failure of consideration. There is, however, one other matter to which I would briefly refer. The sellers, all else failing them, urged that the risk in the goods had passed to the buyers even if the property had not, and that the insurance contract made by the sellers was available for the buyers. Assuming, without deciding, that these propositions are well-founded, I am unable to see how they assist the sellers. If the contract is, as I hold it is, a contract for the sale of rye to be performed by its physical or symbolical delivery, what relevance has it that the sellers say at a certain stage that the risk has passed and that insurance is available? It may well be that, if there is any validity in these propositions, the sellers, recovering on the insurance policies, would hold the proceeds for the benefit of the buyers, but this does not seem to me to touch the question whether there has been a total failure of consideration. It is, I think, probable that the insistence by the learned counsel for the sellers on this aspect of the case was bound up with the reiterated plea that this was a c.i.f. contract. As I have ventured to point out, it is immaterial what the contract may be called or to what category of contract it is nearest akin, if it lacks that salient characteristic, which alone is relevant, namely, that the property in the goods not only may, but must, pass by delivery of the documents against which payment is made. I would allow this appeal with costs here and below.

LORD DU PARCQ : My Lords, the parties to the contract which your Lordships have the task of construing certainly cannot be said to have expressed their meaning in lucid or readily intelligible terms, and I do not find it surprising that the dispute between them has led to a difference of judicial opinion. But, though I hesitate to say that there is no room for doubt, I have come to the conclusion that the appeal should be allowed for the reasons given by my noble and learned friend on the Woolsack.

LORD NORMAND : My Lords, the issue in the appeal is whether as a result of the frustration of the contract there was a total failure of the consideration for the sum of \$4,999.33 paid by the buyers on Apr. 30, 1940. The contract was an agreement to sell a quantity of rye and the sum paid was part of the stipulated price, as brought out in the provisional invoice. It follows that, unless there are in the contract terms modifying the ordinary incidents of a sale of goods, the transfer of the property in the rye was the consideration for which the sum now sued for was paid. For the full implement of the contract two things remained at the date of frustration, the payment of the remainder of the price by the buyers and the delivery of the rye by the sellers. Neither of these things could have been done before the arrival of the ship at Antwerp. Symbolical delivery was never intended, nor was symbolical delivery by bill of lading possible in the circumstances. The rye purchased by the buyers was part of a full cargo afloat and the bill of lading which had been taken covered the undivided bulk. That bill of lading was not one which the buyers would have been bound to accept. The delivery order presented to the buyers by the sellers' agents was not a document of title and was ineffectual to pass the property. Without physical delivery on arrival, there could be no transfer of the property. It is found as a fact that the property was not transferred, but, if that finding had not been made, it would have been the necessary inference from the circumstances already stated. There is also a finding that if the ship had arrived at Antwerp the buyers would never have had in their possession any document of title enabling them to demand delivery of the goods.

What, then, is the basis of the contention that the buyers received consideration for the part of the price paid by them? The main proposition advanced by the sellers was that the delivery order must be treated as equivalent to the goods, though neither the property nor the risk passed, because the contract so provides. But there were independent and subsidiary contentions that the risk of marine loss had passed to the buyers, and, failing all else, that the delivery order was valuable consideration on one of two grounds, either that it was a document of commercial value or that it contained a promise by Van Bree that they personally would honour the delivery order in accordance with the terms of the bill of lading which they held for the inspection of the bearer. I propose to consider first whether these subordinate contentions have any validity and relevance.

Whether the passing of the marine risk under the contract would be relevant to the issue in the appeal may well be doubted. The agreement of parties that the buyers should bear the risk of a loss against which the insurance was provided for by the contract is not evidence of an intention that the buyers were also to take the risk of a frustration which was not within the contemplation of the contract. I have also difficulty in attaching any intelligible meaning in this case to the proposition that the marine risk passed though the property did not pass. The rule *res perit domino* "is generally an unbending rule of law, arising from the very nature of property." I quote from a judgment delivered by LORD INGLIS (Lord Justice-Clerk) (21 Dunl. (Ct. of Sess.) 438) in *Hansen v. Craig* (7) in which he had to consider the civil law. The rule *periculum rei venditae nondum traditae est emptoris* was an exception allowed by the civil law, but it was an exception more apparent than real. It was but an equitable recognition that, when the price was certain and the subject of the sale specific, the substantial interest passed to the buyer though the property remained in the seller till delivery in accordance with the rule *traditionibus non nudis pactis dominia rerum transferuntur*. In the law of England, though these difficulties were avoided, it has been found necessary to provide for the passing of the risk to the buyer before the property passes to him, if the parties so agree. It may be conceded that the parties can agree to some purely artificial allocation of the risk and, if they express that agreement in suitable language in the con-

tract, effect must somehow be given to it. But the parties to commercial contracts are practical people and, in those cases in which it has been held that the risk without the property has passed to the buyer, it has been because the buyer rather than the seller was seen to have an immediate and practical interest in the goods, as, for instance, when he has an immediate right under the storekeeper's delivery warrant to the delivery of a portion of an undivided bulk in store or an immediate right under several contracts with different persons to the whole of a bulk not yet appropriated to the several contracts. In the present case, however, the buyers had no more than a promise to deliver a part of the bulk cargo and the case is typically one for the general rule *res perit domino*. The sellers' practical and real interest in the goods at risk is also evidenced by clauses in the contract by which they assumed liability for deficiency at discharge on bill of lading weight and guaranteed condition on arrival, and by a clause providing that all average should be for sellers' account. Nor is it immaterial to observe that, if the contract had been completely performed, the buyers would never have had in their hands any document entitling them to sue underwriters. The fact that, on two occasions when there was a total loss, the sellers collected the insurance value and remitted it to the buyers, less a small charge for collection, is of no importance, because that was done without the buyers' instructions and, since the sum remitted was not less than the price paid, the buyers had no interest to question the sellers' conduct. The clause obliging the sellers to give to the buyers all policies and certificates of insurance and, if and when called on for the purpose of claiming on underwriters, to give a letter certifying that there were no other insurances effected by them and to exchange certificates of insurance for duly stamped policies is not in harmony with a contract intended to be performed as this contract was. It seems, indeed, that this clause, and, perhaps, some others, though appropriate where it was intended that the sale should be implemented by tender of shipping documents or by tender of a delivery order accepted by one in physical possession of the goods, and by a policy or certificate of insurance, do not fit the course of dealing by the parties which, by imposing a special meaning on "delivery order," required the buyers to accept a document which was not in law a symbol of the goods.

It is not necessary to deny all effect to the clause dealing with policies of insurance and certificates. The buyers had a double interest in the insurance. First, the cost of the premiums was a component of the price and they, therefore, had an interest to know that proper insurance had been effected and at what cost. Secondly, the marine risk policies would cover the risk from the time the rye was delivered to them by the ship until it reached their warehouse. Beyond these two interests I think that the buyers had no concern with the insurance, unless it is established by other terms of the contract that the parties were agreed that the delivery order was to be *inter se* equivalent to delivery of the goods. The other subsidiary arguments for the sellers all depend on the attribution of some value to the delivery order. I again question the relevance of the line of argument. It is agreed that the delivery order was not the equivalent of the goods in the sense that its possession conferred on the holder the right of property in the goods valid against all the world. But the consideration for the price is nothing less than that right, unless there are special terms in the contract. If the delivery order had some value otherwise than as the equivalent of the goods, the fact has not been proved, and, if proved, it would be without relevance. If, as is, I think, plain on the facts found, the delivery order is merely a cog-wheel in the machinery for enabling the sellers to transfer the property, it cannot be treated as to any extent consideration for the price, for the consideration for the price is not what the seller does in order to effect the transfer but the actual transfer of the property itself. It is not, therefore, necessary to consider whether van Bree intended to bind themselves personally

by their signature to any of the undertakings contained in the delivery order, but I can find no evidence of such an intention and I can find no consideration moving from the buyers to van Bree.

These subsidiary arguments by themselves, therefore, avail nothing, and the sellers must rely on their contention that the contract by its special terms provides that, between the seller and the buyer, the delivery order shall be treated as equivalent to the goods. The sellers laid weight on the description of the price as a c.i.f. price and on the description of the business as c.i.f. business. They also founded on the clause dealing with payment which, they said, treated the delivery order as the equivalent of the bill of lading and the price as paid for it. I think, however, that the explanation of the description c.i.f. in relation to the price and the business carried on by these two parties is that the contract stipulates for a price the components of which were cost, insurance and freight, and that the printed form of the contract used was one which was suitable for an orthodox c.i.f. transaction though also for other transactions not conforming to the c.i.f. model. The use of the label "c.i.f." was, therefore, not significant, and I agree with ASQUITH, L.J., that the question is not whether the label was appropriate but what was the effect of the terms of the contract when it was not intended or possible to perform it as an orthodox c.i.f. contract is performed. The stipulation that the price or part of it was to be paid in exchange for a bill of lading and a policy, or in exchange for a delivery order and a certificate, does not carry with it the implication that, in relation to the rights of the parties *inter se*, the delivery order is to have the effect of a bill of lading, and I can see no reason for reading into the words "in exchange for" anything more than their literal meaning or to read "payment in exchange for the delivery order" as meaning "payment for the delivery order." But I think that if the words "delivery order" had had to be construed without the aid of the previous course of dealing, it would have been held to mean a document addressed to and accepted by one in physical possession of the goods. The sellers would then have been bound to tender a document which was, in fact, the legal equivalent of the goods. The effect of the course of dealing was to release the sellers from that obligation and to entitle them to payment on tender of a document which contains no more than a personal obligation. I do not find evidence in the contract that the parties have undertaken to treat this document as a document of title as between themselves. I would, therefore, allow the appeal, with costs, both here and in the courts below.

LORD MACDERMOTT: My Lords, in this appeal the question for determination is whether there has been a total failure of consideration. The construction of the contract and its classification as a commercial document were discussed widely in the course of the argument, but these matters are relevant only in so far as they bear on that question and it is unnecessary to explore them exhaustively. In a buyer's claim for repayment of the price which is based on a total failure of consideration, what has to be regarded, as VISCOUNT SIMON, L.C., pointed out ([1943] A.C. 48) in the *Fibrosa* case (6), is the performance of the seller's promise rather than the promise itself. Moreover, what the seller has done in order to be able to fulfil his obligation is in itself beside the point. To avoid a failure of consideration, his performance, be it complete or partial, must, so to speak, have reached the buyer. If the seller's promise is simply to deliver goods as ordered, it will avail him nothing to say that he has grown or manufactured or procured the goods if there has been no delivery of them. Nor will it justify his retention of the price if he shows that the buyer has got something under the contract which was not reckoned in the price. If, for example, tea is bought and paid for at so much a pound, the delivery of an empty tea chest will not, in the absence of some special stipulation, amount for this purpose to a partial performance of the seller's promise. In such event the buyer has not received anything for which he paid, and the fact that part of

the machinery of fulfilment or some incidental benefit has come to his hands is by the way. These considerations, though important, are not, I think, really in dispute. They may be summed up in the words of ATKIN, L.J., in *Rowland v. Divall* (8) where he describes a total failure of consideration in a sale of goods case thus ([1923] 2 K.B. 506):

“ . . . that is to say . . . the buyer has not got any part of that for which
A he paid the purchase money.”

My Lords, whatever the intent of the present contract may be in other respects, it is, at least, clear that it was an agreement for the sale of a specified quantity of rye “at the price of \$4.025 per 100 kilos c.i.f. Antwerp.” It is also clear that the goods were never separated from bulk or appropriated to the contract and that, in fact, the buyers did not obtain physical delivery of
B an ear of the grain they had ordered. What they did get, in addition to the invoice, which in itself is not a material document for present purposes, was a delivery order, signed by the sellers’ Antwerp agents, Belgian Grain and Produce Co., Ltd., and addressed, not to the ship, but to F. Van Bree S.A., a firm of cargo superintendents who were employed on behalf of the sellers to handle the shipment but were not at any time, or in any respect, the agents of the buyers.
C The contract permitted the sellers to substitute a delivery order for a bill of lading in the documents to be presented and I shall assume, having regard to the previous course of business between the parties, that the form of delivery order tendered, and accepted in this instance was that contemplated by the contract.

It is plain that in law the handing over of this order did not amount to symbolic delivery and did not pass the property in the goods which remained in the sellers’ throughout. But it was contended, none the less, that on the true construction of the contract the sellers’ performance was as complete as if they had tendered the bill of lading and other documents due to be presented under a normal c.i.f. contract and, accordingly, that the consideration had not failed at all. I cannot accede to that contention. Whatever might have been
E the position had the sellers delivered a bill of lading (and leaving out of account any point about policies or certificates of insurance), I am unable to read the agreed terms as binding the buyers to treat the documents they got as a complete fulfilment of the sellers’ obligations. It may be competent for a buyer to agree to accept performance which stops short of delivery, actual or symbolic, but, in my opinion, that has not occurred here. No doubt, the contract contains much
F that is equivocal so far as its commercial classification is concerned. Some stipulations point to it being an arrival contract; others, such as those relating to insurance, suggest a c.i.f. contract. The terms employed, as well as the practice of the parties, afford some indication that it was intended as a dual purpose document and that its mixed nature is the result. But, however
G this may be, I think its terms contemplate quite clearly delivery of the goods by the sellers to the buyers; and, if that is not symbolic, it must be physical; and, if physical, it must be ex ship. The sellers’ contention would leave delivery so to speak, in the air, and cannot be said to echo the intention of the parties. To my mind, neither the provisions as to insurance nor the words “in exchange for” suffice to outweigh this consideration. The former are not incompatible with a promise to deliver, and the latter do not necessarily indicate the *quid pro quo*.
H An omnibus fare is given in exchange for a ticket, but what it buys is the journey. I, therefore, conclude that the handing over of the delivery order was not the performance of the contract but, at most, a step towards performance.

It remains to inquire whether the failure of consideration was partial. On this the sellers advanced several submissions. First, it was said that the delivery order had some commercial value. This is not found, but, assuming such value to have existed, the point cannot prevail unless the value was reckoned

in the price. I do not think it was. Apart from the elements of insurance and freight, the cost was based on the weight of the commodity purchased and that was the grain and nothing else. Then it was submitted that, far from being a mere piece of machinery, the delivery order gave the buyers rights which they had not had before but which were contemplated by the contract, viz., those flowing from what the learned MASTER OF THE ROLLS described as "a personal undertaking and a guarantee by the local agents of the sellers"—i.e., by Van Bree. I need not set out again the terms of this undertaking as signed by Van Bree and appearing in print at the head of the delivery order. Even if it can be regarded as a personal undertaking, I doubt very much if it was paid for by the buyers or if it makes the delivery order more than a cog-wheel in the machinery of delivery. But, apart from that, I do not think the findings warrant the assumption that it was a personal undertaking given by Van Bree to the buyers. It may have been given, as a matter of internal arrangement, to the Belgian Grain and Produce Co., Ltd., as agents for the sellers; or, if addressed to the buyers, it may have been given by Van Bree on behalf of the sellers. The last is, in my opinion, the most likely view, and, if it is right, the sellers' assurance of due performance cannot take their case further.

The next point raised on this aspect of the matter was based on the somewhat vague contention that the risk had passed to the buyers. Of course, if a buyer does not get what he has paid for because of some risk which he has agreed to accept, he cannot recover the price. But that is not the case here, and the contention under discussion is not, as I understand it, concerned with more than the risk of the goods being lost or damaged. As a matter of stipulation a buyer, who has got neither delivery nor ownership, may, no doubt, be made to bear a risk of this kind, but this will not in itself give him something of that which he has bought. What the position would be if, pursuant to his contract, the seller had taken due steps not only to insure against such risk but also to enable the buyer to recover against the underwriters in the event of the loss thus covered is a question which does not arise for determination here, as, even assuming that the risk passed, no insurance documents were tendered. The buyers did not get them. Van Bree did, but, as to that, the arbitrator finds:

" . . . the sellers did not, by delivering to F. Van Bree S.A. certificates of insurance in respect of these goods, constructively deliver the said certificates to the buyers, nor did F. Van Bree S.A. at any time hold the said certificates of insurance . . . at the disposal of the buyers."

That finding has not been disputed and must be accepted.

On these grounds, I am of opinion that the failure of consideration was not partial, but total. I would, therefore, allow the appeal with costs.

Appeal allowed with costs here and in the courts below.

Solicitors: *Richards, Butler & Co.* (for the buyers); *Thomas Cooper & Co.* (for the sellers).

[Reported by C. ST.J. NICHOLSON, ESQ., Barrister-at-Law.]

NOTE.

S. v. S.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Hodson, J.), December 8, 1948.]

Child—Custody—Declaration that divorced parent not fit to have custody—Desirability of making declaration—Guardianship of Infants Act, 1886 (c. 27), s. 7—Guardianship of Infants Act, 1925 (c. 45), s. 4 (1) (2).

A APPLICATION by the wife for a declaration that the husband was unfit to have the custody of the children of the marriage, and for an interim order for their custody.

B The wife had petitioned for a decree of divorce on the ground of the husband's cruelty. HODSON, J., in his judgment, held that the husband had compelled the wife to submit to sexual practices of a gross and debased character, and, in consequence, her health had suffered. The wife had established her allegation of cruelty and the court would exercise its discretion in favour of the wife with regard to the wife's misconduct with a party cited. The court was then cleared while the question of the custody of the children was discussed.

C The Guardianship of Infants Act, 1886, s. 7, provides: "In any case where a decree . . . either *nisi* or absolute for divorce, shall be pronounced, the court pronouncing such decree may thereby declare the parent by reason of whose misconduct such decree is made to be a person unfit to have the custody of the children (if any) of the marriage; and, in such case, the parent so declared to be unfit shall not, upon the death of the other parent, be entitled as of right to the custody or guardianship of such children."

D [AS TO DECLARATION OF UNFITNESS, see HALSBURY, Hailsham Edn., Vol. 10, p. 753, para. 1182; and FOR CASES, see DIGEST, Vol. 27, p. 461, Nos. 4794-4802.]

Case referred to:

(1) *Cliff v. Cliff*, [1948] 2 All E.R. 760; [1948] W.N. 380.

E *Beyfus, K.C.*, and *Hollins* for the wife.
Melford Stevenson, K.C., and *Victor Russell* for the husband.
J. Stirling and *Beezley* for a party cited.

The court having been re-opened,

F HODSON, J.: I pronounce a decree *nisi* in this case. The other matters with which I have to deal relate to the children, of whom there are three—a girl born in 1934, a girl born in 1938, and a boy born in 1942. I have been asked to make a declaration under the Guardianship of Infants Act, 1886, s. 7, that the father is unfit to have the custody of the children. That application is based solely on the facts which I have found in my judgment.

G I think that the declaration ought to be made. The application is opposed first, on the ground that it should not be made without hearing other evidence which may be put forward by the husband in relation to the children, but I do not think that that objection is well founded. The other evidence which he may put forward may well have a bearing on the future of these children, but it would not, in my judgment, be relevant to the question which I have been asked to decide. The application is opposed, secondly, on the ground
H that such a declaration ought not to be made in the circumstances of this case. I do not propose to add anything to what I have said in my judgment. The third ground of opposition is that the Guardianship of Infants Act, 1886, s. 7, is really now obsolete. I have considered that point carefully because I have felt difficulty having regard to the observations of LORD MORTON in *Cliff v. Cliff* (1), where he said that the latter part of s. 7 of the Act of 1886 no longer had any application because a parent was no longer entitled to the custody of the children as of right on the death of the other parent.

That matter was not argued before the Court of Appeal, but I do not desire to shelter myself behind any statement that the observation was *obiter*. If I thought LORD MORTON was really dealing with the point, I should regard his observation as one which I ought to follow, but I do not think he was. Moreover, he had not considered the Guardianship of Infants Act, 1925, s. 4, which provides that, on the death of the parent of an infant, the other parent, if surviving, shall be guardian of the infant, either alone or jointly with any guardian appointed by the deceased parent. The section further provides that, if the deceased parent has appointed no guardian, or if the guardian appointed by that parent is dead or refuses to act, the court may appoint a guardian to act jointly with the surviving parent. That, of course, is the position which is envisaged by an application for a declaration of this kind. It is said that, even if s. 7 of the Act of 1886 is not obsolete, the making of a declaration under s. 7 is valueless. I am not satisfied about that. I think it is desirable in a case of this kind for a court to record the view (if it takes such a view) that a particular parent is unfit to have the custody of the children. Accordingly, I make the declaration.

With regard to the question of custody, I appreciate the force of the argument of counsel for the husband that the question of the future of these children should not be determined in the absence of all the material which can be made available. By what I am going to do, I do not intend to prejudice anything which may be done in the future, but something must be done now. Until some more permanent order is made, I think it is necessary to make an interim order for custody by the wife.

Declaration and order accordingly.

Solicitors: *Evelyn Jones & Co.*, agents for *Jackson & Sons*, Ringwood (for the wife); *Vertue, Son & Churcher* (for the husband); *Withers & Co.* (for a party cited).

[Reported by R. HENDRY WHITE, ESQ., Barrister-at-Law.]

HAM RIVER GRIT CO., LTD. v. RICHMOND RATING AUTHORITY AND ANOTHER.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Finemore, JJ.), January 13, 1949.]

Rating—Derating—Industrial hereditament—Apportionment of net annual value—Site used for gravel pit and for rubbish tip—Factory and Workshop Act, 1901 (c. 22), s. 149 (4)—Rating and Valuation (Apportionment) Act, 1928 (c. 44), s. 4 (2).

A company used a certain site for the quarrying of sand and gravel and also as a tip for rubble and rubbish to fill the excavations caused by the quarrying. The rating authority claimed to apportion the net annual value between the part of the hereditament used for quarrying and the part used as a tip.

HELD: the tip was a defined and ascertainable "place" within s. 149 (4) of the Factory and Workshop Act, 1901, solely used for a purpose other than the quarrying process on the other part of the site, and, therefore, it was not "occupied and used for industrial purposes" within the meaning of s. 4 of the Rating and Valuation (Apportionment) Act, 1928, and the rating authority's claim should be upheld.

Lewis v. Gilbertson & Co., Ltd., (1904) (91 L.T. 377), and *Cox v. S. Cutler & Sons, Ltd. and Hampton Court Gas Co.*, ([1948] 2 All E.R. 665), applied.

[AS TO DERATING OF INDUSTRIAL HEREDITAMENT, see HALSBURY, Halsbury's Laws of England, Vol. 27, pp. 439-459, paras. 876-887; and FOR CASES, see DIGEST, Vol. 38, pp. 569, 570; Nos. 1071-1078, and Supplement.]

Cases referred to :

- (1) *Lewis v. Gilbertson & Co., Ltd.*, (1904), 91 L.T. 377 ; 68 J.P. 323 ; 24 Digest 898, 4.
- (2) *Cox v. S. Cutler & Sons, Ltd. and Hampton Court Gas Co.*, [1948] 2 All E.R. 665.

CASE STATED by the Rating Appeals Committee of the Surrey Quarter Sessions under the Rating and Valuation Act, 1925, s. 31 (5). Quarter sessions allowed an appeal by the Ham River Grit Co., Ltd., from a decision of the Assessment Committee of the Surrey North-Eastern Assessment Area by which the committee determined to amend the valuation list as proposed by the rating authority, *i.e.*, by increasing the net annual value of the company's premises and apportioning such value between that part of the hereditament used for quarrying and that part used as a tip for rubble and rubbish. The rating authority and valuation committee were dissatisfied with the decision of quarter sessions and applied to have a Case stated for the opinion of the King's Bench Division. The Divisional Court held that quarter sessions had erred in law. The facts appear in the judgment of LORD GODDARD, C.J.

Simes, K.C., and *Geoffrey Lawrence* for the rating authority and valuation committee.

Rowe, K.C., and *Squibb* for the company.

LORD GODDARD, C.J. : This Case Stated relates to the rating of a hereditament adjoining Teddington Lock on the River Thames which is owned by the Ham River Grit Co., Ltd., and is used, and has been used, no doubt, for many years, as an area from which sand and gravel is excavated and sold to contractors and the public. As always happens in gravel pits, as the gravel and sand is excavated water forms in the excavations so that the area of the pits varies from year to year according, first, to the amount of excavation, and, secondly, to the amount of rainfall. The pits in question here are used as tips for rubbish and rubble. In the last few years there has been a great demand for tips, more especially for the disposal of the rubble and debris in the metropolitan area caused by the bombing and the excavations for new buildings consequent on the reconstruction of London. The ratepayers' property is, therefore, valuable because not only do they obtain sand and gravel which they can sell, but they also have large areas which can be used as tips. In fact, the area in question may be said to consist of three different sites. Part has already been filled up, *i.e.*, the excavated area has been filled with rubble, rubbish and other material so that the surface of the land is restored so far as its depth or height is concerned and it is as if there had been no excavation. There is still left a considerable area which is covered by water, and in one place the work of quarrying or winning sand and gravel is proceeding. There are one or two other sites from which it will, no doubt, be possible in the future to excavate and obtain sand and gravel.

The question which arises is whether in the rating and valuation of this hereditament the assessment committee were entitled to apportion the rating between the part which was being used as a sand and gravel quarry and that which was being used as a tip. The rating appeals committee of quarter sessions reversed the decision of the assessment committee, and allowed an appeal by the ratepayers subject to the Case which they stated, giving as their reason that the excavating and filling in of the excavations were one process. Counsel for the company has said he does not rely on that finding of the appeals committee. He agrees that it was wrong and it clearly is wrong. The quarrying of sand and gravel and the tipping or dumping of rubbish into the hole which the sand and gravel previously occupied, is not one operation, but two different things altogether.

The question which does arise turns on the true construction of a section in the Factory and Workshop Act, 1901, but it is the Rating and Valuation

(Apportionment) Act, 1928, which provides for the apportionment of the net annual value between that part of a hereditament which is industrial and that part which is non-industrial. The industrial part of the hereditament gets what is commonly called the advantage of derating, while the non-industrial portion does not get that advantage. Section 4 of the Act of 1928 provides :

"(1) In every valuation list every industrial hereditament occupied and used wholly for industrial purposes shall be shown as being so occupied and used, and as respects every such hereditament occupied and used partly for industrial purposes, the net annual value thereof shall be shown, in the prescribed manner, as being apportioned between the occupation and user of the hereditament for industrial purposes, and the occupation and user thereof for other purposes. (2) For the purpose of determining in what proportions an industrial hereditament is occupied and used for industrial purposes and for other purposes respectively, the following provisions shall have effect :—(a) The hereditament shall be deemed to be occupied and used for industrial purposes except in so far as any part thereof is, under this Act or under the enactments relating to the regulation of mines, factories and workshops, to be deemed neither to be, nor to form part of, a mine, factory or workshop."

Therefore, the task is to find whether any part of the hereditament which *prima facie* is an industrial hereditament forms no part of a mine, factory or workshop. To discover what principles to apply to determine that question, we have to consider the Factory and Workshop Act, 1901, under sched. VI to which, among the places which are to be deemed to be factories, are :

" ' Quarries ' that is to say, any place, not being a mine, in which persons work in getting slate, stone, coprolites or other minerals."

*This area is for that purpose a quarry. Section 149 provides :

"(4) Where a place situate within the close, curtilage or precincts forming a factory or workshop is solely used for some purpose other than the manufacturing process or handicraft carried on in the factory or workshop, that place shall not be deemed to form part of the factory or workshop for the purposes of this Act, but shall, if otherwise it would be a factory or workshop, be deemed to be a separate factory or workshop and be regulated accordingly."

That shows that the test is whether there is a place used for some purpose other than the manufacturing process. For this purpose we may use the words "quarrying process carried on" and for the word "factory" we can say "quarry." It seems to me there is no difficulty here in determining that the tip is a place separate from the quarry in the sense that no part of the quarrying is carried on where the process of tipping is carried on. No one suggests that the process of tipping is a manufacturing process or a quarrying process. It is no part of the quarryman's work to tip rubbish into the excavated land, though it may be a convenient and profitable thing to allow other people to tip into it.

When the case was before quarter sessions it was agreed

"... between the parties to the said appeal and we were so informed that the said hereditament was an 'industrial' hereditament within the meaning of the Rating and Valuation (Apportionment) Act, 1928, and that the issue between the parties was whether the part of the net annual value of the said hereditament attributable to the tipping of material should be apportioned as 'industrial' or 'non-industrial' in accordance with the provisions of s. 4 of the said Act."

The rating appeals committee do not seem to have applied their minds to the point which counsel for the company maintains, and I think counsel for the

rating authority agrees, was the real point which ought to have been decided. They decided that the tipping was part of the quarrying operation, which it is not contended now was right. The company can uphold the decision of quarter sessions on any ground which is open to them, and they seek to uphold the decision on the ground that the tip was not a "place" within the meaning of the Factory and Workshop Act, 1901, s. 149. I cannot take that view. I think that there is no difficulty in saying which part of this hereditament was

A being used as a tip and which part as a quarry, and, indeed, our attention has been called to valuations which have been made by the valuers, and, apparently, agreed, in which there does not seem to have been any difficulty in the valuers apportioning their valuation between the two in the way in which the Act of 1928 provides.

B Counsel for the company has suggested that one reason which prevents the court holding that the tip is "a place" is that it is a shifting place in the sense that as the material is tipped into it the space into which tipping takes place gets smaller or gradually nearer to the face of the quarry where the quarrying is being done. If the cubic content that is tipped greatly exceeds the cubic content that is being quarried, no doubt, at some time or other the tipping face, if that is the right expression, will get very near the working face. It

C seems to me that the material question is what was the position of things on Mar. 25 when the proposal was made. At that date it does not seem to me there was any difficulty in ascertaining the difference between the two places. I see no reason, therefore, why the tipping face should not be regarded as a place. I think that would be in accordance with the decision of this court in

D *Lewis v. Gilbertson & Co., Ltd.* (1). I think this is as defined and ascertainable a place as was the place in that case. There the question arose whether a certain site was used as a factory. An accident occurred on that part of the hereditament where a new mill was to be constructed and the machinery which was there being used was not fenced. It was within the curtilage of the original factory. The court held that the site came within the words of s. 149 because

E it was an ascertainable place, and, therefore, there was no obligation on the occupiers to fence because it was outside the factory. That case was approved by the Court of Appeal in *Cox v. S. Culler & Sons, Ltd. and Hampton Court Gas Co.* (2), and, in my opinion, the present case is covered by those two cases. Accordingly, in my opinion, the appeals committee came to a wrong decision in point of law and this appeal must be allowed.

F **HUMPHREYS, J. :** I am of the same opinion. I am inclined to think that the rating appeals committee of quarter sessions were right in thinking that the only ground on which they could allow the appeal was that which they stated—that the hereditament should be treated as occupied and used wholly for industrial purposes because the excavating and filling in of the excavations formed one process. If that view were correct, it would have been right for the

G appeals committee to have allowed the appeal, but, in fact, there is no evidence to support it. The evidence is all the other way, and the company agreed that the decision of the appeals committee could not be supported on that ground. Counsel for the company then argued that it was impossible to say

H that there was any land here which could be allocated to the non-industrial part of the hereditament, but the answer to that appears in the Case Stated where we are told that the issue between the parties was whether the part of the net annual value of the hereditament attributable to the tipping of the material should be treated as worth so much, and the figure is given, or whether the whole hereditament should be treated as industrial, and therefore, deratable.

There is no difficulty in the law in this case. The statute seems to me to be tolerably plain. The Rating and Valuation (Apportionment) Act, 1928, s. 4, in effect states, that where the hereditament is mainly used for industrial purposes it shall be deemed to be occupied for that purpose

"except in so far as any part thereof is, under this Act or under the enactments relating to the regulations of mines, factories and workshops, to be deemed neither to be, nor to form part of, a mine, factory, or workshop."

That takes us to the Factory and Workshop Act, 1901, s. 149 (4), which provides that a place situate within the precincts forming a factory and solely used for some purpose other than the manufacturing process or handicraft carried on in the factory is not to be deemed to form part of the factory. That leaves the simple question, which seems to me to be much more one of fact than one of law, whether this process of tipping was one for which it can be said that some part of this otherwise industrial hereditament was used. I think the evidence is conclusive that the tipping of rubbish and the process of winning gravel or sand are two quite separate processes. The fact that they are carried on on the same ground raises no difficulty. I agree with the result proposed by my Lord.

FINNEMORE, J.: I agree that this appeal should be allowed and for the reasons which have already been given. *Appeal allowed with costs.*

Solicitors: *Wyatt & Co.*, agents for *Dudley Auckland*, Kingston-on-Thames (for the rating authority and valuation committee); *William Charles Crocker* (for the company).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

Affirmed. C.A. [1949] 2 All E.R. 34.

MACRAE v. MACRAE.

[PROBATE, DIVORCE AND ADMIRALTY (Lord Merriman, P., and Hodson, J.), December 14, 1948.]

Maintenance—Jurisdiction—Husband ordinarily resident in Scotland—Wife resident in England—Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 4.

In June, 1948, the parties were living in Manchester where the husband had been working for three years. He then refused to continue living there, gave up his work, and went to his parents' house in Inverness. The wife thereupon took out a summons before the Manchester justices, alleging desertion. This summons was served on the husband in Inverness, and on July 22, 1948, the justices made an order against the husband.

HELD: the husband being ordinarily resident out of the jurisdiction, the justices had no jurisdiction to make the order against him.

Forsyth v. Forsyth ([1947] 2 All E.R. 623; [1948] P. 125; 177 L.T. 617), explained and applied.

[AS TO SUMMARY JURISDICTION OF JUSTICES IN MATRIMONIAL CAUSES, see HALSBURY, Hailsham Edn., Vol. 10, pp. 834-848, paras. 1336-1354; and FOR CASES, see DIGEST, Vol. 27, pp. 554-568, Nos. 6081-6264.]

Cases referred to:

- (1) *Forsyth v. Forsyth*, [1947] 2 All E.R. 623; [1948] P. 125; [1948] L.J.R. 487; 177 L.T. 617; *revsq.*, [1947] 1 All E.R. 406; 176 L.T. 507; 2nd Digest Supp.
- (2) *Berkeley v. Thompson*, (1884), 10 App. Cas. 45; 54 L.J.M.C. 57; 52 L.T. 1; 49 J.P. 276; 3 Digest 393, 312.
- (3) *M'Queen v. M'Queen*, [1920] 2 Sc.L.T. 405.

APPEAL by the husband from an order of the Manchester City justices.

On July 22, 1948, the husband having left his wife in Manchester and returned to his parents in Inverness, the justices made an order against him on the ground of desertion. On appeal, the Divisional Court held that, the husband being resident in Scotland, the justices had no jurisdiction and allowed the appeal. The facts appear in the judgment of LORD MERRIMAN, P.

Harris Walker for the husband.

H. Clifford Mcrtimer for the wife.

LORD MERRIMAN, P. : This is an appeal by a husband from a decision by Manchester City justices who, on July 22, 1948, made an order against him on the ground that he had deserted his wife. The case, which is not an unimportant one, turns solely on the question of jurisdiction.

- A Attempts were made to serve the husband in Manchester, where the wife was living. Those attempts failed, and he was served in Inverness. It is said that both at the time when the wife issued her summons in the Manchester City justices' court and at the time when that summons was served on the husband there was no jurisdiction to issue or serve it, because the husband was not amenable to the jurisdiction. In one respect it is clear that there was
- B jurisdiction to issue a summons, always assuming that the husband was amenable to jurisdiction. In June, 1948, the parties were living in Manchester, at the house of the wife's parents. The husband had been working in Manchester since his demobilisation in October, 1945, and they resided in Manchester from that date until June, 1948. Then, for reasons which I will assume had no justification (in other words, I am assuming that the wife was rightly found to have
- C a grievance against her husband), the husband refused to go on living there, gave up his work, and, having made it clear that he intended to return to his parents in Inverness, he collected his things and left Manchester. After the issue of the summons he wrote from Inverness, to say that he was living with his parents and that he had secured in their house a separate flat, and he offered his wife accommodation there.
- D It seems throughout the whole case (including the statement prepared by the husband in Scotland, and read out by a solicitor to the justices at Manchester) to have been accepted as common ground that before the issue of this summons the husband had severed his connection with Manchester and had returned to his parents' home in Inverness, and I propose to deal with this point of jurisdiction on that basis. It is said that in the circumstances the justices
- E had no jurisdiction to issue this summons, to have the summons served, or to make an order. Whether there was jurisdiction, depends on a recent decision of the Court of Appeal in *Forsyth v. Forsyth* (1) overruling a decision of this court. The facts are not precisely the same, and I shall have to refer shortly to a certain doubt which is raised by this difference between the facts in the two cases, but the decision of the Court of Appeal is succinctly and correctly
- F summarised in the headnote, which I will read :

- "A wife complained to justices that her husband, who was domiciled and resident in Scotland had deserted her there by remaining there after she had come to England on the understanding that he would follow her. There was no evidence that the husband was ever in England at any material time. The justices' summons, issued on the wife's complaint, was served
- G on the husband in Scotland under the Summary Jurisdiction (Process) Act, 1881. The husband was represented before the justices by a solicitor who objected to their jurisdiction. The solicitor also put to the wife, while cross-examining her, certain questions not limited to the question of jurisdiction. *Held*: (1) that since the husband was not shown to have been in England at any material time the justices had no jurisdiction to entertain
- H the wife's complaint, in as much as the principle enunciated by LORD SELBORNE, L.C., in *Berkeley v. Thompson* (2), that there must be a cause of action of which the tribunal could take cognisance and also a defendant subject to its jurisdiction, remained unaffected by the combined operation of the Summary Jurisdiction Act, 1848, s. 1, the Summary Jurisdiction (Process) Act, 1881, s. 4, and the Summary Jurisdiction (Married Women) Act, 1895, s. 4; (2) that the husband's appearance before the justices by his solicitor did not debar him from challenging their jurisdiction on

appeal, since neither that Act nor any act of the parties could confer on the justices a jurisdiction which they did not possess."

In the present case, we have no concrete evidence about the husband's domicile. I think we may assume that his domicile of origin was Scotland. We know that his parents are still alive and living in Inverness, but we have no evidence whether he acquired a domicile of choice in England. There remains the question of residence. Undoubtedly, up to the date in June when he left Manchester he might well have been said to have been ordinarily resident in Manchester, but from the moment he travelled to Inverness on the day after he left his wife all the evidence tends to show that he was ordinarily resident in Scotland, and I think this case must be decided on that basis. The question, therefore, is whether we are or are not bound by the decision in *Forsyth v. Forsyth* (1). Counsel for the wife has argued that we are not bound by it. First, he said that the decision appears to go much too far, and that, taken literally, it means that, if an English husband happens to be over the Border for business or other reasons for a few days or hours at a time, which happens to coincide with the issue of the summons, the whole proceeding is void *ab initio*. I do not take that view. I cannot see anything in the decision which goes anywhere near that. On the contrary, one of the material facts on which that decision is based, as, indeed, the headnote shows, is that there was no evidence whatever to show that the husband had any English connection at all. It was not even shown that he had ever been in England, and it could only be said that the offence arose partially within the jurisdiction because there was evidence that he had suggested to his wife that she should go to England, had paid her fare on the basis that he intended to join her there, and it was his very failure to join her in England which was the suggested desertion. There was no evidence that he had ever been present in this country or connected with it in any way other than that.

In my opinion, the only doubt which is created by *Forsyth v. Forsyth* (1) is that raised by counsel's second argument, which is that the decision was based on Scottish domicile, as distinct from residence or ordinary residence, and I am bound to say that there is a certain difficulty in knowing precisely what was decided in that respect by *Forsyth v. Forsyth* (1). In the Divisional Court, over which I happened to preside, I said ([1947] 1 All E.R. 408):

"At the hearing on Sept. 12 the husband was represented by a solicitor, who objected to the jurisdiction on the ground that the husband was a domiciled Scotsman, and relied on *M'Queen v. M'Queen* (3). He called no evidence in support of this submission. The husband's counsel admitted that, as things stand, the point can be put no higher than that the wife called no evidence to show that the husband was a domiciled Englishman. It must, I think, be taken for the purposes of the case that he is shown to be ordinarily resident in Scotland."

I then set out the facts from which the court drew that inference. In the Court of Appeal the leading judgment was delivered by BUCKNILL, L.J., who stated the proposition thus ([1947] 2 All E.R. 625):

"The only point taken on behalf of the husband before the Divisional Court, and the main point argued before this court, was that the residence in England of the husband as well as the wife was a condition precedent to the exercise by the justices of their jurisdiction in this case."

Later, he said (*ibid.*, 626):

"I doubt whether in a case like the present it is necessary to prove that the husband was ordinarily resident in the jurisdiction at the time when the summons was issued and I am disposed to think that mere presence therein is sufficient, but it is unnecessary to decide the point because in this case not only was the husband ordinarily resident in Scotland, but there is no evidence that he was ever in England."

I hope I shall be corrected if I am wrong in saying that I find no reference whatever to domicile in the judgment of BUCKNILL, L.J. TUCKER, L.J., who expressed his general concurrence with that judgment, stated (*ibid.*, 624) the issue as being :

A " . . . the jurisdiction of the justices to make an order against the husband under the Summary Jurisdiction (Married Women) Act, 1895, on the ground of desertion, he having, at all material times, been resident and domiciled in Scotland, having been served with the summons in Scotland and not having been personally present within the jurisdiction when the summons was issued or when the order was made."

He then dealt specifically with the first submission of counsel—"that there was nothing to show that the husband was resident or domiciled in Scotland," and said :

B "There was no evidence that he had ever resided in England, and the only inference that could properly be drawn from the evidence is that he was at all times domiciled and resident in Scotland."

This differs as to domicile from BUCKNILL, L.J.'s acceptance of the finding of the Divisional Court in this respect. COHEN, L.J., agreed with both the other
C Lords Justices. It is, therefore, a little difficult to know whether the decision was based on domicile or ordinary residence or both, but I think that the substance of the matter is that their Lordships were dealing with ordinary residence in Scotland, coupled, no doubt, with the fact that there was nothing to show that the husband had ever been in England. On those facts they held that there was no jurisdiction to issue a summons, and, therefore, no jurisdiction
D to serve it under the process provided by the Summary Jurisdiction (Process) Act, 1881.

In my opinion, it is impossible to distinguish this case from *Forsyth v. Forsyth* (1), and, therefore, in my opinion, we are bound to allow this appeal and to say that the Manchester City justices had no jurisdiction to issue a summons against this Scottish husband, or to cause him to be served, or to
E sit in judgment on him. The appeal, therefore, must be allowed.

HODSON, J. : In my opinion, this case is covered by the decision of the Court of Appeal in *Forsyth v. Forsyth* (1). The husband was at the material times ordinarily resident in Scotland, and that is the footing on which I want to make it plain that I am dealing with the matter. It has been argued that *Forsyth v. Forsyth* (1) may be only really conclusive in the case of a man who is
F domiciled and not merely resident out of the jurisdiction, but I do not think that argument can be sustained. The Divisional Court in *Forsyth's* case (1) made it clear that they were approaching the problem on the footing that the husband was ordinarily resident in Scotland, and in the Court of Appeal BUCKNILL, L.J., who gave the only judgment on the main question of jurisdiction, dealt with the matter on the same footing. COHEN, L.J., agreed with
G him, and TUCKER, L.J., said that he entirely agreed with the conclusions which BUCKNILL, L.J., had reached and the reasoning whereby he had reached them, so there was a clear concurrence of opinion that the jurisdiction was ousted by the lack of residence alone, and it is not really possible, therefore, to draw any conclusion or get any assistance in favour of the husband in this appeal from the independent conclusion of TUCKER, L.J., that the husband in *Forsyth*
H *v. Forsyth* (1) was not only resident but also domiciled in Scotland. For these reasons and the reasons which my Lord has given, I think there was no jurisdiction in the justices to make the order, and, therefore, the appeal must be allowed.

Appeal allowed with costs.

Solicitors : *Mackrell, Ward & Knight* (for the husband) ; *Pritchard, Englefield & Co.*, agents for *Boote, Edgar & Co.*, Manchester (for the wife).

[*Reported by R. HENDRY WHITE, ESQ., Barrister-at-Law.*]

TYNE IMPROVEMENT COMMISSIONERS *v.* ARMEMENT ANVERSOIS SOCIETE ANONYME. THE BRABO.

[HOUSE OF LORDS (Lord Porter, Lord Simonds, Lord du Pareq, Lord Normand and Lord MacDermott), November 3, 4, 8, 1948, January 19, 1949.]

Constitutional Law—Action against Minister of Crown—Competency—Minister of Supply—Privileges and immunities inherent in Crown—Action by conservancy authority against Minister as cargo owner to recover expenditure incurred in removing wrecked ship—War Department Stores Act, 1867 (c. 128), s. 20—Ministry of Supply Act, 1939 (c. 38), s. 2 (3)—Ministry of Supply (Transfer of Powers) (No. 1) Order, 1939 (S.R. & O., 1939, No. 877).

Writ — Service — Service out of the jurisdiction — Action “properly brought” against defendants within jurisdiction—Action by conservancy authority against shipowners and Minister of Supply as cargo owner to recover expenditure incurred in removing wreck—Shipowners outside jurisdiction—R.S.C., Ord. 11, r. 1 (g).

A conservancy authority incurred heavy expenditure in clearing the obstruction caused by the wreck of a Belgian ship and its cargo consisting of ordnance stores which were the property of the Crown. Under the War Department Stores Act, 1867, s. 20, as adapted by the Ministry of Supply Act, 1939, and the Ministry of Supply (Transfer of Powers) (No. 1) Order, 1939, the Minister of Supply was empowered to institute or defend any action in regard to these stores, but a proviso to s. 20 retained the privileges and prerogatives of the Crown and gave the Minister the right in any action to exercise such privileges and prerogatives as if the Crown were a party to such action. By the conservancy authority's special Act (the Tyne Improvement Act, 1890, s. 42), the authority could recover from the shipowners and cargo owners the expenses incurred in removing a wreck, but the rights of the Crown had been expressly reserved under the Tyne Improvement Act, 1934, s. 81, and other relevant Acts. In an action against the shipowners and the Minister of Supply to recover the expenditure incurred, the conservancy authority asked for leave to serve notice of a concurrent writ out of the jurisdiction on the shipowners, who were a Belgian company, registered and resident in Belgium.

HELD : (i) in determining whether or not leave should be granted under R.S.C., Ord. 11, r. 1 (g), where the law was plain and all the facts necessary for a decision were set out and uncontradicted, the court should decide on the hearing of the summons whether the plaintiffs would succeed against the defendants within the jurisdiction, and, if it decided that the action against the English defendants was bound to fail, it must conclude that the action against them was not “properly brought,” within the meaning of the rule and refuse leave to serve out of the jurisdiction. An action could not be said to be “properly brought” merely because it was brought *bona fide*: observation of LINDLEY, L.J., in *Witted v. Galbraith* ([1893] 1 Q.B. 579) explained, and observation of HAWKINS, J., ([1893] 1 Q.B. 434), not approved. The right to bring a foreigner before the British courts should be sparingly used, and care should be taken in interpreting the rule and in exercising the discretion which arose when a case was brought within it.

(ii) the effect of the War Department Stores Act, 1867, s. 20 (as adapted by the Ministry of Supply Act, 1939, and the order made thereunder) was to enable the Minister to be sued without the necessity of a petition of right, but it did not debar him from the protection which the Crown itself would have had in the particular case.

Minister of Supply v. British Thomson-Houston Co., Ltd. ([1943] 1 All E.R. 615; [1943] K.B. 478; 168 L.T. 389), *explained*.

(iii) as the Crown itself was clearly free from any liability to the conservancy authority, the action against the Minister, who was acting as the agent of the Crown, was bound to fail, and, therefore, it was not "an action properly brought," within the meaning of R.S.C., Ord. 11, r. 1 (g), and service out of the jurisdiction on the shipowners could not be allowed.

Decision of the COURT OF APPEAL ([1947] 2 All E.R. 363; [1948] P. 33), *affirmed*.

A [AS TO SERVICE OUT OF THE JURISDICTION, see HALSBURY, Hailsham Edn., Vol. 26, pp. 31-33, para. 44; and FOR CASES, see DIGEST, Practice, pp. 355-362, Nos. 690-741.

AS TO LEGAL PROCEEDINGS AGAINST THE CROWN AND ITS SERVANTS, see HALSBURY, Hailsham Edn., Vol. 6, pp. 486-491, paras. 599-603, and Supplement; and FOR CASES, see DIGEST, Vol. 11, pp. 523, 524, Nos. 284-293.]

B Cases referred to:

(1) *The Hagen*, [1908] P. 189; 77 L.J.P. 124; 98 L.T. 891; Digest Practice 340, 579.

(2) *Russell (John) & Co., Ltd. v. Cayzer, Irvine & Co., Ltd.*, [1916] 2 A.C. 298; 85 L.J.K.B. 1152; 115 L.T. 86; Digest Practice 362, 739.

C (3) *Flower v. Rose*, (1891), 7 T.L.R. 280; Digest Practice 361, 731.

(4) *Witted v. Galbraith*, [1893] 1 Q.B. 577; 62 L.J.Q.B. 248; *sub nom.*, *Witted v. Pembroke Galbraith & Co.*, 68 L.T. 421; Digest Practice 357, 705; *revsq.*, [1893] 1 Q.B. 431.

(5) *Massey v. Heynes*, (1888), 21 Q.B.D. 330; 57 L.J.Q.B. 468; 59 L.T. 470; Digest Practice 356, 701.

D (6) *Societe Generale de Paris v. Dreyfus Bros.*, (1887), 37 Ch.D. 215; 57 L.J.Ch. 276; 58 L.T. 573; Digest Practice 339, 574; *revsq.*, (1885) 29 Ch.D. 239.

(7) *Bloomfield v. Serenyi*, [1945] 2 All E.R. 646; 173 L.T. 391; 2nd Digest Supp.

(8) *Ellinger v. Guinness, Mahon & Co., Frankfurter Bank A.-G., and Metallgesellschaft A.-G.*, [1939] 4 All E.R. 16; Digest Supp.

E (9) *Johnson v. Taylor Bros. & Co., Ltd.*, [1920] A.C. 144; 89 L.J.K.B. 227; 122 L.T. 130; Digest Practice 340, 581.

(10) *Bombay Province v. Bombay Municipal Corpn.*, [1947] A.C. 58; [1947] L.J.R. 380; 2nd Digest Supp.

(11) *Hornsey Urban Council v. Hennell*, [1902] 2 K.B. 73; 71 L.J.K.B. 479; 86 L.T. 423; 66 J.P. 613; 42 Digest 690, 1051.

F (12) *Minister of Supply v. British Thomson-Houston Co., Ltd.*, [1943] 1 All E.R. 615; [1943] K.B. 478; 112 L.J.K.B. 520; 168 L.T. 389; 2nd Digest Supp.

APPEAL by the plaintiffs, the Tyne Improvement Commissioners, from a judgment of the Court of Appeal (SCOTT, BUCKNILL and WROTTESELEY, L.J.J.), dated July 16, 1947, and reported [1947] 2 All E.R. 363, reversing a judgment of PILCHER, J.

G To recover expenditure incurred by them in clearing the wreckage of the Brabo, the plaintiffs, a conservancy authority, brought an action against the shipowners (the first defendants), the Minister of Supply (the second defendant) as owner on behalf of the Crown of the cargo consisting of ordnance stores, and the British Iron and Steel Corporation, Ltd. (the third defendants), as agents of the cargo owner. On learning that the shipowners were a Belgian company, registered and resident in Belgium, the conservancy authority, on June 6, 1946, obtained *ex parte* leave from PILCHER, J., to serve on them notice of a concurrent writ out of the jurisdiction. On an application by the shipowners to set aside service of notice out of the jurisdiction, PILCHER, J., held, by his order of Jan. 27, 1947, that they were a "necessary or proper party" within the meaning of R.S.C., Ord. 11, r. 1 (g), as co-defendants to the action

brought against the Minister and the Steel Corporation and that the action was "properly brought" against the last two defendants, and he refused to set aside the notice. On an appeal by the shipowners from this decision, the Court of Appeal held that the action against the Minister and the corporation could not be regarded as one that was "properly brought," within the meaning of R.S.C., Ord. 11, r. 1 (g), because, on the correct view of the law as applied to the admitted facts, the Minister and the corporation were not liable to the conservancy authority, and they allowed the appeal. Their decision was now upheld by the House of Lords. The facts appear in the opinions of LORD PORTER and LORD SIMONDS.

Carpmael, K.C., and *A. J. Hodgson* for the appellants.

Sir William McNair, K.C., and *Mocatta* for the respondents.

The House took time for consideration.

Jan. 19. The following opinions were read.

LORD PORTER : My Lords, this is an appeal from a judgment of the Court of Appeal which reversed a judgment of PILCHER, J., who had given leave to the appellants under R.S.C., Ord. 11, r. 1 (g), to issue a concurrent writ for service out of the jurisdiction on the respondents as necessary and proper parties to an action properly brought against the Minister of Supply in this country and the British Iron and Steel Corporation, Ltd., which is an English company and is hereafter referred to as "the company." The Court of Appeal withdrew that leave, but granted leave to the appellants to appeal to your Lordships' House. The argument on which the appellants claimed that leave should be granted turns on the true application of R.S.C., Ord. 11, r. 1 (g), to the facts of this case. That rule is contained in the following terms :

"1. Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the court or a judge whenever . . .
(g) Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction."

The questions for your Lordships are : (i) Whether the action was properly brought against the other two defendants, and (ii) Whether the respondents are necessary or proper parties to an action brought against either of the two other defendants.

These questions arise in the following circumstances. (i) The appellants are the conservancy authority for the River Tyne and the port of Newcastle-upon-Tyne and the respondents were, in March, 1942, owners of the Belgian ship *Brabo*. (ii) On Mar. 14 that ship was in collision off the entry to the Tyne and in respect of that collision her owners were held 70 per cent. to blame. (ii) After the collision she was towed into the River Tyne, but sank and became an obstruction. She was loaded with a cargo of wood pulp and steel billets and slabs consigned to the Minister of Supply and to the British Iron and Steel Corporation, Ltd., and, as she constituted an obstruction in the appellants' undertaking, they took steps under their statutory powers to save such portions of the wreck and cargo as were salvable and to disperse the rest. It is difficult to compute what the cost of dispersion may amount to, but it is already a very large sum and may ultimately reach a figure of £250,000. I need not state the exact nature of the proceedings taken below which led up to the judgment of the Court of Appeal. No complaint is made of them but only of the result arrived at in the present decision. It is enough to say that on Mar. 20, 1946, the appellants issued a writ against the respondents, the Minister and the corporation, claiming against each judgment for the charges incurred and to be incurred in raising and removing the *Brabo* and the cargo. After failing in an attempt to serve the respondents personally, the appellants obtained leave

ex parte to serve a concurrent writ out of the jurisdiction, and have now had that leave withdrawn.

The facts, so far as they are known, are to be found in an affidavit by Mr. Fenwick, the solicitor to the respondents, and, so far as they are relevant to the present appeal, are contained in paras. 7 and 8 of that document and read as follows :

A " 7. In so far as the second-named defendant is concerned I submit
that the writ and the said affidavit disclose no good cause of action in
that the Minister of Supply was dealing with the said cargo on behalf of
the Crown under his powers conferred by the Ministry of Supply Act,
1939, and that the Minister of Supply was not at any material time owner
of the said or any part of the said cargo. Alternatively, I submit that
B any remedy which the plaintiffs may have must be by way of petition
of right.

C 8. In so far as the third-named defendants are concerned I am informed
and verily believe that the bill of lading for the part cargo of steel on board
this vessel at the material time shows the British Purchasing Commission
as the shippers and the said third-named defendants as the consignees
and that the said third-named defendants were merely the agents of the
Ministry of Supply and were at no material time the owners of such cargo,
and that, accordingly, the plaintiffs have no good cause of action against
the third-named defendants."

D This affidavit is, it is true, technically defective in that it does not state the
sources of information relied on, and it is in very condensed form, but no objec-
tion was taken on either ground at the original hearing and, therefore, in my
view, full effect must be given to its contents.

E In these circumstances, it is said on behalf of the respondents that they are
not necessary or proper parties to an action properly brought in England because
the action against the two parties domiciled in England must fail. It is, there-
fore, not properly brought against those two parties within the meaning of the
rule. For the appellants it is urged that no facts are established such as to
show that the action must fail and, in any case, an action may be properly
brought though its success is uncertain, whether that uncertainty is due to a
doubt as to the law or to the facts in dispute. Indeed, they go further and
maintain that, if the claim was brought *bona fide*, that is enough, and its chances
of success or failure are irrelevant. As a further contention they submitted
F that, if the possibility of success or failure was material at all, it was not the
objective possibility which had to be determined. The chances, they asserted,
must be judged solely from a consideration of the plaintiffs' knowledge of the
facts at the date of the issue of the summons to serve the concurrent writ
and not at some later date, such as the date of Mr. Fenwick's affidavit or the
hearing of the summons.

G My Lords, the earlier contentions raise questions of some difficulty which
will have to be considered later, but I cannot accept the last two suggestions.
If the *bona fides* of the applicant were the only test, then the less competent
the advice he received and the less his capacity of judging accurately for himself,
the greater would be his opportunity of obtaining leave to serve a writ out of
the jurisdiction, and, if his knowledge at the date of the issue of a summons for
H leave is the vital question, then the greater his ignorance, the better his chances
of success. Both these considerations, in my view, point to the fact that neither
bona fides nor personal knowledge is the true criterion. Some chance of success,
at least, seems to be necessary, and a knowledge of the true facts, so far as
ascertainable, must, I think, be required. The tribunal should not be confined
to a consideration of the facts as known to one party only, whether at the date
of the issue of the summons or at the time when it was heard. The criterion
must be objective, not subjective.

This view, however, still leaves open the difficult question : What cases can be said to be properly brought within the jurisdiction ? Is it enough that there is a reasonable doubt either in law or in fact as to what the result of the case against the defendants within the jurisdiction may be, or must the court decide on the hearing of the summons whether the plaintiffs will succeed against them or not ? My Lords, where all the facts necessary for a decision are set out by one side or the other and not contradicted, I think that the tribunal must make up its mind on the hearing of the summons, at any rate, where the law is plain. A

Primarily the jurisdiction of the courts in this country is territorial in the sense that the contract or tort sued on must have some connection with this country or the defendant must be served here. To this principle R.S.C., Ord. 11, r. 1 (g) is an exception and enables foreigners domiciled abroad to be impleaded in this country, provided an action is properly brought against someone duly served within the jurisdiction and the party outside the jurisdiction is a necessary or proper party to that action. The rule is not only an exception to, but also an enlargement of, the ordinary jurisdiction of the court and should not, in my opinion, be given an unduly extended meaning. The observation of FARWELL, L.J. ([1908] P. 201) in *The Hagen* (1) and of LORD SUMNER ([1916] 2 A.C. 304) in *John Russell & Co., Ltd. v. Cayzer, Irvine & Co., Ltd.* (2) (both quoted by SCOTT, L.J.) point out the care which should be taken before the jurisdiction is exercised. No doubt, it is in some circumstances desirable that persons not usually subject to the jurisdiction should be brought before our courts in order that a case may be fairly and fully disposed of, but the right to add the foreigner should be sparingly used, more particularly in a case where the party within the jurisdiction may not be subject to any liability, and, therefore, the action would fail as against the only person or persons who could be sued here were it not for the rule. In theory this objection has as great force where the law is in dispute as it has where the facts in respect of which liability is asserted are in issue, inasmuch as the defendant within the jurisdiction may in either case be held to be blameless, but in practice the position differs, since the latter involves what may be a long and complicated consideration of the weight of evidence after the examination of a larger or smaller number of witnesses, whereas the former, if, as in the present case, the facts are ascertained, can often be decided as well at the hearing of a summons as it can in a formal trial. These seem to me to be the general considerations which should guide your Lordships in coming to a decision, but a body of authority has been cited and it has still to be determined what effect it has on the principle at issue. B C D E F

It is not in dispute that, if in substance those within the jurisdiction are made parties without a plausible cause of action, merely that their presence may be used to support an application to issue a writ against persons without the jurisdiction, leave will not be granted. *Flower v. Rose* (3) and *Witted v. Galbraith* (4) are illustrations of this attitude. But there are cases in which leave has been given where there is a genuine and substantial doubt whether the parties within the jurisdiction are liable or not. *Massey v. Heynes* (5), in which those within the jurisdiction were sued for breach of warranty of authority and those without on the alternative plea that they had, in fact, authorised the contract said to be unwarranted, is, perhaps, as good an example as can be chosen, since in that case, the claims being alternative, it was impossible that the action should succeed against the one unless it failed against the other. Nevertheless, as was pointed out in *Société Générale de Paris v. Dreyfus Bros.* (6), it is not enough that the form of action and the nature of the relief sought bring it within R.S.C., Ord. 11. The plaintiff must show to the satisfaction of the court that he has a probable cause of action. *Bloomfield v. Serenyi* (7) goes further and distinguishes between cases where the facts are ascertained G H

and the only issue is one of law and those which involve the determination of facts. SCOTT, L.J., said that the court, without trying to determine the merits of the action, would consider all the relevant documents, even though this might involve some investigation. MACKINNON, L.J., was even more explicit. His words were ([1945] 2 All E.R. 649):

- A "It has been rightly said in some of these cases that on such an application as this the court cannot try the merits of the action. That is quite true, but I think that means trying and determining disputed facts. Where on such an application the court considers the admittedly relevant documents without the necessity of deciding disputed matters, I do not think that is trying the merits of the action within the meaning of the warning not to do so."
- B It is, no doubt, true that in certain cases where no question as to the exact limitation of the court's powers have come in issue, expressions have been used tending to show a very wide discretion in the judge, e.g., in *Ellinger v. Guinness, Mahon & Co., Frankfurter Bank A.-G. and Metall Gesellschaft A.-G.* (8), MORTON, J., said ([1939] 4 All E.R. 22):
- C "I do not think it is part of the function of the court, in considering whether an action is 'properly brought' against a party within the jurisdiction, to arrive at a conclusion as to whether the plaintiff will or will not succeed against that party. It is enough if the court is satisfied that there is a real issue between the plaintiff and that party which the plaintiff may reasonably ask the court to try."
- D So, too, in *Massey v. Heynes* (5), LORD ESHER, M.R. (21 Q.B.D. 338) uses as his test: Supposing both parties had been within the jurisdiction, would they both have been proper parties to the action?, and WILLS, J. [in the Divisional Court of the Queen's Bench Division], speaks to the like effect.
- E My Lords, the language used in each case was, no doubt, sufficiently accurate in regard to the circumstances in connection with which it was used, but I cannot myself subscribe to the wide interpretation which is sought to be derived from it in reference to all cases. One may say generally that serious disputes of fact cannot as a rule be decided on a summons, whereas questions of law can, except, perhaps, in exceptional and complicated cases. Ultimately, I think that the granting or withholding of leave must be a matter of discretion, but in exercising it the considerations, which I have dealt with, must be borne
- F in mind. It is not enough to say that there is an arguable point of law because, as in the present case, a series of legislative enactments has to be considered and collated. The question is whether the law is plain as a result of comparing them and analysing their effect. If after a careful scrutiny the law is plain, this House will interfere with the judge's discretion, as it did in *Johnson v. Taylor Bros. & Co., Ltd.* (9).
- G What, then, is the legal position in the present instance? PILCHER, J., thought, in my opinion rightly, that the action against the defendants within the jurisdiction would fail, but held the view that, where the inquiry involved a consideration of an interwoven series of provisions in Acts of Parliament, there would, as a rule, be sufficient doubt, and there was in this case sufficient doubt, to warrant the giving of leave. In my opinion, these circumstances
- H do not constitute a sufficient ground for granting leave. Where there is a substantial question of fact in issue, no doubt, leave should be given. It may even be that the existence of an exceptionally difficult and doubtful point of law would of itself be enough. In the present case, however, when the various Acts and provisions are collated, the answer is clear enough. The cause of action is statutory only. The right of the appellants to charge the shipowners with the expense of dispersing the wreck is to be found in the various Tyne Improvement Acts, but I need only quote from the Act of 1890, since it contains

in substance the material provisions with which your Lordships are concerned. The principle section is s. 42. The material words are :

“ . . . the commissioners may . . . sell break up or otherwise dispose of or may cause to be sold broken up or otherwise disposed of any wreck or any vessel or thing sunk stranded or abandoned or any obstruction within the port and may recover and receive the moneys . . . arising therefrom and may retain out of such moneys any expenses incurred by them . . . in any manner or for any purpose whatsoever in respect or on account of such wreck vessel thing or obstruction or any part thereof . . . rendering the balance (if any) to the person who was the owner of such wreck vessel thing or obstruction immediately before it became a wreck or obstruction . . . and if there be no such moneys or if any such moneys be insufficient to cover all of such expenses and charges the commissioners may recover such expenses and charges or the unsatisfied balance thereof from such person . . . ”

By s. 3 of the same Act :

“ . . . ‘ owner ’ when used in relation to goods unless there be in the subject or context something repugnant to or inconsistent with such construction shall include as the case may be the consignor consignee importer shipper exporter receiver broker or agent for sale or custody . . . ”

I need not quote further from the several Acts, whether successive or supplemental, dealing with the same matter. The section quoted, in my opinion, sufficiently raises the questions at issue.

In the appellants’ contention the Minister and the corporation must come within one of the classes included in the definition of owner and are, therefore, properly the subjects of an action brought against them after due service within the jurisdiction. If no question arose as to the position of these two parties as agents for the Crown, the claim would be incontrovertible, but the claim is, in my view, in substance against the parties as agents for the Crown and not against them personally. The Minister plainly is such agent and, though Mr. Fenwick’s affidavit is, perhaps, a little reticent in the matter, I think it sufficiently emerges that the Minister and the corporation dealt with and held the property as agents of His Majesty and in no other capacity. It was sought to be contended that the position of the Minister had been altered by the provisions of s. 20 of the War Department Stores Act, 1867, in conjunction with s. 2 (3) of the Ministry of Supply Act, 1939, and the Ministry of Supply (Transfer of Powers) (No. 1) Order, 1939. Those provisions in the case of the Minister of Supply provide that he may bring or defend in his own name any action concerning any stores belonging to or supplied by or for the purposes of the Minister, but the original section [s. 20 of the Act of 1867] contains the proviso, commonly found in Acts which may affect the Crown, retaining its privileges and prerogatives. The result of this saving of His Majesty’s right is, as I think, to enable the Minister to be sued without the necessity of a petition of right, but not to debar him from the protection which in the particular case the Crown itself would have had.

That the Crown itself would have been free from liability is, in my opinion, abundantly plain. The local Acts conferring powers on the appellants preserve the privileges of the Crown throughout. Section 99 of the Harbours, Docks, and Piers Clauses Act, 1847, which is incorporated in the Tyne Improvement Acts up to 1934 by the Tyne Improvement Act, 1934, s. 3 (1), and s. 81 of the latter Act make this clear, but, indeed, the general principles of the law of this country would produce the same effect, and in this connection I need only refer to *Bombay Province v. Bombay Municipal Corporation* (10).

My Lords, in these circumstances it is immaterial that in the relevant statutes the word “ owner ” is given an extended meaning. The Crown still is not

bound by the extension and, even if it were, is under no obligation to pay the charges. I am not myself fully persuaded in any case that the extended meaning given to "owner" applies to the case of those against whom the Acts give a right to recover the cost of dispersion of a wreck or its cargo. The answer to that question may well await a case in which such a claim must be decided. In this case, however, the action against the two parties within the jurisdiction must plainly fail, and in those circumstances I cannot think that the action is properly brought against them within the meaning of R.S.C., Ord. 11, r. 1 (g). I would dismiss the appeal with costs.

LORD SIMONDS : My Lords, this appeal from a judgment of the Court of Appeal, which reversed a judgment of PILCHER, J., dismissing a motion by the respondents for an order to set aside an order made by the same learned judge by which he gave leave to the appellants to issue a concurrent writ for service out of the jurisdiction and to serve notice thereof on the respondents in Belgium, raises a procedural question of some difficulty.

The relevant facts can be shortly stated and it must be said at once that they cannot be regarded as seriously in dispute. The appellants are the conservancy authority for the River Tyne and the port of Newcastle-upon-Tyne. The respondents were, in March, 1942, the owners of S.S. Brabo. In that month she was in collision off the entrance to the Tyne and thereafter was towed into the River Tyne where she sank and became an obstruction. She was loaded at the time with a cargo of wood pulp and steel billets and slabs which were consigned to the Minister of Supply and the British Iron and Steel Corporation. The vessel and her cargo constituting an obstruction in their undertaking, the appellants took steps under their statutory powers to salve and recover such portions of them as could be saved and to disperse the remainder. This work was expensive and difficult. Its cost may amount to about £250,000. On Mar. 20, 1946, a writ was issued by the appellants against the respondents and against the Minister of Supply and the British Iron and Steel Corporation, to whom I will refer as the second and third defendants, claiming from the defendants and each of them the unsatisfied balance of the charges and expenses incurred by them in relation to the wreck and the cargo taken thereon. The Treasury Solicitor accepted service on behalf of the second and third defendants and entered an appearance for them without protest. The respondents being resident in Belgium, the writ was served on a Mr. Aragon, one of their directors, who was then in this country, but on motion by the respondents this service was set aside by PILCHER, J., who, nevertheless, allowed the writ to be amended by substituting for the address in this country at which Mr. Aragon had been served the address of the respondents in Belgium. The appellants then made an *ex parte* application, supported by an affidavit of Mr. V. H. Smith, a managing clerk in the firm of solicitors acting for the appellants, to the assistant registrar in the Admiralty Division for leave to serve the respondents out of the jurisdiction. This application was refused on the ground that the respondents were not a necessary or proper party to the action brought against the second or third defendants. The appellants appealed to PILCHER, J., *ex parte* and on June 6, 1946, he allowed the appeal. He thought that the respondents were a necessary or proper party to the action and gave leave to issue a concurrent writ out of the jurisdiction and to serve notice thereof on the respondents at Antwerp. It will be observed that at this stage the question which has been so much debated in this House whether the action was "properly brought" against the second and third defendants had not yet emerged, but it was about to emerge and it is convenient to remind your Lordships that leave to serve out of the jurisdiction was given under R.S.C., Ord. 11, r. 1 (g), which provides :

"1. Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the court or a judge whenever . . .

(g) Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction."

On Aug. 22, 1946, the respondents entered a conditional appearance to the writ and at a later date moved to set aside the order of June 6, 1946, on the grounds (a) that they were not a "necessary or proper party" to the action, and (b) that the action against the second and third defendants had not been "properly brought" against them. They supported their application by an affidavit of Mr. E. A. Fenwick, the senior partner in the firm of solicitors acting for the respondents, in which he submitted that, in so far as the second defendant was concerned, the writ and the affidavit of Mr. V. H. Smith disclosed no good cause of action in that the Minister of Supply was dealing with the cargo on behalf of the Crown under his powers conferred by the Ministry of Supply Act, 1939, and that the Minister of Supply was not at any material time owner of any part of the cargo, and that, in so far as the third defendants were concerned, the bill of lading for the part cargo of steel on board the vessel showed the British Purchasing Commission as the shippers and the third defendants as the consignees and that the third defendants were merely the agents of the Minister of Supply and were at no material time the owners of such cargo, and that, accordingly, the appellants had no good cause of action against them. I cannot, my Lords, deny that this affidavit both in form and substance leaves something to be desired, but it was not challenged and I do not think your Lordships would be justified in coming to any other conclusion than that the whole of the cargo was the property of the Crown vested in the second or third defendants for the purposes of the Crown. If there was any doubt on this matter, which I do not think there was, it should have been cleared up by the appellants, whose duty it was on an application for leave to serve out of the jurisdiction to place all relevant facts before the court.

The question then was, and is, whether on these facts the appellants bring their case within the terms of the rule, and further, whether, if they do, the court should exercise its discretion in their favour. On this question PILCHER, J., decided in favour of the appellants and dismissed the respondents' motion, but the Court of Appeal (SCOTT, BUCKNILL and WROTTESELEY, L.JJ.) unanimously reversed his decision, holding that the action was not "properly brought" against the second or third defendants, and that, accordingly, the conditions of the rule had not been satisfied.

On the respondents' first ground of objection I do not think it necessary to say more than that, if I thought that the second ground of objection failed and that the action was properly brought against the second or third defendants, I should hesitate to say that the respondents were not at least a proper party to the action. It was on the second ground of objection that the Court of Appeal founded their decision and I find myself in agreement with them. I do not propose to attempt an exhaustive definition of the words "action properly brought." To do so would probably lead to the use of words which would themselves require elucidation, but, in considering whether in any particular case an action can be regarded as "properly brought," within the meaning of the rule, I keep in mind the principles (to which SCOTT, L.J., has referred) laid down, not for the first time, by FARWELL, L.J. ([1908] P. 201), in *The Hagen* (1). What, then, is here the basis of the respondents' objection to being served with process out of the jurisdiction? It is simply that on the facts, which cannot fairly be regarded as in dispute, the action against the second and third defendants is not sustainable in law and is bound to fail, and that, if so, it cannot be regarded as properly brought against them.

My Lords, I will first briefly examine the contention that the appellants' action against the second and third defendants is bound to fail—briefly, because I think it is so clear as not to require elaboration. The appellants' claim is

based on their statutory powers and, in particular, the provisions of s. 42 of the Tyne Improvement Act, 1890. Since on the facts, which I hold to be undisputed, the cargo here in question is the property of the Crown vested in its servants or agents, the appellants' claim, so far as it relates to such cargo, can only succeed if they can establish that the Crown is bound by the statutory provisions on which they rely, but not only is the Crown bound neither by express mention nor by necessary implication, but, in addition, in every relevant Act the rights of the Crown are expressly preserved. I need do no more than mention s. 99 of the Harbours, Docks, and Piers Clauses Act, 1847, which, by s. 3 of the Tyne Improvement Act, 1934, is deemed to be incorporated with each of the Tyne Improvement Acts, 1850 to 1934, and s. 81 of the Act of 1934 itself. From such a conclusion, which is supported by abundant authority (I will refer only to *Hornsey Urban Council v. Hennell* (11), and the recent case of *Bombay Province v. Bombay Municipal Corporation* (10)), the appellants seek to escape by pointing to s. 20 of the War Department Stores Act, 1867, as applied to the Minister of Supply by s. 2 (3) of the Ministry of Supply Act, 1939, and the Ministry of Supply (Transfer of Powers) (No. 1) Order, 1939 (S.R. & O., 1939, No. 877). This section, as adapted to the Minister of Supply, provides, in effect, that he may in his own name bring or defend any action concerning any stores belonging to or supplied by or for the purposes of the Minister. It has its own significant proviso which (as adapted) provides that :

“ Nothing herein shall take away or abridge in or in relation to any such action, suit, or proceeding any legal right, privilege, or prerogative of the Crown ; and in all such actions, suits, and proceedings, and in all matters and proceedings connected therewith, the Minister of Supply may exercise and enjoy all such rights, privileges, and prerogatives as are for the time being exercised and enjoyed in any proceeding in any court of law or equity by the Crown, as if the Crown were actually a party to such action, suit, or proceeding.”

I can see no justification for the suggestion that, in an action brought against the Minister of Supply, he is debarred from asserting the immunity of the Crown from claims brought under a statute which not only does not purport to bind the Crown but expressly exempts it. Nor, on an examination in their context of the observations of MACKINNON, L.J., and GODDARD, L.J., in *Minister of Supply v. British Thomson-Houston Co., Ltd.* (12), do I think that those learned judges intended to cast any doubt on the question. If they did, such observations must be regarded as *obiter* and *per incuriam*. All that was decided in that case was that the Minister of Supply could be sued by way of counter-claim for breach of contract. I must mention briefly one further contention of the appellants. It was, as I understand the argument, urged that, whether or not the Crown was the owner of the cargo in question, yet by virtue of an extended definition of the word “ owner ” to be found in s. 3 of the Harbours, Docks, and Piers Clauses Act, 1847, and s. 3 of the Tyne Improvement Act, 1890, the second and third defendants (or, at any rate, the third defendant) were to be regarded as “ owners ” within the ambit of s. 42 of the Act of 1890. I am by no means satisfied that this initial step is made good, but, whether it is or not, inasmuch as the Act does not bind the Crown, it does not affect the right of its servants and agents, by whatever name the Act may choose to call them, to assert its and their immunity.

I come then to the conclusion that this action is bound to fail against the second and third defendants, and it appears to me that, once a court has come to that conclusion, it cannot say that none the less the action is “ properly brought ” against them so as to permit service of a writ out of the jurisdiction on another party. I am, as I have already said, very conscious of the difficulties that arise from any attempt at exhaustive definition, but I think that certain propositions may fairly be laid down. (i) I would dismiss the contention that

the action is "properly brought" if it is brought *bona fide*. As my noble and learned friend, LORD MACDERMOTT, observed in the course of the argument, the rule is not designed to place a premium on folly or ignorance. The test cannot be a subjective one. But I agree that, if it were brought *mala fide*, that would be fatal. (ii) I do not think that the court ought to assume that the defendants within the jurisdiction would not avail themselves of any defence open to them. In this case it was suggested that the second and third defendants might not assert the immunity of the Crown, but if one valid line of defence is assumed to be abandoned, so might another, until at last any action may be deemed to be properly brought because the defendants might throw down their arms and run away. Such an argument is inconsistent with the principle laid down in this House by LORD SUMNER ([1916] 2 A.C. 304), in *John Russell & Co., Ltd. v. Cayzer, Irvine & Co., Ltd.* (2), that the phrase "properly brought" enures to the protection of the person out of the jurisdiction whom it is proposed to serve with process. (iii) I do not accede to the suggestion that the court, which has to consider whether leave to serve out of the jurisdiction should be given, or, alternatively, to consider whether an order giving such leave should be set aside, is concerned only with the facts or, indeed, the law as they existed or were assumed to be at the date of the issue of the writ or of service of the writ on the defendants within the jurisdiction. It is, in my view, consistent with the international comity, which must be observed in the application of this order, that the court should have regard to the facts and the law as at the date of hearing: see *Société Générale de Paris v. Dreyfus Bros.* (6). (iv) If on the available materials the court comes to the conclusion that the action against the defendants within the jurisdiction must fail, it must equally conclude that the action is not properly brought. Here arises the difficulty. For at once the question will be asked: "Is the court at this stage compelled to come to any conclusion at all? Cannot it say that there is a serious and difficult question to be argued and that the action is properly brought for the purpose of arguing it?" This was, in effect, the contention of the appellants which found favour with PILCHER, J., in this case. I would not deny that there might be cases, particularly where issues of fact are involved, in which the court would be justified in taking such a view, and I do not invite your Lordships to decide that, whenever the defendant out of the jurisdiction takes on himself the burden of showing that the action must fail against the defendants within the jurisdiction, the court is bound to make an adjudication which in any case cannot be final as between the plaintiff and the latter defendants, but I would say at least negatively that, where the defendant out of the jurisdiction does take on himself that burden, the court should not easily be deterred by any apparent difficulty or complexity of subject-matter from considering, and, if it can do so at that stage, forming an opinion on, the question whether the action is bound to fail against the defendants within the jurisdiction. If, having done so, the court answers that question in the affirmative, then it must conclude that the action is not "properly brought." That I conceive to be the position in this case and I would affirm the order under appeal accordingly.

I should finally observe on some of the cases which have been cited. In *Witted v. Galbraith* (4) the Court of Appeal, overruling a decision of the Divisional Court, set aside an order for service out of the jurisdiction and in the course of his judgment LINDLEY, L.J., said ([1893] 1 Q.B. 579):

"... there is no plausible cause of action against the brokers... It is not a *bona fide* case of an action properly brought against a person who has been served within the jurisdiction."

On this it was urged that, assuming *bona fides*, the test of an action properly brought was whether there was a "plausible" cause of action. It is, I think, sufficient to say that LINDLEY, L.J., was not considering the problem which now faces your Lordships and that it is unnecessary to speculate whether he

would have thought a cause of action plausible which was demonstrated to be bad in law. In the Divisional Court in the same case *HAWKINS, J.*, had said ([1893] 1 Q.B. 434):

- A “I think that, if a plaintiff, who is acting *bona fide*, has anything like a semblance of a cause of action against a person who is within the jurisdiction, he is entitled to issue a writ against that person and serve it on him, and may then obtain leave to serve any person out of the jurisdiction who is a necessary or proper party to such action.”

This statement is, I think, far too wide, but it must in any case be qualified by saying that, if leave is so granted, it must be rescinded when the defendant out of the jurisdiction has shown that it is but a semblance and that the action is bound to fail. In *Ellinger v. Guinness, Mahon & Co.* (8) MORTON, J., thought ([1939] 4 All E.R. 22) that the condition of the rule was satisfied if there was “a real issue” to be tried. I cannot accept this test if it means that the defendant out of the jurisdiction is to be denied the opportunity of showing that the issue can as a matter of law be resolved in one way only. It may well be that, where there is conflicting evidence of fact, it is only at the trial of the action that the issue can be determined. That may be the misfortune of the defendant out of the jurisdiction, but if, the only real issue being an issue of law, he can satisfy the court what the answer must be, then he is entitled to say that he cannot be brought to trial in a jurisdiction to which he is not generally subject.

- I have so far considered only the question what is the meaning of the words “action properly brought” where they occur in the rule, but there still remains the question how, assuming the action to be properly brought, the discretionary jurisdiction should be exercised. The two questions will often be found to interlock. For instance, if it were the true view that an action is properly brought if the plaintiff brings it *bona fide* and there is a “plausible cause of action” or “a real issue” to be tried, yet the court may and, as I think, should as a rule allow the defendant out of the jurisdiction to try to show that the case against the defendants must fail and, if he succeeds in doing so, then in its discretion set aside the order of service. Thus, in this case, whatever view I took of the construction of the rule, I should have no hesitation in saying that on the materials adduced by the respondents the court should in the exercise of its discretion set aside the order. I will conclude by saying that, whether in considering the interpretation of the rule or in exercising the discretion that arises when a case is brought within it, the underlying and guiding principle is that which was long ago stated by PEARSON, J. (29 Ch.D. 242), in *Société Générale de Paris v. Dreyfus Bros.* (6):

- G “. . . it . . . ought always to be considered a very serious question . . . whether this court ought to put a foreigner, who owes no allegiance here, to the inconvenience and annoyance of being brought to contest his rights in this country . . .”

LORD DU PARCQ: My Lords, it is correctly stated in the appellant’s case that:

- H “. . . the short point in this appeal is whether the action was ‘properly brought’ against the second and third defendants, the Minister of Supply and the British Iron and Steel Corporation, Ltd.”

At first sight the point so stated has a pleasing appearance of simplicity. It is, perhaps, less simple than it looks, but it may be true to say that no words or phrases long retain their simplicity when they are exposed to a process of delicate, prolonged and remorseless dissection. Before I deal with the narrow question which is presented to your Lordships, I would add that it is necessary to keep in mind two further matters which are at once elementary and important—first, that those applying for leave are under an obligation to make the fullest

disclosure of all relevant facts to the court, and, secondly, that, even if they are able to bring their application within the strict terms of the rule, the granting of leave is discretionary, and there may be grounds which will justify the court in refusing it.

My Lords, I have no intention of paraphrasing in my own language the apparently simple words "properly brought." One is unlikely to find other words which are precisely synonymous with them, and it is useless to substitute for them words which may have a slightly different meaning. I will confine myself to considering what effect ought to be given to these precise words, in their context, with reference to the case before the House. There is, I think, general agreement that the context makes the purpose of the introduction of the words plain enough. The foreigner is not to be brought before our courts, and so under a jurisdiction to which he is not normally subject, unless certain provisions are satisfied. If he is a necessary or proper party to an action brought against a defendant who is subject to the jurisdiction, there is obviously something to be said, on the ground of convenience, for allowing service on him. There would, however, be no sufficient safeguard for the foreigner, if the claim made against the resident defendant were not open to the scrutiny of the court, and if the mere making of a claim were enough. The words "properly brought" are introduced to provide such a safeguard. In construing them, it is permissible and, indeed, necessary to remember that this is their object. It is easy to state extreme cases in which it is plain that the provision is, or is not, satisfied. On the one hand, no one would say that an action was properly brought if it could be shown to be (in the language of R.S.C., Ord. 25, r. 4) "frivolous or vexatious." On the other hand, an action may well be "properly brought" although no one can be sure that the facts which must be established if the action is to succeed will certainly be proved. Between these two extremes there is a considerable field in which the problem is less clear-cut. In the present case the argument proceeded mainly on the assumption that the facts, at any rate so far as they had been elucidated, were not in dispute. It was contended on behalf of the appellants that they had at least reasonable ground for confidence that the law was on their side, and on behalf of the respondents that the court must decide the point of law at this stage, and that on a correct view of the law the decision must be adverse to the appellants' claim.

My Lords, I am anxious to give full weight to the manifest object of a provision which protects the foreigner, but I am unable to construe the phrase "properly brought" as ruling out an action founded on a legal proposition, which, though it may not commend itself to the court hearing the application, expresses a possible and reasonable opinion on a point which is one of difficulty, and is open to doubt. I am conscious that I am here making an assumption which, in the submission of the respondents, is wholly illegitimate. The law, they say, is always certain. There are no doubtful points. There is only one right answer to any question. If an action is founded on a wrong view of the law and could succeed only if that view were accepted, then it is not "properly brought." Therefore, in order to decide whether or not an action is "properly brought," the court must make up its mind about the law, however difficult and doubtful the point involved may seem. In support of his thesis counsel for the respondents emphasised, very rightly, the injustice that would result if a foreigner were joined as a defendant in proceedings in which it ultimately appeared that there was no cause of action against the resident defendants. Regrettable though it may be that a foreigner should ever be haled before our courts, and, perhaps, suffer judgment, though no action lay against his co-defendants, the fact must be faced that this risk is hardly to be avoided on any view of the rule. Let it be granted that the law is always certain. It must, nevertheless, be acknowledged that practitioners, and even judges, sometimes have to find the best way they can through an obscure and difficult field of law,

illuminated only by conflicting decisions. There may be a period, sometimes a long period, during which the truth, which is in its nature certain, has not been finally revealed to a perplexed world. At such a time it may happen that a judge, compelled to express a definite opinion, will accept, by an excusable error, a plaintiff's incorrect view of the law. The foreigner may not be disposed to welcome the suggestion that he should take the matter further, possibly even as far as your Lordships' House. He may not be anxious to fight the battle of the other defendant, and may think that as a series of appeals might after all prove to be nothing better than a preliminary skirmish, he will be wise to reserve himself, and keep his money, for the main engagement. Should he take this prudent course, it may turn out in the end, after the action has been heard and finally disposed of, that the judge who permitted service on him was wrong, that there was no case against the resident defendant, and that, therefore, the foreigner ought never to have been joined, but, if the foreigner has rightly been held liable, the fact that he was wrongly joined will avail him nothing. He will not get his money back, or be freed from the judgment given against him. If the doubt is about the facts rather than the law, it is admittedly inevitable that after the trial and any appeals which follow it are over, the foreigner may be found to have been brought before the court on a false assumption.

For these reasons I am of opinion that those who framed the rule cannot have hoped, or intended, that a foreigner should never be joined as a "necessary and proper party" to an action which was wrongly brought against his English co-defendants in the sense that, on a true view of the law, it could not succeed against them. I think that the *dictum* of MORTON, J. ([1939] 4 All E.R. 22), in *Ellinger v. Guinness, Mahon & Co.* (8), on which the appellants relied, was substantially correct. Further support for this view may be found in the decision in *Massey v. Heynes* (5), where the action was bound to fail against the English defendants if it succeeded against the foreign defendants. In the Court of Appeal, LORD ESHER, M.R., said (21 Q.B.D. 338):

"To what period of time does the rule in question apply? It must certainly apply to the time of the service of the writ or notice of the writ. How can the court deal with the case then? Not according to the result of the trial of the action; they cannot take into account what may be the result of the trial, or they could never decide who would be a 'proper party' to the action until the trial was over."

My Lords, the construction of the rule which commends itself to me, as it has, I think, long commended itself to the courts, is criticised on the ground that the rule, so interpreted, supplies only a vague and uncertain criterion. I think it must be admitted that the rule, as I understand it, does not supply a touchstone so certain that there is no room left for difference of opinion among judges, but this defect, if it be a defect, is, I think, inherent in the words which those who framed the rule have chosen, and it is not for the courts to impose a more rigid test. Moreover, it does not seem to me to be at all surprising that the rule should leave some latitude to the judge. A judge is frequently set the task of deciding whether there was "reasonable and probable cause" for an action, and I have heard no complaint that the question is too vague to be answered with accuracy. Indeed, if the question be asked whether in this country one is likely to find a rigid rule laid down rather than one which has some elasticity, I suppose that few English lawyers would say that rigid rules form a marked feature of our system of law. It may be added that there is something to be said for a construction which avoids the result that a question of law vitally affecting an English defendant is tried and determined in his absence. It is true that, if the court decides that there is no case against him, he will have no cause to complain. His position will be less happy if, on the assumption that the facts are not in dispute, it is held in his absence that he can have no

answer in law to the claim. It has been suggested that he would be entitled to join in the argument even at this preliminary stage. If that is right, the procedure would be costly and cumbrous, and I find it difficult to believe that the rule contemplates proceedings in which the liability of one defendant is to be determined before the trial begins.

My Lords, I apologise for this lengthy preamble, but it seems to me important that the judges who have to observe the rule should be left in no doubt as to its true effect. For myself, I do not differ from the view expressed by the Court of Appeal ([1947] 2 All E.R. 365), that, assuming all the facts to be admitted, an action is not properly brought if "on those facts it is apparent that the plaintiffs cannot succeed against the defendants served within the jurisdiction," and I think that they correctly stated the question for decision as being whether "it can be reasonably argued" that those defendants are liable to the plaintiffs. I cannot follow them to the length of accepting without qualification, as in one passage of the judgment they seem to do, the proposition for which the respondents' counsel contended. It cannot be said of every legal problem that the correctness of one of two conflicting views is "apparent," or that the opposing contention is not reasonably arguable. I agree, however, with my noble and learned friend on the Woolsack that it would be wrong to say that there was an arguable point of law merely because a series of enactments had to be considered and collated, and also with my noble and learned friend LORD SIMONDS that difficulty or complexity of subject-matter ought not to deter the court from qualifying itself to answer the question: "Is this action bound to fail?"

I now turn to the facts, which have been said by PILCHER, J., and the Court of Appeal not to be in dispute. It is at this point that it is essential to remember that it is for the plaintiffs (the appellants in this case) to satisfy the court that the demands of the rule are satisfied, and that, in their own interests, as well as in pursuance of their duty, it is for them to see that all relevant facts known to them are before the court. It cannot be said of the present appellants that they have been generous with their information. Such as it is, it is contained in the affidavit of Mr. Smith, a managing clerk of the appellants' solicitors. He tells us that the appellants are advised, and that he (Mr. Smith) verily believes, that they have a good cause of action against all the defendants. He adds that an action has already been begun against the second and third defendants, as owners of part of the cargo of the *Brabo*, and this action, he says, he is advised and verily believes to have been "properly brought" against them. Speaking for myself, I am prepared to accept this evidence, and to regard it as disposing of any charge of bad faith against the appellants. They believe in their case. That is really all that Mr. Smith told the court. Paragraph 7 of his affidavit suggests that he could, if he would, have told a good deal more, for he refers to "documents and information" in the possession of his firm, from which his means of knowledge and information are derived. At this stage it may have been thought unnecessary further to enlighten the court. Later, perhaps, more might have been revealed with advantage. The affidavit of the respondents' solicitor, though irregular in form, since the source of his information is not stated, asserts plainly (i) that the Minister of Supply was dealing with the cargo on behalf of the Crown, and (ii) that the third defendants were "merely the agents of the Minister of Supply." If these words are given their ordinary meaning, the facts which they state seem to me to rule out the possibility of a successful action by the appellants against the second and third defendants, or either of them. As to this, I find myself substantially in agreement with the Court of Appeal. The statutes to which your Lordships were referred do not bind the Crown. The Minister of Supply, acting as the agent of the Crown, cannot be sued successfully under a statute which does not bind the Crown. This is, in general, equally true of any person who is acting as

A "a mere agent" of the Crown. Counsel for the appellants submitted, as one branch of his argument, that the facts were not sufficiently ascertained, on the information before the courts, to make it possible to say whether the action could succeed against the second and third defendants, and he suggested that, so far as the third defendants were concerned, it was consistent with the evidence that the appellants had dealt with them as principals, but, as I have said, it was for the appellants to satisfy the court that they had a claim against the second and third defendants which brought them within the rule. If they were in a position to prove, or to allege on reasonable grounds, any facts from which it could be argued that the other defendants, although they were agents of the Crown, might still be liable, it was for them to bring to the notice of the court such evidence of those facts as they possessed. The "documents and information" which, as we know from Mr. Smith's affidavit, are in the possession of the appellants' solicitors, would in all probability have furnished the necessary information. On the evidence available I do not think that it can be said that there is secure ground for a belief that the action is "properly brought" against the English defendants. The statements contained in the affidavit sworn on behalf of the respondents remain unchallenged, and I think it a legitimate inference that the appellants are in no position to swear to any facts which would weaken their effect. Even assuming, therefore, that the appellants might succeed against the third defendants if they did not know them to be "mere agents" of the Crown, it would be wrong, in my opinion, to deal with the case on the footing that the appellants had not that knowledge. I have thus reached the conclusion that the Court of Appeal rightly decided that, on a fair reading of the available evidence, it was apparent that the appellants' claim against the second and third defendants could not succeed and that it was, therefore, not properly brought. It was contended for the appellants that the Crown might (as it was put) waive the defence that it was not bound by the appellants' statutes. I think, with respect, that this is an idle contention. If the Crown is not bound by a statute, it cannot owe a debt by reason of the terms of that statute. If there is no debt owing, an action for debt cannot be properly brought.

E It may be that the reticence of the appellants has left the courts in the dark as to some material fact, and that this action will still proceed against the English defendants. If it does, it is conceivable that those defendants may have evidence to produce which will throw a new light on the case, and even that they may wish to submit that the respondents should be brought in as third parties.

F In that, perhaps, not very likely event, the position of the second and third defendants would not be prejudiced, and it would be open to them to apply to the court under R.S.C., Ord. 11, r. 8A. I say this, not to encourage such proceedings, but to make it clear that the dismissal of this appeal cannot, in my opinion, injuriously affect the rights of parties who were not before the courts or this House. On the view I take, no question arises about the proper exercise of discretion. I would dismiss the appeal.

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LORD NORMAND : My Lords, as this appeal raises a question of the English law of procedure, I would have wished merely to express my concurrence in the conclusion which has been arrived at unanimously, but there is a difference of opinion whether leave to serve out of the jurisdiction should have been refused because the action was not "properly brought" (R.S.C., Ord. 11, r. 1 (g)), or because the granting of leave was not a proper exercise of the judicial discretion, and it, therefore, becomes necessary that I should state the view which I have reached. The jurisdiction conferred by service out of the jurisdiction is anomalous, and the very words which describe it betray that it is a departure from the jurisdiction recognised by the comity of nations and an invasion of the sovereignty of the state within which leave to serve is granted. The rules laid down by FARWELL, L.J., in *The Hagen* (1) emphasise the court's duty of caution when it is asked to allow service out of the jurisdiction, and the

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duty of the party applying for leave to make a full and fair disclosure. In *Russell & Co., Ltd. v. Cayzer, Irvine & Co., Ltd.* (2) LORD SUMNER pointed out ([1916] 2 A.C. 304) :

“The words ‘properly brought’ enure to the protection of the person out of the jurisdiction whom it is proposed to serve with process. His protection is not to be found exclusively in the words ‘a necessary or proper party.’”

Their function is, therefore, to restrain within proper limits a power made mainly for the convenience of English plaintiffs, though it is also advantageous in many cases to the English defendant and in some even to the foreign defendant. The words “properly brought,” if narrowly construed, would not afford to the foreign defendant the protection to which he is entitled, and I think they are wide enough to oblige the court, whether it be the court to which the original application is made or any court reviewing the order made by that court, to refuse the application when, on all the material before it, it comes to the conclusion that the action as laid against the English defendants cannot succeed, either because the plaintiff has failed to state a valid ground of action or because on the facts established by admissions or by uncontradicted affidavits the English defendants have a valid defence.

LORD MACDERMOTT: My Lords, while I agree that this appeal should be dismissed, I prefer to relate my conclusion to the discretion exerciseable under R.S.C., Ord. 11, r. 4, rather than to the test which was adopted by the Court of Appeal and which appears to mean that an action must be regarded as not “properly brought” within the meaning of R.S.C., Ord 11, r. 1 (g), if, on the relevant facts being admitted, the court decides that in law it cannot succeed.

My Lords, in themselves the words “an action properly brought” do not suggest the ultimate result as a criterion and there is nothing that I can find in their context to indicate the contrary. I think; indeed, that r. 8A (a) of R.S.C., Ord. 11, rather points the other way, for it makes r. 1 (g) applicable to originating summonses, and the nature of proceedings so initiated may well be such as to make it inapt, when the legal issues are determined, to speak of the plaintiff as having either succeeded or failed against particular defendants. It must be borne in mind, of course, that the words under discussion “enure to the protection of the person out of the jurisdiction whom it is proposed to serve with process,” as LORD SUMNER put it ([1916] 2 A.C. 304) in *John Russell & Co., Ltd. v. Cayzer, Irvine & Co., Ltd.* (2). That consideration, however, seems to me to fall far short of supporting the view adopted here by the Court of Appeal, and it is to be observed in this connection that in the case just cited LORD WRENBURY said (*ibid.*, 306), with reference to the expression in question :

“My Lords, those words, to my mind, do not mean founded upon a good cause of action.”

I confess that, for my part, I do not see why an action with the object of resolving some vexed question of law should not be “properly brought” irrespective of the decision to be obtained, or why the expression as used in R.S.C., Ord. 11, r. 1 (g), should be given the highly artificial meaning necessary to make a test of success or failure in the suit applicable. Whatever the theory may be, points of law are in practice often highly debatable and hard to settle, as well as being less easily laid to rest than questions of fact, and I find it difficult to construe these particular words as inviting the court, on an interlocutory application made in the earliest stages of the litigation, to embark, in the absence of any factual dispute, on an adjudication as to the ultimate rights of the parties within the jurisdiction. I respectfully agree with the opinion of MORTON, J., in *Ellinger v. Guinness, Mahon & Co.* (8), when he says ([1939] 4 All E.R. 22) :

"I do not think it is part of the function of the court, in considering whether an action is 'properly brought' against a party within the jurisdiction, to arrive at a conclusion as to whether the plaintiff will or will not succeed against that party. It is enough if the court is satisfied that there is a real issue between the plaintiff and that party which the plaintiff may reasonably ask the court to try."

- A Here, I think, the issue between the plaintiffs and the defendants in the jurisdiction was real in the sense in which I take MORTON, J., to have used the term. The claim was not made vexatiously or *mala fide*. It was of a nature known to the law and arose, undoubtedly, from a genuine dispute as to where liability for the grave loss which had been incurred should rest. I think also that the issue was one which the plaintiffs were reasonable in asking
- B the court to try. It was raised with due regard to the rules of procedure. It was substantial and important. It was, moreover, triable in the sense that the questions of law which emerged invited close argument from both sides and a careful exposition of the relevant enactments. That this process was followed before the frailty of the plaintiffs' case was judicially exposed is more important than the exposure itself as respects the point now under discussion. To my
- C mind, PILCHER, J., was right on this aspect of the matter, and, with him, I would hold that the action was "properly brought."

- But this view does not, in my opinion, mean that the probable outcome of an action is necessarily irrelevant to the question whether leave should be given under R.S.C., Ord. 11, r. 1 (g). If the facts are settled, or are to be taken as settled, and the applicable law is thought by the court to be so much against
- D the plaintiff that his chances of success are negligible, that may on occasion be ground for saying that the foreigner should not be subjected to process in this jurisdiction, and is, at least, a matter to be taken into account in exercising the discretion conferred by the order. This is apart from any question of *mala fides*. It is, of course, well settled that an action brought against a party within the jurisdiction without any hope of success and merely in order to found
- E an application under R.S.C., Ord. 11, r. 1 (g), is not "properly brought," but from the standpoint of the foreigner the motive in suing those within the jurisdiction may well matter less than the circumstance that the proceedings in which it is sought to involve him have no real weight against those already served. If the proceedings are of that kind, there exists an element which can hardly be left out of consideration, however "properly brought" the suit
- F may be.

- On this view two questions remain: Had the present action any chance of success against one or other of the defendants served in England? And, if not, was the discretion properly exercised? My Lords, on the first of these questions I agree that all matters of defence or objection to the claim may be regarded as open, and I also agree, for the reasons already stated by your
- G Lordships, that the second defendant, the Minister of Supply, is entitled to the immunity enjoyed by the Crown in respect of the statutes sued on and which, it is clear, do not bind it. As regards the third defendant, the British Iron and Steel Corporation, Ltd., I have experienced some difficulty because the affidavit of Mr. E. A. Fenwick gives little information as to the nature of this defendant's agency, and I do not think it can be said with safety that any agent of the Crown
- H is, irrespective of the terms of the agency, entitled to rely on this immunity. On consideration, however, I feel that the affidavit which, though vague and unsatisfactory in some respects, has not been challenged, makes it impossible to distinguish between the position of the second and third defendants—at least, for the purposes of the present application. I, accordingly, reach the conclusion that in law, and assuming the defence of immunity to be taken, the plaintiffs would not succeed against either of these defendants. As it is, on the view I have taken, unnecessary to decide whether the statutory definitions

of "owner" include the consignees, I express no opinion on the point. On the question of discretion I do not read the careful judgment of PILCHER, J., as indicating that he took into account the weak character of the suit as against the English defendants in relation to the exercise of his discretion. For that reason I think the learned judge's conclusion on this branch of the case may properly be regarded as open to review. On all the facts and circumstances, including the exceptional nature of the claim and its futility as against the second and third defendants, I do not think the respondents should be brought to court in this jurisdiction. I would, therefore, dismiss the appeal.

Appeal dismissed with costs.

Solicitors: *Bentleys, Stokes & Lowless*, agents for *Bramwell, Clayton and Clayton*, Newcastle-upon-Tyne (for the appellants); *Holman, Fenwick & Willan* (for the respondents).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

Applied. SIDNEY TRADING CO., LTD.
v. FINSBURY B.C. [1952] 1 All E.R. 460.

ALLIANCE PROPERTY CO., LTD. v. SHAFFER.

[COURT OF APPEAL (Tucker and Denning, L.J.J., and Roxburgh, J.), January 12, 1949.]

Rent Restriction—Standard rent—"Rent"—Lease of flat—Agreement in contemporaneous document to pay annual sums for decorative alterations and cost of management—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 12 (1) (a) (as amended by the Rent and Mortgage Interest Restrictions Act, 1939 (c. 71), s. 3 (1), sched. I).

Before the coming into operation of the Rent and Mortgage Interest Restrictions Act, 1939, a flat was let on a yearly tenancy at a rent of £175, but contemporaneously with the lease the parties executed a deed, described in the endorsement as a supplemental agreement, under which the tenant and any person in whom the lease at any time might be vested covenanted to pay an additional £40 a year in consideration of decorative and other works carried out by the landlords and a further £60 a year towards the cost of the management of the building in which the flat was situated, the second agreement to run concurrently with the lease and to determine with it and the sum payable thereunder to be paid together with the rent and to be recoverable "by distress or otherwise as for rent in arrear." The flat came within the protection of the Rent Restrictions Acts on the coming into operation of the Act of 1939.

HELD: the extra payment of £100 per annum was part of the monetary compensation payable by the tenant in consideration for what had been granted to him by the landlord under the two documents taken together, and also it formed part of the contractual monetary obligation payable under the two agreements taken together and relating to the demised premises, and, therefore, the standard rent consisted of the sum of the amounts payable under the two documents.

Property Holding Co., Ltd. v. Clark ([1948] 1 All E.R. 165; [1948] 1 K.B. 630), *applied*.

White v. Richmond Court, Ltd. ([1944] 1 All E.R. 689; [1944] K.B. 576; 171 L.T. 41), *distinguished*.

Decision of SLADE, J. ([1948] 2 All E.R. 224; [1948] 2 K.B. 464), *affirmed*.

[AS TO STANDARD RENT, see HALSBURY, Hailsham Edn., Vol. 20, pp. 312-315, paras. 369, 370; and FOR CASES, see DIGEST, Vol. 31, pp. 559-561, 563-565, Nos. 7068-7084, 7111-7127.]

Cases referred to :

- (1) *Property Holding Co., Ltd. v. Clark*, [1948] 1 All E.R. 165 ; [1948] 1 K.B. 630 ; [1948] L.J.R. 1066.
- (2) *Wilkes v. Goodwin*, [1923] 2 K.B. 86 ; 92 L.J.K.B. 580 ; 129 L.T. 44 ; 31 Digest 560, 7030.
- (3) *Nye v. Davis*, [1922] 2 K.B. 56 ; 91 L.J.K.B. 545 ; 126 L.T. 537 ; 31 Digest 560, 7072.
- A (4) *White v. Richmond Court, Ltd.*, [1944] 1 All E.R. 689 ; [1944] K.B. 576 ; 113 L.J.K.B. 497 ; 171 L.T. 41 ; 2nd Digest Supp.
- (5) *Bell Property Trust, Ltd. v. Hampstead Borough Assessment Committee*, [1940] 3 All E.R. 640 ; [1940] 2 K.B. 543 ; 109 L.J.K.B. 792 ; 163 L.T. 292 ; 104 J.P. 411 ; 2nd Digest Supp.
- B (6) *Bryanston Property Co., Ltd. v. Edwards*, [1943] 2 All E.R. 646 ; [1944] K.B. 32 ; 113 L.J.K.B. 161 ; 169 L.T. 362 ; 2nd Digest Supp.
- (7) *Tedman v. Whicker*, [1944] 1 All E.R. 26 ; [1944] K.B. 112 ; 113 L.J.K.B. 166 ; 170 L.T. 51 ; 2nd Digest Supp.
- (8) *Conqueror Property Trust, Ltd. v. Barnes Corpn.*, [1944] 1 All E.R. 34 ; [1944] K.B. 96 ; 113 L.J.K.B. 30 ; 170 L.T. 54 ; 108 J.P. 28 ; 2nd Digest Supp.

C APPEAL by the tenant from an order of SLADE, J., dated June 15, 1948, reported [1948] 2 All E.R. 224, whereby the landlords were awarded judgment for £115 2s. 2d., arrears of rent. The decision turned on the amount of the standard rent of the demised premises, which SLADE, J., found to be the aggregate of the amount of the rent reserved in the lease and periodic sums agreed to be paid in a contemporaneous deed in respect of decorative and other works and as a contribution to management costs. The Court of Appeal now dismissed the appeal. The facts appear in the judgment of TUCKER, L.J.

Michael Hoare and T. H. K. Berry for the tenant.

Lionel Blundell and Plume for the landlords.

E TUCKER, L.J. : This is an appeal from a judgment of SLADE, J., in which he decided the issue between the parties in favour of the landlords. There was a claim and counterclaim, and it is common ground that the only issue is whether the standard rent of the property in question is £175 per annum or £275 per annum.

F By a lease of May 23, 1944, made between the plaintiffs (the landlords) and the defendant, the defendant became the tenant of flat No. 12 on the fifth floor of Weymouth Court for a term from June 7, 1944, at a rent of £300 per annum payable quarterly. By a memorandum endorsed on the lease and dated May 7, 1947, the parties agreed that the term should be extended for a further seven years, the rent to be increased to £325 per annum as from June 7, 1948. It is common ground that the sums fixed by that lease and memorandum are in excess of the standard rent and the landlords do not contend otherwise. They G say that the standard rent is £275 and the tenant says it is £175. It is agreed that in 1934 the premises in question were outside the scope of the Rent Restrictions Acts, but that they came within the Acts by virtue of the Act of 1939. Accordingly, by s. 12 (1) (a) of the Rent Restrictions Act, 1920 (as amended) the standard rent for the present purpose is the rent at which the dwelling-house was let on Sept. 1, 1939.

H The only question is at what rent was this dwelling-house let on Sept. 1, 1939 ? On May 31, 1934, the landlords had granted a lease to a Mr. Denham of these premises for seven years from June 24, 1934, for a term thereafter mentioned, at the rent of £175. That document was a lease complete in itself. It required no addition to constitute an effective letting. It contained in cl. 15, and this is much relied on by the tenant, a proviso for re-entry if the rent reserved or any part thereof should be in arrear or unpaid for 21 days after the same became due whether legally demanded or not. On the same day, May 31, 1934, there

was also executed by the landlords and Mr. Denham another agreement, also under seal, and described on its back as a supplemental agreement relating to flat No. 12, Weymouth Court. It is necessary to refer to this agreement in some detail. After stating the parties—who are referred to as the lessors and the lessee—the agreement goes on :

“Whereas the lessors have this day granted unto the lessee a lease in respect of a flat known as 12, Weymouth Court, No. 1, Weymouth Street in the parish of Saint Marylebone in the county of London And whereas the lessors have made considerable decorative and other alterations to the premises And whereas it has been agreed between the parties that the lessee in consideration thereof shall contribute the sum of £10 per quarter, *i.e.*, £40 per annum during the period of his lease towards the cost of the aforesaid alterations in addition to the sum of £60 per annum towards the cost of the management of the building Now it is hereby agreed as follows namely :—
 (1) The lessee shall pay to the lessors the sum of £25 on each of the four quarter days in each year during the period of his lease together with and as the rent reserved by the said lease becomes due. (2) This agreement shall run concurrently with the said lease and shall be deemed at an end as and when the said lease is terminated. (3) All amounts payable hereunder shall be recoverable by distress or otherwise as for rent in arrear. This agreement shall be binding on the person or persons in whom the lease is for the time being vested.”

The question is whether for the purposes of s. 12 of the Act of 1920 (as amended) the rent at which the dwelling-house was let on Sept. 1, 1939, is the aggregate of the sums provided for by those two agreements, or whether it is confined to the sum of £175 described as the rent in the lease. It is to be observed (and, in my view, this is the strongest point in favour of the tenant's contention) that the proviso for re-entry in the event of non-payment does not extend to this sum of £100 per annum payable under the supplemental agreement. That is a matter which it is, no doubt, right and proper to take into consideration in deciding whether the rent includes this extra £100 or not.

The case which has been principally relied on and referred to by both sides is the recent case in this court of *Property Holding Co., Ltd. v. Clark* (1). The effect of that case was, in substance, to approve of the *dictum* of YOUNGER, L.J., in *Wilkes v. Goodwin* (2), where he had in dealing with this question used this language ([1923] 2 K.B. 105) :

“... the word ‘rent’ in this exception surely means not rent in the strict sense but the total payment under the instrument of letting. The exception assumes that ‘rent’ so called may include for example ‘board’ payment of which is not rent. I am here paraphrasing the statement of SHEARMAN, J., in *Nye v. Davis* (3), with which I agree. And the second consideration is that the exception contemplates separate ‘payments’ for any of the three things it specifies—namely, board, attendance, use of furniture, the plural ‘payments’ being in striking contrast with the singular ‘payment’ in s. 9, where only one of these three things, namely, use of furniture, is being dealt with. In my judgment so far from the exception contemplating primarily a tenancy in which rent strictly so called is with these other payments or one of them lumped together under one composite payment designated rent, the contrary is the case. Such a composite payment may indeed be within the exception; but separate payments are within its more immediate contemplation.”

The gist of the *dictum* is contained in the opening sentence, that the word “rent” surely means not rent in the strict sense but the total payment under the instrument of letting. EVERSLED, L.J., in his judgment in the *Property Holding Co.* case (1), although in substance accepting and adopting what

YOUNGER, L.J., had said (which had also been accepted by ASQUITH, L.J.), observed that the language might require some slight modification, because he said ([1948] 1 All E.R. 174):

A "It is possible that the paraphrase suggested by YOUNGER, L.J., 'the total payment under the instrument of letting' may be somewhat too widely stated, for, in a contract of tenancy, there may be included separate and collateral bargains, the payments to be made in respect of such bargains being in substance and reality distinct from the 'rent' as I have defined it. Thus, a contract for the tenancy of a dwelling-house might include a term that, on paying the sum of, say, 10s. a week, the tenant might, during the tenancy or for some different period, have the privilege of garaging his car in the landlord's garage, no part of which was included in the demise."

B With that modification, the language of YOUNGER, L.J., was accepted, I think, by all the members of the court. In *Property Holding Co., Ltd. v. Clark* (1) the court was dealing only with one document. The rights of the parties, whatever they might be, were to be found in one agreement, and the language used by the Lords Justices must be read in those circumstances. The judgments all emphasise the necessity of arriving at the substance and reality of the matter as distinct from the formal and precise language used. SCOTT, L.J., said (*ibid.*, 169):

C "It is the substance that matters, and I am satisfied that in this case the £30 a year was a part of the rent within the meaning of the Rent Restrictions Acts."

D EVERSLED, L.J., said (*ibid.*, 174):

"Looking, therefore, at the substance of the matter, I conclude that the 'rent' within the meaning of the Act under the lease of 1934 was £140 per annum and not £110 per annum."

E In a later passage he emphasises the necessity of looking at the substance of the matter.

I think, therefore, that to ascertain whether the rent is £175 or £275—to ascertain the reality and substance of this transaction—we must look at both documents and see what results from the two read together. Counsel for the tenant argues that in the judgment of EVERSLED, L.J., in *Property Holding Co. v. Clark* (1), a test is laid down as to what constitutes rent for this purpose, and he says the facts of the present case do not come within either suggested definition. EVERSLED, L.J., said (*ibid.*, 173):

G "In my judgment, the question in each case is to determine what in substance is the subject-matter of the tenancy granted to the tenant by the contract. *Prima facie* the rent is the monetary compensation payable by the tenant in consideration for the grant, however it be described or allocated. Alternatively, it may be described (as SCOTT, L.J., has described it) as the contractual monetary obligation the payment of which is the condition of the right to enjoy the property granted."

H Taking the first limb, "the rent is the monetary compensation payable by the tenant in consideration for the grant, however it be described or allocated," counsel for the tenant says the £100 is not monetary compensation payable for the grant because the grant had already been made by the lease and there was nothing more to grant. I would emphasise, as I have already stated, that EVERSLED, L.J., was dealing not with two documents, but with only one document, but I think the way in which he approached the question is applicable to the present case. I think that the £100 here was part of the monetary compensation payable by the tenant in consideration for that which had been granted to him by the landlord under these two documents taken together.

Under the second limb it is said that this £100 does not come under the definition which was suggested by SCOTT, L.J.—the contractual monetary obligation the payment of which is a condition of the right to enjoy the property granted. In *Property Holding Co. v. Clark* (1), there being a proviso for re-entry in the case of non-payment both of the rent and of the sum which was called the additional payment, it is true that the payment of both sums was a condition of the right to continue to enjoy the property, because on non-payment of either of them the landlord could forfeit. I think that is why the word “condition” appears, but I can find nothing in the judgments as a whole to indicate that the view of the court would have been otherwise if there had not been a proviso for re-entry. It is true that SCOTT, L.J., emphasises the existence of this condition and says that he regards it as conclusive, but, none the less, one frequently gets a lease where a sum is payable which nobody could describe as anything other than rent and there is no proviso for any re-entry on non-payment. In those circumstances it is not accurate to say that the payment of the rent is a condition of the continued enjoyment of the property, but all the same it is rent, and, in my view, this extra payment of £100, being payment expressly made in consideration for decorative and other alterations to the premises and as a contribution towards the management of the building, was a payment made in respect of the enjoyment of the demised premises. It was part of the contractual monetary obligation payable under these two agreements taken together and relating to the premises demised. It, therefore, appears to me that, unless there is some authority which forces me to a contrary view, the common sense view of this matter is that the rent payable on Sept. 1, 1939, in respect of these premises was £275 and not £175, and that that is the standard rent of these premises.

I should have mentioned that by Sept. 1, 1939, Mr. Denham, the original tenant, was no longer holding under these agreements. It is common ground that by that date he was holding as a yearly tenant on the terms of the tenancy existing, whatever that may have been, on May 18, 1937. I think the terms of that tenancy should be ascertained by reference to the two documents to which I have referred.

It only remains for me to say that I agree with the view expressed by SLADE, J., that no assistance is to be derived for present purposes from *White v. Richmond Court, Ltd.* (4), because that case dealt with the second limb of the definition of standard rent in the case of houses which were not let on a certain date, the standard rent of which had to be ascertained on the basis of the rent at which the premises were first let after the named date. In *White v. Richmond Court, Ltd.* (4) the question was at what rent the dwelling-house was first let within the meaning of s. 12 (1) (a) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The court held that, a complete lease having been entered into on Mar. 24, 1941, fixing the rent, that was the document which constituted the first letting and the fact that a few hours or a few moments later a separate agreement was entered into varying the first could not alter the fact that the first agreement constituted the first letting. It seems to me that *White v. Richmond Court, Ltd.* (4) is distinguishable from the present case and affords no assistance in the determination of the present question. I find myself in complete agreement with the conclusions arrived at by SLADE, J., and I think the appeal fails.

DENNING L.J. : I agree. It seems to me that the cases relating to the standard rent of flats fall into two groups. First, where a flat was let before Sept. 1, 1939, the courts have determined the standard rent by reference to the total amount payable at Sept. 1, 1939, for the physical hereditament and the services that go with it, such as central heating, hot water, lift and so forth, and including also board, attendance and use of furniture where those are not of sufficient value to take the case out of the Act. It is common know-

ledge that the landlords of flats often divide the total payment into two parts, one part to represent the value of the physical hereditament, the other part to represent the value of the services. The reason is because for rating purposes the value of the flat is fixed without taking the services into account: see *Bell Property Trust, Ltd. v. Assessment Committee for the Borough of Hampstead* (5). As GODDARD, L.J., pointed out in that case, this division of the total payment is sometimes made in one document, namely, the lease itself, as in *Property Holding Co. v. Clark* (1), and sometimes in two documents, as in this case, but howsoever the total payment is split up in the documents the court will ascertain the standard rent by taking the total amount payable for the physical hereditament and the services that go with it.

Secondly, when a flat is let after Sept. 1, 1939, the standard rent is the rent at which it was first let, ascertained again by reference to the total amount payable, but the courts have had regard to the conditions produced by the war. At the end of 1940 and the beginning of 1941 everyone who could do so left London. The rents obtainable for flats were much below the 1939 figure. In that situation some landlords, who did not wish to be saddled permanently with a low standard rent, adopted the device of letting the flat on a lease which on its face stated as the rent the figure which was intended to apply in the post-war period, but containing provisions by which the landlord agreed for the time being to accept a lower rent. This device was sometimes made in one document, namely, the lease itself, as in *Bryanston Property Co., Ltd. v. Edwards* (6), and *Tedman v. Whicker* (7), and sometimes in two documents as in *White v. Richmond Court, Ltd.* (4), but, however it was done, the court determined the standard rent, not by reference to the sum in fact first paid, but by reference to the higher figure stated in the lease, provided it was a real figure. This device was, however, obviously open to abuse, because the landlord might insert in the lease a fictitious figure simply to establish the standard rent at a figure which was higher than was fair or reasonable, as in *Conqueror Property Trust, Ltd. v. Barnes Corpn.* (8). The device has, therefore, so far as I know, never been held to be good, except in the very special class of case where war-time conditions prevented the flat being let at a fair rent, and even in these cases, if the figure stated in the lease is not a reality, the court will reject it and have regard to the rent in fact paid.

These two groups of cases show that the courts endeavour as far as possible to ascertain the standard rent on a realistic and fair basis. The present case falls clearly within the first group. The amount payable in 1939 for the physical hereditament and for the services was £275. The present tenant has the same benefit and should pay the same sum. I agree that the appeal should be dismissed.

ROXBURGH J. : I agree. If the tenant, Mr. Denham, did not agree to make the recurrent quarterly payments of £25 each in consideration of the demise of the premises, I cannot think why he agreed to make them.

Appeal dismissed with costs.
Solicitors: *Bernard Shaffer* (for the tenant); *Clifford-Turner & Co.* (for the landlords).

[*Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.*]

DUCK v. PEACOCK.

[KING'S BENCH DIVISION (Lord Goddard, C.J., and Humphreys, J.), January 14, 1949.]

Street Traffic—Motor vehicle—Driving while under the influence of drink—Disqualification for holding licence—"Special reasons" for not disqualifying—Driver fit when commencing journey—Stopping car on feeling effects of drink A
—Road Traffic Act, 1930 (c. 43), s. 15 (2).

After drinking a quantity of intoxicating liquor, a motorist entered and drove his car. Ten minutes later he felt dizzy, stopped his car, and fell asleep. He was convicted of being in charge of a motor-vehicle while under the influence of drink so that he was incapable of having proper control of it, but he was not disqualified for driving. On a Case stated B by the magistrate,

HELD : the fact that as soon as the incapacity made itself felt the motorist stopped his car was not a "special reason" under the Road Traffic Act, 1930, s. 15 (2) why he should not be disqualified.

Rennison v. Knowler ([1947] 1 All E.R. 302), *sub nom. Knowler v. Rennison* ([1947] K.B. 488; 176 L.T. 271), *applied*. C

[FOR THE ROAD TRAFFIC ACT, 1930, s. 15, see HALSBURY'S STATUTES, Vol. 23, pp. 622-623.]

Case referred to :

- (1) *Rennison v. Knowler*, [1947] 1 All E.R. 302; [1947] L.J.R. 555; 111 J.P. 171; *sub nom. Knowler v. Rennison*, [1947] K.B. 488; 176 D L.T. 271; 2nd Digest Supp.

CASE STATED by a metropolitan magistrate.

At a court of summary jurisdiction sitting at Marlborough Street, London, on July 16, 1948, the respondent was charged by the appellant, an officer of the Metropolitan Police Force, with having been, while in charge of a motor vehicle on a road, Lowndes Square, London, S.W.1, under the influence of drink to such an extent as to be incapable of having proper control of the vehicle, contrary to the Road Traffic Act, 1930, s. 15 (1). The magistrate convicted E the respondent and ordered him to pay a fine of £10 and £10 10s. costs. The magistrate also ordered that the respondent should not be disqualified for holding or obtaining a driving licence on the ground that he had been fit to drive when he began his journey and stopped when he realised that, owing to F being in the open air or for some other reason, he was no longer fit to drive. He held that these facts constituted "special reasons" within the Road Traffic Act, 1930, s. 15 (2). The appellant now appealed against the decision not to disqualify, and the court allowed the appeal. The facts appear in the judgment of LORD GODDARD, C.J.

Vernon Gattie for the appellant.

T. Springer for the respondent. G

LORD GODDARD, C.J. : The learned magistrate convicted the respondent, but he found special reasons for not ordering disqualification. The respondent left Berkeley Street at 10.20 p.m. and drove to Hyde Park Corner accompanied by a friend, who alighted there. The magistrate finds : H

"He drove on towards Sloane Street, and at about 10.30 p.m., on turning into Lowndes Square, he stopped his car because he felt dizzy. He then fell asleep and remembered nothing more until he was awakened by the police at 11.45 p.m."

He had, therefore, been asleep for an hour and a quarter. The magistrate says :

"I was of the opinion that the fact that the respondent was fit to drive when he began his journey and stopped when he realised that, owing to

being in the open air or for some other reason, he was no longer fit to drive was a 'special reason' within s. 15 (2)."

The respondent obviously was not fit to drive when he left Berkeley Street. The position was simply that the effect of the drink had not fully disclosed itself. That he was under the influence of drink is clear because nothing happened in between the time he had his last drink and when he was found to be under the influence of drink.

We said in *Rennison v. Knowler* (1) ([1947] 1 All E.R. 304):

"We are in agreement with decisions given in Scotland that the question whether, on facts found by the court, it is open to the court to hold that special reasons exist is one of law."

Therefore, we have to look at the facts found by the learned magistrate here, and say whether as a matter of law he could hold that a special reason existed.

This is a question, not of driving, but of being in charge of a car. If what is suggested here were a special reason, it would mean that a man who had taken too much to drink so that he was unfit to manage the car or be in charge of it could escape the penalty of disqualification merely by stopping and going to sleep in the car. The court is not going to give any countenance to such a reason as that. The moment when the unfitness shows itself is neither here nor there. The man is under the influence of drink, and he is not any the less under the influence of drink because the symptoms do not show themselves at the moment he starts his journey. In my opinion, on the facts found by the magistrate there was no ground for saying that any special reason existed for not imposing the disqualification which Parliament has decreed shall otherwise be imposed. Therefore, this case must be remitted to the magistrate with an intimation that we think he was wrong in law, and the respondent must be disqualified for the statutory period.

HUMPHREYS, J. : I agree.

Appeal allowed with costs.

Solicitors : *Solicitor for the Metropolitan Police* (for the appellant); *Arthur Robson* (for the respondent).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

F GALASHIELS GAS CO., LTD., v. O'DONNELL (OR MILLAR).

[HOUSE OF LORDS (Lord Normand, Lord Morton of Henryton, Lord MacDermott and Lord Reid), December 6, 7, 1948, January 20, 1949.]

Factory—Lift—"Properly maintained"—Unexplained failure of mechanism—Absolute obligation of occupier—Factories Act, 1937 (c. 67), ss. 22 (1), 152 (1).

By s. 22 (1) of the Factories Act, 1937: "Every hoist or lift shall be of good mechanical construction, sound material and adequate strength, and be properly maintained." By s. 152 (1): "'maintained' means maintained in an efficient state, in efficient working order, and in good repair."

On Oct. 1, 1945, M., who was employed as a stoker in the appellants' gas works, was using an electrically operated lift to carry coke to a screening plant on the first floor. Having reached the first floor with a bogie full of coke, he switched off the power, opened the lift gates and ran the bogie out, leaving the gates open. He then emptied the bogie and ran it back into the lift shaft, but, owing to a failure of the brakes to operate, the lift cage had moved up in the shaft, with the result that both M. and the bogie fell to the bottom of the shaft and M. was killed. After the accident the mechanism was dismantled and examined by experts, but nothing was discovered to account for the failure and it was found that the appellants

had taken every practical step to ensure that the lift mechanism worked properly and was safe to use. In an action by the respondent, M.'s widow, for damages in respect of his death the appellants contended that they were only bound to take such steps as would ensure that the lift was in efficient working order, and that, in the absence of proof of the nature of the defect which caused the accident, the respondent could not succeed.

HELD: the words "shall be . . . properly maintained" in s. 22 (1), read with the definition of "maintained" in s. 152 (1), were imperative and imposed on the occupiers of a factory an absolute and continuing obligation, and there was nothing in the context or the general intention of the Act which could lead to the inference that there should be any qualification of that obligation; to succeed the respondent need only prove that the mechanism of the lift had failed to work efficiently and the failure had caused the accident; and that burden she had discharged.

Dictum of MACNAGHTEN, J., in Cole v. Blackstone & Co., Ltd. ([1943] K.B. 616, 617), approved.

[FOR THE FACTORIES ACT, 1937, ss. 22 (1), 152 (1), see HALSBURY'S STATUTES, Vol. 30, pp. 217, 298.]

Cases referred to:

- (1) *Smith v. Cammell Laird & Co., Ltd.*, [1939] 4 All E.R. 381; [1940] A.C. 242; 109 L.J.K.B. 134; 163 L.T. 9; 104 J.P. 51; 2nd Digest Supp.
- (2) *Potts (or Riddell) v. Reid*, [1942] 2 All E.R. 161; [1943] A.C. 1; 111 L.J.P.C. 65; 167 L.T. 301; 2nd Digest Supp.
- (3) *Carroll v. Barclay (Andrew) & Sons*, [1948] 2 All E.R. 386; [1948] A.C. 477; [1948] L.J.R. 1490.
- (4) *Cole v. Blackstone & Co., Ltd.*, [1943] K.B. 615; 112 L.J.K.B. 510; 107 J.P. 209; 2nd Digest Supp.
- (5) *Wilson & Clyde Coal Co., Ltd. v. English*, [1937] 3 All E.R. 628; [1938] A.C. 57; 106 L.J.P.C. 117; 157 L.T. 406; Digest Supp.
- (6) *Caswell v. Powell Duffryn Associated Collieries, Ltd.*, [1939] 3 All E.R. 722; [1940] A.C. 152; 108 L.J.K.B. 779; 161 L.T. 374; 2nd Digest Supp.
- (7) *Reilly v. Beardmore & Co.*, [1947] S.C. 275; 2nd Digest Supp.
- (8) *Lewis v. Denye*, [1940] 3 All E.R. 299; [1940] A.C. 921; 109 L.J.K.B. 817; 163 L.T. 249; 2nd Digest Supp.
- (9) *Lochgelly Iron & Coal Co., Ltd. v. M'Mullan*, [1934] A.C. 1; 102 L.J.P.C. 123; 149 L.T. 526; Digest Supp.

APPEAL from an interlocutor of the Second Division of the Court of Session (LORD MACKAY *dissentiente*), dated Feb. 6, 1948, affirming an interlocutor of the Lord Ordinary, dated June 13, 1947, in an action by a widow for damages in respect of the death of her husband, George Danse Millar, who died as the result of injuries sustained while working as a stoker in the appellants' gas works.

The accident was due to the failure of a lift on which Millar was working, as the result of which he fell down the lift shaft. The House of Lords held that the appellants, the occupiers of the factory, were under an absolute duty to see that the lift was properly maintained and dismissed the appeal. The facts appear in the opinion of LORD REID.

Guest, K.C., and *J. O. M. Hunter* for the appellants.

James Walker, K.C., *R. S. Johnston* (both of the Scottish Bar) and *Vincent* for the respondent.

The House took time for consideration.

Jan 20. The following opinions were read.

LORD NORMAND: My Lords, I have had the advantage of reading in print the speeches which my noble and learned friends are about to deliver,

A and I find myself in complete agreement with them. The facts will be dealt with by my noble and learned friend, LORD REID. I desire only to emphasise that no new principle and no extension of any principle already recognised is involved in the conclusion that the appellants are liable to the respondent for breach of the duty imposed on them by s. 22 (1) of the Factories Act, 1937. The only question of law in the case is the proper construction of the obligation imposed by s. 22 (1) as controlled by the definition of "maintained" in s. 152 (1), and on that I wish to add nothing.

LORD MORTON OF HENRYTON : My Lords, Section 22 (1) of the Factories Act, 1937, is in the following terms :

"Every hoist or lift shall be of good mechanical construction, sound material and adequate strength, and be properly maintained."

B The statutory duty which, it is alleged, the appellants have failed to discharge is contained in the words, "Every hoist or lift shall be . . . properly maintained" in s. 22 (1) read in conjunction with the definition of "maintained" in s. 152 (1) :

C " 'Maintained' means maintained in an efficient state, in efficient working order, and in good repair."

D There can be no doubt that this sub-section imposes a continuous obligation on the appellants. I shall shortly consider the precise nature of that obligation. Equally there can be no doubt, in view of the findings of fact of the Lord Ordinary (LORD BLADES), that the brake of the lift in question was not in efficient working order at the time when the accident happened, though it would appear to have worked efficiently during the periods before and after the accident.

E The contention of the respondent, which has so far succeeded, is that she has established a breach of statutory duty by the appellants simply by proving that the brake was not in efficient working order at that time. If this contention is sound, the appeal must fail, for contributory negligence by the deceased workman has been negatived and there can be no doubt that the failure of the brake to operate efficiently caused the death of the deceased. The appellants contend that no breach of statutory duty has been proved. They contend that their statutory duty is to take such active steps as will ensure that the lift is in efficient working order, and that the respondent cannot succeed unless she can point to some particular step which the appellants omitted to take and which would have prevented the accident. They say truly that the respondent cannot point to any such step and failed to prove any specific cause for the failure of the brake to operate. They rely strongly on the following passages in the judgment of the Lord Ordinary ([1948] S.L.T. 284) :

G "I am satisfied that the defenders took every practical step to ensure that the lift mechanism worked properly and was safe to use. I am equally satisfied that the failure of the brake was one which, apparently, nobody could have anticipated or, after the event, explain. (*Ibid.*, 285) . . . that the defenders took all reasonable steps to provide a suitable lift and to maintain it properly is to my mind established beyond doubt."

My Lords, in my view, the Lord Ordinary supplied the correct answer to the whole of this argument when he said (*ibid.*, 285) :

H "... in my opinion, there is imposed on the defenders an absolute and continuing obligation binding upon them which is not discharged if at any time their lift mechanism, in this case the brake, is not maintained in an efficient state, in efficient working order, and in good repair."

The words in the sub-section "shall be properly maintained," are imperative, and I can find nothing in the context or in the general intention of the Act, read as a whole, which should lead your Lordships to infer any qualification

on that absolute obligation. It is quite true that the sub-section, so read, imposes a heavy burden on employers, but the object of this group of sections is to protect the workman. I think the sub-section must have been so worded in order to relieve the injured workman from the burden of proving that there was some particular step which the employers could have taken and did not take. This would often be a difficult matter, more especially if the cause of the failure of the mechanism to operate could not be ascertained. The statute renders the task of the injured workman easier by saying: "You need only prove that the mechanism failed to work efficiently and that this failure caused the accident."

Counsel for the appellants contended that a decision against him "would go further than any decided case." I do not agree, but even if I did agree I should not be unduly perturbed. Your Lordships were not referred to any decision on this particular sub-section, but there are other statutory provisions for the protection of workmen which have been held to impose an absolute and continuing obligation on employers: see *Smith v. Cammell Laird & Co., Ltd.* (1), *Riddell v. Reid* (2) and *Carroll v. Barclay* (3). In the last-mentioned case this House had to decide a question as to the nature of the fencing which was required under s. 13 (1) of the Factories Act, 1937, but no member of the House doubted that the obligation as to fencing was absolute and continuous. LORD NORMAND observed ([1948] 2 All E.R. 391):

"The sub-section imposes an absolute obligation in the sense that the obligation, whatever its meaning and effect, must be actually fulfilled and not merely that the occupier of the factory must do his best to fulfil it . . ."

Counsel for the appellants relied on the word "properly" in s. 22 (1) and contended that the presence of this word indicates that the obligation of the employers is limited. I cannot agree. If the word "maintain" alone imposes on the employers the absolute obligation, I cannot see that the addition of the word "properly" can lessen their obligation. In *Cole v. Blackstone & Co., Ltd.* (4), MACNAGHTEN, J., had to consider s. 25 (4) of the same Act which provides that "all ladders shall be soundly constructed and properly maintained." The facts were that when a workman, named Cole, was ascending a ladder a rung gave way, with the result that he fell to the ground and received injuries from which he died. The ladder was subsequently taken to pieces and examined. The strings were made of deal and the rungs of coppice oak, and both the strings and all the rungs, including that which had given way, were found to be in perfect condition. The rungs were screwed to the strings with three-inch steel screws, and it was found that those which had held the rung which had given way had broken in half at a point between the rung and the string, and that the fractures were due to corrosion. All the other screws were in perfect condition. A few weeks before the accident happened the ladder had been inspected by a "safety first" committee appointed by the defendants, to which the workmen elected their own representatives, and nothing had been found requiring attention. Cole, who used the ladder several times a day, had never made any complaint about it. Cole's widow was successful in an action alleging breach of the statutory obligation imposed by s. 25 (4) and MACNAGHTEN, J. ([1943] K.B. 617), said, in regard to the words "properly maintained":

"Mr. Marshall, for the defendants, submitted that the statutory duty to keep the ladder in an efficient state and in good repair is not an absolute duty, and that the words of the Act must be qualified to this extent that, if the employer took all reasonable steps to see that the ladder was in an efficient state and in good repair, he would have discharged his duty. In support of this contention he relied on the observations of LORD WRIGHT in *Wilsons & Clyde Coal Co. v. English* (5), while Mr. Dixon, on the other

hand, relied on the observations made in *Potts (or Riddell) v. Reid* (2). I see no ground for qualifying the words of s. 25 (4) of the Factories Act, 1937. The duty to keep all ladders in an efficient state and in good repair appears to me to be as absolute as the duty imposed by the Act to fence all dangerous parts of machinery. It is true that the defendants took great care for the safety of their men, and that this particular failure was one which, apparently, nobody could have anticipated."

A Later, the learned judge added (*ibid.*):

"... the ladder was not in fact in an efficient state or in good repair on the morning of the accident. The plaintiff, therefore, is entitled to recover compensation..."

B I agree with the reasoning and with the conclusion of MACNAGHTEN, J., and, in my view, a similar construction should be placed on the same phrase "properly maintained" where it appears in s. 22 (1). I have carefully considered all the other sections of the Act which were mentioned in the course of the argument on the present appeal, but I can find nothing in them which throws doubt on this view. Counsel sought to rely on the observation of LORD ATKIN in *Caswell v. Powell Duffryn Associated Collieries, Ltd.* (6) ([1939] 3 All E.R. 729):

C "The statute does not in terms create a statutory cause of action. It does not, for instance, make the employer an insurer."

That observation does not assist the appellants when it is read in its context. LORD ATKIN went on to say:

D "The person who is injured, as in all cases where damage is the gist of the action, must show not only a breach of duty but that his hurt was due to the breach."

So, in the present case the respondent would have failed in her action if the Lord Ordinary had held that there was a breach of duty, but that such breach of duty was not the cause of the fatal accident. Finally, counsel sought to derive assistance from certain observations of the Lord President (LORD COOPER) in *Reilly v. William Beardmore & Co.* (7). In that case the First Division had to consider s. 23 (1) (a) of the Act, which provides:

E "No chain, rope or lifting tackle shall be used unless it is of good construction, sound material, adequate strength and free from patent defect."

F The last five words are not present in the section now under consideration, and, in my view, the Lord President's observations, properly construed, contain nothing which is inconsistent with the views which I have already expressed as to the absolute duty imposed by s. 22 (1). For these reasons, which are in substance the same as the reasons advanced by the majority of the Second Division of the Court of Session, I would dismiss the appeal.

G LORD MACDERMOTT: My Lords, two questions remain for determination in this appeal. The first is the nature of the duty imposed by sub-s. (1) of s. 22 of the Factories Act, 1937; the second is whether the respondent has proved a breach of the duty arising under that sub-section.

Section 22 (1) of the Act of 1937 provides:

H "Every hoist or lift shall be of good mechanical construction, sound material and adequate strength, and be properly maintained."

To this must be added the following definition from s. 152 (1):

"'Maintained' means maintained in an efficient state, in efficient working order, and in good repair."

Leaving out of these provisions the words which are not immediately material the terms of the obligation are: "Every... lift shall be... properly maintained... in efficient working order..."

My Lords, if this means that every lift shall be kept continuously—or at least while it is available for use as a lift—in efficient working order the nature of the obligation is clear. It then falls into a category long recognised and firmly established by authority; it is a strict or absolute duty and neither intention nor lack of care need be shown in order to prove a breach of it. This was not, indeed, disputed, but counsel for the appellants submitted that on the true construction of the sub-section such was not its meaning. He contended that, in this context, “maintained” did not connote the continuance of a state and he relied strongly on the adverb “properly” as introducing something less than an absolute standard. If, he said, the appellants had done all that was reasonable and proper to “maintain” the lift and its mechanism they had not fallen short of what the statute requires. My Lords, the word “maintain,” when used in relation to the state or condition of things, is not always used in the same sense. It may be used to indicate the continuance of a particular state or condition, as when one says of someone that “he maintains his buildings just as they were,” but on occasion it takes colour from the work of maintenance and is used in reference to the acts done or requisite to be done in the course of maintenance, as when one says of another that “he maintains his buildings methodically.” This latter use gives the word “maintained” in relation to machinery rather the meaning of “serviced” or “looked after” or “attended to”—I doubt if there is an exact synonym—and it was in this sense, according to the appellants’ argument, that the word ought to be read in s. 22 (1). If that argument prevails the appeal should succeed as the Lord Ordinary has found that the appellants took

“every practical step to ensure that the lift mechanism worked properly and was safe to use, [and, again that] the failure of the brake was one which, apparently, nobody could have anticipated or, after the event, explain.”

My Lords, had the legislature thought fit not to define “maintained” the submission of counsel for the appellants on this aspect of the case would have encountered less difficulty, but when the terms of the definition are regarded the meaning for which he has contended is, in my opinion, at once displaced. To my mind, they indicate conclusively that in s. 22 (1) “maintained” is employed to denote the *continuance* of a state of working efficiency. In the ordinary use of language one cannot be said to maintain a piece of machinery in efficient working order over a given period if, on occasion within that period, the machinery, whatever the reason, is not in efficient working order. In short, the definition describes a result to be achieved rather than the means of achieving it. I do not think the use of the word “properly” weakens or detracts from the compelling effect of this definition. Why exactly “properly” was inserted is, perhaps, a matter of speculation as the Act does not appear to furnish any very obvious explanation. However this may be, the word is certainly not incompatible with the duty in question being absolute in character. There may be more than one way of discharging such a duty, and I do not see that the quality of the duty need be affected by an additional obligation to discharge it in a proper manner.

I turn now to the second question. Did the respondent prove the breach alleged? The point made against her was that she had failed to do so because the cause of the failure in the lift mechanism had not been discovered and remains a mystery. In my opinion, this point has no substance. There was abundant proof that the mechanism had failed and that that failure resulted in the death of the respondent’s husband. Once the absolute nature of the duty imposed by the statute is established that is proof enough. The obligation was to have the lift “in efficient working order” at the time of the accident, as well as at other times, and the breach of that obligation has been clearly shown. For these reasons I am of opinion that the view taken by the courts in Scotland was right. I would, therefore, affirm the interlocutors and dismiss the appeal.

LORD REID : My Lords, the pursuer and respondent is the widow of George Danse Millar who died as a result of injuries sustained while working as a stoker in the appellants' Gas Works. Coke is discharged from retorts on the ground floor of the gas works into bogies each of which holds about 15 cwt. When each bogie is filled it is run into a lift, taken up to the first floor, run out of the lift along a gantry to a point where it is emptied into a screening plant, then run back into the lift and brought down to be re-filled. At about 9 p.m. on Oct. 1, 1945, the deceased George Millar was engaged in this work. He took a full bogie up in the lift and some time later he was found seriously injured lying with an empty bogie at the bottom of the lift shaft, and the lift was found to be at the top of the lift shaft. He died on the following day as a result of these injuries. The lift was electrically operated. There are gates on the lift and also gates at each floor level. The electric circuit of the power which operates the lift runs through these gates so that if any one of the gates is open the circuit is broken and the power cannot be applied. The lift is attached to wire ropes which pass over a hoist drum at the top of the shaft to a counter balance weight which moves up as the lift moves down, and down as the lift moves up. Power is applied to rotate the hoist drum and so move the lift up or down according to the direction of rotation of the drum. When power is not being applied the drum is held by a brake. The brake shoes are held against the drum by strong springs and the brake can only be taken off by withdrawing the shoes against the pressure of the springs. The force necessary to withdraw the brake shoes is provided by a solenoid which is part of the electric power circuit. When this circuit is closed the flow of the power current magnetises the solenoid with the result that a plunger attached to the brake shoes is moved by magnetic force so as to withdraw the brake shoes from the hoist drum against the pressure of the springs. The hoist drum is then free to rotate. Immediately the power current ceases to flow the solenoid is de-magnetised and the pressure of the springs forces the brake shoes back into position against the hoist drum so that it cannot rotate and therefore the lift cannot move. Accordingly, if this mechanism is in efficient working order it is impossible for the lift to move while any one of the gates is open. What must have happened immediately before the accident to the deceased George Millar is that Millar switched off the power with the lever in the lift cage when he reached the first floor and opened the gates. He then ran the bogie out to the point of discharge, leaving the gates open. He then emptied the bogie, and ran it back to the lift shaft. By this time the lift cage had moved upwards in the shaft. Millar did not see that this had happened and ran the bogie into the lift shaft. The lift not being in place, he and the bogie fell to the bottom of the shaft. It is not now maintained that Millar was guilty of contributory negligence in doing this. Immediately after Millar was discovered the lift was examined. It was found that the liftway gates on the first floor were open and that the lift was at the top of the shaft. The hoist drum and brake shoes were examined but not touched. It was seen that the brake shoes were not gripping the hoist drum. They had not returned to their proper position when Millar switched off the power current in stopping the lift at the first floor. The counterbalance weight is heavier than the empty lift cage and in the absence of a brake this difference of weight moved the lift up and away from the first floor while Millar was unloading the bogie. The next day the appellants asked a firm of lift engineers to carry out a thorough examination. The fitters who were sent to do this found that although the current was off the solenoid plunger had remained in the "energised" position, and, therefore, the brake shoes were clear of the hoist drum. As soon as one of the fitters touched the plunger it moved to the off position and the brake shoes gripped the drum. Every effort was made to find out what had caused the plunger to stick when the solenoid was de-magnetised. The whole mechanism was dismantled and care-

fully examined, but nothing was found to account for the failure. The mechanism was then re-assembled and it worked perfectly. It has continued to work perfectly since the accident and no repairs or renewals have been necessary. For at least nine years before the accident the brake had never been known to fail on any occasion. No satisfactory explanation of this isolated failure has since been found. I agree with the Lord Ordinary in saying :

"I am satisfied that the defenders took every practical step to ensure that the lift mechanism worked properly and was safe to use. I am equally satisfied that the failure of the brake was one which, apparently, nobody could have anticipated or, after the event, explain."

The question at issue in this case is the nature and extent of the duty imposed on employers by s. 22 (1) of the Factories Act, 1937. That sub-section requires that :

"Every hoist or lift shall be of good mechanical construction, sound material and adequate strength, and be properly maintained."

The word "maintained" is defined in s. 152 as meaning "maintained in an efficient state, in efficient working order, and in good repair." It has been held by the Lord Ordinary and by the learned judges of the Second Division, LORD MACKAY dissenting, that this section imposed on the appellants an absolute duty to have the lift in efficient working order, that the accident was caused by its not being in efficient working order, and that, therefore, the respondent is entitled to damages. The appellants' case is that s. 22 (1) of the Act does not impose an absolute duty to keep lifts in efficient working order and that a pursuer cannot succeed without averring and proving the nature of the defect which prevented the lift from being in efficient working order. It was argued that the requirement is, not that the lift shall be in efficient working order, but that the employer shall take all necessary steps to ensure that it is so, and, therefore, that a pursuer must show what it was that the employer could have done to prevent the accident but did not do. It is clear, as the appellants' counsel properly admitted, that the employer's duty under the section goes beyond a duty to take care. It was admitted that the employer is liable in damages where the defect could not have been discovered before the accident by any examination which any reasonable man would have undertaken and even where the defect was a latent defect which could not have been discovered by examination before the accident of the defective part of the mechanism. In such cases it would have been physically possible to prevent the accident. In the present case, as no one has discovered the cause of the defect, the respondent cannot show whether or how the accident could have been prevented, and, therefore, it is said, cannot establish any breach of duty by the appellants.

My Lords, I can understand a duty to exercise a high degree of care and I can understand an absolute duty under which the mere fact that a machine is not in efficient working order entails liability, if that is the cause of injury to a workman, but I find it hard to understand the nature of a duty which falls short of an absolute duty, but yet cannot be discharged even by the highest degree of care, and equally hard to understand what practical object could be achieved by enacting a duty of this character. The result would be that the pursuer would have to undertake an investigation of the precise nature of the defect which would often be difficult and expensive. Where this investigation was successful it would be no defence for the employer to show that he could not by any exercise of care have prevented the accident, but where this investigation failed, as it did in this case, the employer would be under no liability. I think that clear words would be necessary before it could be held that such was the intention of the legislature. Much stress was laid by the appellants' counsel on the word "properly" in s. 22 (1). It was argued that the introduction of this word must be held to have some effect—that, if the section without this word would have imposed an absolute duty, the insertion of the

word could not increase the obligation on the employer, so it must have been intended to reduce that obligation. "Properly" must refer to the conduct of the employer so that the section requires, not that the mechanism shall always be in efficient working order, but that the employer shall take such active steps as are necessary to ensure that it is in efficient working order. It follows that, if a pursuer cannot specify any step which could have been taken by the employer to avoid the accident, he cannot show that the employer was in breach of the statutory duty, and, as the present respondent has not proved the cause of the accident, she cannot point to any particular step which could have been taken to avoid it. My Lords, I cannot attribute any such effect to the use of this word. I think that there may be a much simpler explanation of its use. If the definition of "maintained" in s. 152 had been written into s. 22 (1) there would have been no need to insert the word "properly."

The relevant part of the sub-section would then have read :

"Every hoist or lift shall . . . be maintained in an efficient state, in efficient working order, and in good repair."

But if the definition were not written in and the word "properly" omitted, the result—

"Every hoist or lift shall be of good mechanical construction, sound material and adequate strength, and be maintained"

—would have been so bald as to be misleading. I doubt whether the word "properly" was inserted for any purpose beyond rounding off the sentence.

In any event, it does not appear to me to alter the sense of the sentence. If the duty is proper maintenance, and maintenance is defined as maintenance in efficient working order, then, once it is established that the duty goes beyond a duty to exercise care, the fact that on a particular occasion the mechanism was not in efficient working order shows that there had not been proper maintenance. Reference was made to a number of sections of the Act where the word "maintained" occurs, and, particularly, to ss. 24 and 25 where the phrase "properly maintained" is used, but I do not think that a comparison of these sections with s. 22 assists materially the decision of the present case.

A number of previous decisions was canvassed in argument. In *Cole v. Blackstone & Co.* (4) the accident was caused by the rung of a ladder giving way. The rungs were held in place by steel screws. It was found after the accident that all but one of the screws were in good order, but one screw was badly corroded. That screw broke when the injured workman stepped on the rung which it held. The case was laid on a breach of s. 25 (4) of the Factories Act, 1937, which provides that "all ladders shall be soundly constructed and properly maintained." MACNAGHTEN, J., having held that the ladder was soundly constructed said ([1943] K.B. 616) :

"On the question whether the ladder was in an 'efficient state' and in 'good repair' on the morning of the accident, the fact that the rung gave way establishes, to my mind, beyond question, that the ladder was not in an efficient state and was not in good repair at that time. Mr. Marshall, for the defendants, submitted that the statutory duty to keep the ladder in an efficient state and in good repair is not an absolute duty, and that the words of the Act must be qualified to this extent that, if the employer took all reasonable steps to see that the ladder was in an efficient state and in good repair, he would have discharged his duty. In support of this contention he relied on the observations of LORD WRIGHT in *Wilsons & Clyde Coal Co. v. English* (5), while Mr. Dixon, on the other hand, relied on the observations made in *Riddell v. Reid* (2). I see no ground for qualifying the words of s. 25 (4) of the Factories Act, 1937. The duty to keep all ladders in an efficient state and in good repair appears to me to be as absolute as the duty imposed by the Act to fence all dangerous parts of machinery."

The appellants' counsel sought to displace this interpretation by referring to a number of *dicta*. He was unable to cite any decision which was inconsistent with it. In *Lewis v. Denye* (8), VISCOUNT SIMON, L.C., quoting from a speech of LORD ATKIN in *Caswell's case* (6), said ([1940] 3 All E.R. 304):

“The statute does not in terms create a statutory cause of action. It does not, for instance, make the employer an insurer. The person who is injured, as in all cases where damage is the gist of the action, must show not only a breach of duty but that his hurt was due to the breach.”

That does not appear to me to help the appellants. It is entirely consistent with the existence of an absolute duty. However absolute the duty may be, a pursuer cannot succeed unless he proves that his injury was caused by a breach of that duty. In *Lewis v. Denye* (8) there had been a breach of absolute duty, but the plaintiff's action failed because the cause of his injury was held to be, not that breach of duty, but his own negligence in failing to use a safety device with which he had been furnished. It was, accordingly, appropriate to re-state that such a duty does not make the employer an insurer. If in the present case the appellants had proved that George Millar's death was due to his own negligence and not to their breach of duty they would have succeeded. In *Smith v. Cammell Laird & Co., Ltd.* (1) LORD ATKIN ([1939] 4 All E.R. 390) said:

“It is precisely in the absolute obligation imposed by statute to perform or forbear from performing a specified activity that a breach of statutory duty differs from the obligation imposed by common law, which is to take reasonable care to avoid injuring another.”

It was argued that LORD ATKIN's reference to a “specified activity” means that the pursuer must specify the act, the doing or neglect of which led to the plant not being safe. I do not so read the words. In that case the Shipbuilding Regulations, 1931, made under the Factory and Workshop Act, 1901, provided that “all staging shall be securely constructed of sound and substantial material and shall be maintained in such condition as to ensure the safety of all persons employed.” A workman fell and received injuries as a result of there being a defect in staging, but no point was made in the case about the precise nature of the defect. I think that LORD ATKIN was referring to an activity specified in the statute or regulation: he cannot have meant that there was an absolute obligation to perform or forbear from performing some activity not so specified. Reference was also made to a passage in the speech of LORD WARRINGTON OF CLYFFE in *Lochgelly Iron & Coal Co., Ltd. v. M'Mullan* (9) ([1934] A.C. 13), quoted by LORD THANKERTON in *Riddell v. Reid* (2) ([1942] 2 All E.R. 165), beginning with the words: “If the obligation is to do or abstain from doing a particular thing”, and it was argued that the particular thing which it was the obligation of the respondents to do in the present case to avoid the accident had not been discovered. I do not agree. The obligation of the respondents was that which is expressed in the Act—to maintain the hoist in efficient working order. That is the particular thing which they were under a duty to do. How they did it or how they failed to do it was their concern. It was not the concern of the workman and is not the concern of the respondent. None of the other authorities cited appears to me to have any direct bearing on the present case or to aid in its decision. I agree with the opinions of the majority of the judges of the Second Division and I would dismiss this appeal.

Appeal dismissed with costs.

Solicitors: *J. K. Edmondson & Co.*, agents for *J. Gibson Kerr*, Edinburgh (for the appellants); *Henry Polak & Co.*, agents for *Frederick Robinson*, Edinburgh (for the respondent).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

NATIONAL PROVINCIAL BANK LTD. v. MEYRICK
REDMAYNE FARMS, LTD.
SAME v. M. R. DRIERS, LTD.

[COURT OF APPEAL (Tucker, L.J., and Birkett, J.), January 17, 18, 1949.]

Courts Emergency Powers—Enforcement of remedy—Appointment of receiver—
A “*Circumstances directly or indirectly attributable to any war*”—*Contract*
made after cessation of active hostilities—Onus of proof—Business impeded
by fuel difficulties and shortage of supplies—Courts (Emergency Powers)
Act, 1943 (c. 19), s. 1 (2) (a) (iii), (4) ; s. 2 (3).

On Nov. 6, 1944, a farm company was incorporated with a view to
growing large quantities of lucerne which was to be dried by a drying
company incorporated on July 25, 1945. The companies incurred heavy
debts by way of overdraft with a bank, to secure which, on Oct. 28, 1946,
they executed mortgages on the whole of their assets. The state of the
companies appeared unsatisfactory, and as the overdraft continued to
grow, the bank sought leave under the Courts (Emergency Powers) Act,
1943, s. 1 (2) (a) (iii), to appoint a receiver under the mortgage.

The difficulties experienced by the companies fell into four groups :
fuel permits, fuel cuts, electric load shedding, and shortage of supplies.
As regards fuel permits the evidence was that in 1944, before the contract
for the drying plant was placed, a licence to use anthracite French nuts
for firing boilers was obtained, but in 1946, when, after delays due to
difficulty in obtaining delivery of the plant, the plant was started up,
none was available, and the boilers had to be run on coke which was not
satisfactory. Shortly afterwards the drying company was advised to
convert its apparatus to burn oil, and at first was able to obtain a permit
for diesel oil but later had to use heavy oil the use of which was in an
experimental state for the purpose in question. In consequence, delays
and heavy expenses were incurred. Fuel cuts caused delay in producing
the apparatus to convert the furnaces to each new type of fuel. Electric
load shedding, which commenced early in 1947, on occasion caused complete
break-down of the apparatus, and destruction of large quantities of
lucerne. The shortage of supplies caused prolonged delay in securing
parts of the apparatus, and various expedients had to be resorted to.
It was argued by the companies that their inability immediately to discharge
their indebtedness was occasioned by circumstances “directly or
indirectly attributable to any way in which His Majesty may be engaged,”
within s. 1 (4) of the Act.

HELD : (i) although the drawing of each cheque created a fresh relationship
of debtor and creditor, for the purposes of s. 2 (3) of the Act, the
contract between the parties was the obligation created by the mortgages
of Oct. 28, 1946.

(ii) it was not necessary that the contract should be one made while
hostilities were actively proceeding, but it was sufficient to entitle the
court, under s. 1 (4), to refuse leave to exercise a remedy under if the
circumstances relied on could be traced to be directly or indirectly attributable
to the active period of hostilities of any war.

(iii) the onus of proving that the circumstances relied on were attributable
to the war was on the companies, and, as there was nothing in the
evidence to raise the necessary inference that their difficulties were so
attributable, the onus had not been discharged.

Observations on the exercise by the court of the discretion, given it
by s. 1 (4) of the Act, to refuse leave for the exercise of a right or remedy.

[FOR THE COURTS (EMERGENCY POWERS) ACT, 1943, ss. 1 and 2, see
HALSBURY'S STATUTES, Vol. 36, pp. 465-471.]

APPEAL by two companies against orders of WYNN-PARRY, J., dated Dec. 3, 1948, granting leave under the Courts (Emergency Powers) Act, 1943, s. 1 (2) (a) (iii), to a mortgagee bank to exercise any remedy which was available to it by way of the appointment of a receiver under two mortgages and general charges, dated Oct. 28, 1946, and made between the companies and the bank. WYNN-PARRY, J., refused to accept the companies' argument that their inability to discharge their liabilities was due to "circumstances attributable to any war" within s. 1 (4) of the Act, and he was now upheld by the Court of Appeal. The facts appear in the judgment of TUCKER, L.J.

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Pascoe Hayward, K.C., and *R. W. Goff* for the companies.

P. J. Sykes for the bank.

TUCKER, L.J. : These are two appeals from orders made by WYNN-PARRY, J., under summonses under the Courts (Emergency Powers) Act, 1943, taken out by the National Provincial Bank. To one, the appellants, Meyrick Redmayne Farms, Ltd., were respondents (they have been referred to throughout as the "farm company"), and to the other, the appellants, M. R. Driers, Ltd. (and they have been referred to throughout as the "drying company"), were respondents. In each summons the bank asks for leave to exercise any power they have to appoint a receiver under two mortgages and general charges, each dated Oct. 28, 1946, and made between the bank and each of these companies respectively. The necessity for asking for leave to exercise these powers arises under the Courts (Emergency Powers) Act, 1943, s. 1, which provides :

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(1) Subject to the provisions of this Act, a person shall not be entitled, except with the leave of the appropriate court, to proceed to execution on, or otherwise to the enforcement of, any judgment or order of any court (whether given or made before or after the commencement of this Act) for the payment or recovery of a sum of money. (2) Subject to the provisions of this Act, a person shall not be entitled, except with the leave of the appropriate court—(a) to proceed to exercise any remedy which is available to him by way of— . . . (iii) the appointment of a receiver of any property . . . (v) the realisation of any security . . . (4) If, on any application for such leave as is required under this section for the exercise of any of the rights and remedies mentioned in sub-ss. (1), (2) and (3) of this section, the appropriate court is of opinion that the person liable to satisfy the judgment or order, or to pay the rent or other debt, or to perform the obligation, in question is unable immediately to do so by reason of circumstances directly or indirectly attributable to any war in which His Majesty may be engaged, the court may, subject to the provisions of this Act, refuse leave for the exercise of that right or remedy, or give leave therefor subject to such restrictions and conditions as the court thinks proper."

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Section 2 provides :

"(3) Where an application is made by any person under the foregoing section for leave to exercise or take any of the remedies or proceedings mentioned in sub-s. (2) of that section (other than those mentioned in the proviso to that sub-section) which are available to him in consequence of any default in the payment of a debt or the performance of an obligation, being a debt or obligation arising by virtue of a contract made after the commencement of the Courts (Emergency Powers) Act, 1939, the appropriate court shall not, subject to the provisions of this Act relating to mortgaged dwelling-houses, exercise its powers under sub-s. (4) of that section unless it is satisfied that the circumstances referred to in that sub-section arose after the contract was made."

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Two questions have been raised with regard to the proper construction of those two sections, and I propose to deal with them at the outset. Before doing so it is necessary just to state in outline how the questions arise. The mortgages and general charges in question, dated Oct. 28, 1946, are under seal, and provide in cl. 1 :

- A "The mortgagor covenants with the bank that the mortgagor will on demand pay to the bank all such sums of money as now are or as shall from time to time be owing by the mortgagor or by the mortgagor jointly with any other or others in partnership or otherwise and whether as principal or surety to the bank anywhere upon banking account or upon any discount or other account or for any other matter or thing whatsoever including interest discount commission and all other banking charges."
- B The total sum of money which is now due from these two companies under those documents is some £166,700, the indebtedness of the drying company being £65,970 and of the farm company £100,744. The debts were demanded of these companies on Sept. 24, 1948, and the summonses which were issued in the present proceedings are entitled: "In the matter of the Courts (Emergency Powers) Act, 1943, and in the matter of a Mortgage and General Charge dated the 28th day of October, 1946." In my view, the contract in question for the purposes of s. 2 (3) of the Courts (Emergency Powers) Act, 1943, is the contract which arises out of these mortgages and general charges by reason of the covenant in cl. 1 by the mortgagor to pay the bank on demand "all such sums of money as now are or as shall from time to time be owing."

- D It is said by counsel for the bank that the true view of the matter is that, as these companies had considerable overdrafts at the bank, each drawing created a fresh relationship of debtor and creditor, and as the accounts were never in credit there was a continuous series of contracts, some of which may have been created after the circumstances attributable to the war which are relied on, and some of which may have preceded them. He says that it is the duty of the companies to dissect these accounts and show to the court the circumstances which have affected each particular contract, and then show that those circumstances are attributable to the war. On the other hand, counsel for the companies contends that, although, no doubt, it is perfectly true that in a relationship between banker and customer each drawing of a cheque creates a relationship of debtor and creditor, none the less in this particular case the bank have elected to proceed under these documents, they have called in the sums of money pursuant to their rights under cl. 1 of the mortgages, and they are bringing these proceedings seeking to obtain leave to enforce the remedies given to them by the documents. In my view, the submission of counsel for the companies is the correct one, and I think for the purposes of this sub-section we have to regard the contract between the parties as the obligation created by cl. 1 of these mortgages and general charges of Oct. 28, 1946. That is a view which I think WYNN-PARRY, J., was disposed to take, but he did not find it necessary to express a final view on the matter.

- G That being so, the companies rely on a series of matters which arose after October, 1946, and which, they say, are attributable directly or indirectly to the war. That brings me to the second point of construction, which arises under s. 1 (4). It relates to the words: "by reason of circumstances directly or indirectly attributable to any war in which His Majesty may be engaged." Reading those words in reference to the concluding words of s. 2 (3), "unless it is satisfied that the circumstances referred to in that sub-section arose after the contract was made," counsel for the bank submits that the contract there referred to must have been made during a period when His Majesty was actively engaged in war. He concedes that on Oct. 28, 1946, a state of war was still in existence, but he says it was not actively proceeding, and, therefore, it would not be correct to say that His Majesty was then engaged in a war.

I am unable to accept that construction of these sections. The circumstances relied on must, of course, occur after the contract, but, in my view, it is sufficient if those circumstances are proved, and can be traced, to be directly or indirectly attributable to any war, that is to say, any war which may have been previously existing but which does not necessarily exist at the time of the contract. However, I agree, and I think counsel for the companies agrees, that, in applying these sections, it is necessary to show that the circumstances relied on are directly or indirectly attributable to the active period of hostilities. Counsel for the companies contends that he can fulfil those requirements in the present case. He says that he has a contract made in October, 1946, that circumstances exist which have affected the ability of his clients to pay, and that he must then go on to show that those circumstances are directly attributable to the conditions prevailing at the time of the actual hostilities, which he can do. Any other construction would be impossible. I, therefore, proceed to deal with the facts of the case on the footing that these contentions are correct.

The circumstances in which the companies contend that the bank should not be given leave to proceed are as follows. These two companies were incorporated in 1944 and 1945 respectively. They are closely inter-connected. The shareholders are identical and the directors of each are the same, with the exception that the wife of one of the directors is a director of one company, and not of the other. At the time when these mortgages and general charges were executed the companies had previously had their account with the Westminster Bank, and the position was that the drying company were overdrawn some £4,000 and the farm company some £65,000, making a total of £69,000 as against the present indebtedness of considerably over £166,000. The National Provincial Bank took over those accounts and these deeds were executed. The scheme was that the farm company should cultivate lucerne for the purpose principally of cattle feeding, together with other crops, and that the drying company should dry the lucerne before it was put on the market to render it suitable for use as a feeding stuff. Shortly, the case for the companies was that in October, 1946, when they entered into these deeds, they expected that the necessary plant which would be required for drying purposes would be ready in May, 1947, but they say that, in fact, it was not ready until September, 1948, and even then it had not the full capacity which was originally anticipated. They say that the reason why the plant was not ready by May, 1946, was owing to circumstances which were attributable directly or indirectly to the war. In the affidavit of Mr. Allen-Meyrick, the managing director, he says that the circumstances fall to be dealt with under four heads: fuel permits, fuel cuts, electric load shedding and shortage of supplies. With regard to fuel permits, he says:

"In 1944 before the contract for the plant was placed the drying company obtained licence from the Ministry of Fuel and Power to use anthracite French nuts for firing the furnaces. In 1946, when the plant was started up, none was available, and the furnaces had to be run on coke which was not satisfactory. Major Ramsay Green, therefore, advised shortly after the date of the mortgage that while reconstructing the plant it should be converted to burn oil and a licence to use diesel oil was applied for in or about December, 1946, or January, 1947. The Ministry, however, would only give a temporary permit allowing diesel oil to be used for 1947 to give time for adaptation of the plant for burning heavy oil and subject thereto required the drying company to use heavy oil. Such oil can only be used if pre-heated. It, therefore, became necessary to obtain additional plant for this purpose. Moreover, while diesel oil has long since been used for heating this type of plant, the use of heavy oil for such a purpose had not, before 1948, been put to commercial use on any

appreciable scale and was in an experimental stage. The result was that the drying company was put to considerable expense in obtaining the additional plant required and production in 1948 was much hampered while experiments were made in the use of heavy oil. In particular, it was found that heavy oil requires a much larger intake of secondary air than diesel oil and that the secondary air inlets were not large enough and production was seriously hampered for about six weeks while they were altered."

The court is asked to infer that those circumstances were due directly or indirectly to the war. There is no direct evidence given to that effect, and, in my view, the dominating circumstance appears to have been the inability to procure these anthracite French nuts for firing furnaces. It is not clear from the affidavit the precise moment of time when it became apparent that that source of fuel would not be available, but I think it is clear that that was appreciated before these mortgages were executed. Furthermore, this matter has been referred to more than once as due to a shortage of diesel oil. As I think counsel for the bank rightly points out, there is really nothing in these paragraphs to show that there was, in fact, a shortage of diesel oil or that that shortage, if it existed, was attributable to the war, directly or indirectly. This is one of the instances in which the whole thing depends on inference. WYNN-PARRY, J., came to the conclusion that in all these matters the companies had failed to discharge the burden that lay on them of proving that the circumstances on which they relied can really and truly be said to be attributable directly or indirectly to the war. With regard to this question of fuel permits I find myself in agreement with the view arrived at by the learned judge.

The next matter is with regard to fuel cuts. In his affidavit Mr. Allen-Meyrick says :

"The tremendous fuel cuts which occurred in January, 1947, completely stopped the work of the contractor and sub-contractors who were engaged on the work of converting the plant to an oil burning unit with the result that instead of the plant being ready on Mar. 20, 1947, it was not possible to use it even for a trial run until May 25, 1947, and only one furnace could be used at all throughout 1947 as the fuel cuts had so delayed production that it was impossible in that year to obtain all the requisite apparatus to convert the other."

Similarly, with regard to these fuel cuts, I think that this affidavit does not contain material to enable the court to conclude by necessary inference that these cuts were due to the war. The shortage may have been due to numerous circumstances, and I think it is incumbent in a case of this kind for the party who is relying on such a matter as this to show its direct connection with matters which have arisen during the war and not simply to ask the court to infer that every difficulty in the post-war life of this country is necessarily due to some circumstance which arose during the war.

The next matter is the electric load shedding. Counsel for the companies says, whatever the position may be with regard to the other circumstances, that he has a strong case with regard to electric load shedding. The affidavit on that point says :

"Load shedding of electric current is carried out on the instructions of the generation division of the British Electricity Authority and I have made inquiries and am informed by Mr. Whitely of the local electric board (formerly the East Anglian Electric Supply Co.) and verily believe that it commenced early in 1947 but was not much resorted to in that year and that there has been very considerable load shedding since April, 1948."

Then there is exhibited a circular from the Bury St. Edmunds and District Electricity Committee dated Nov. 22, 1947, showing that "arbitrary cutting

off of supply was then apprehended and that the position was brought about by the shortage of electricity generating plant throughout the country." The deponent goes on to explain that the heat of the furnaces is controlled by fans operated by electrically driven motors which also work throwers passing the product through the drying chambers. He explains that when there is load shedding the machinery is adversely affected and it was only after they had experienced the difficulties resulting from load shedding that they were able to take the necessary steps to minimise the effects by fitting to the mains volt meters which registered the load shedding and enabled immediate adjustments to be made, but that they had to wait six weeks after placing their order before delivery could be obtained. There is no explanation given here of the reasons for the shortage of electricity generating plant throughout the country. It is said that we must infer that that was due to the war to the exclusion of other possible causes. Counsel for the bank says that for all we know it may have been due to local conditions or to the need to export the necessary plant, and he further points out—and I think this is, perhaps, his best point—that the necessity for load shedding may have been due to the increased demand for electricity in this country. Counsel says that the mere fact that that may be a possibility is sufficient for his purpose and this court cannot infer that but for the war those shortages would have been made good to such an extent that there would have been no load shedding in this part of England. It seems to me that the argument of counsel for the bank on that point is unanswerable, and I certainly accede to it.

Finally, we come to the question of the shortage of supplies. Here, again, the matter is put in very general and very vague terms. Mr. Allen-Meyrick says :

"Owing to shortage of supplies much of the work of reconstruction contemplated when the mortgage was entered into had to be carried out with materials not up to specification which has caused repeated troubles involving loss of production and expensive replacements of which the following are notable examples. In or about May, 1948, to replace unsatisfactory ones, new worm conveyors were installed for carrying the produce from the drying chambers. These were made of lighter steel than specified by the engineers with the result that they quickly bent. Temporary repairs were effected, but the proper steel to enable a permanent replacement to be made was not obtainable for several weeks . . . The self feeder requires a variable speed gear box. One known to be too light had to be fitted in May, 1947, with the result that it broke down completely in or about May, 1948. It was then replaced with a fixed speed gear box which during the months of May, June, or July, 1948, repeatedly became overheated and caused the self feeder to break down again. A proper variable speed gear box could not be purchased until June, 1948, when a second-hand one was secured and the necessary adjustments and installation could not be effected before July. To make the plant properly effective it required a brattice elevator, which is a highly specialised plant for teasing out the material to secure an even flow, largely used in the textile industry. The experts in the manufacture of this apparatus are Petrie and MacNaught of Rochdale and early in 1947 they were asked to quote for the construction of a brattice elevator, but they were unable to undertake it at all owing largely to the post-war export drive. A less experienced firm had, therefore, to be instructed. They made a brattice elevator, but it was not sufficiently robust. In the winter of 1947, Messrs. Petrie and MacNaught being still not available, a new and stronger brattice elevator was constructed by the same firm as before. This, however, required chains known as Renolds chains, but these were quite unobtainable and the contractors had to make the tools to make some

substitute chains themselves. Much trouble was also experienced with a new cooling conveyor belt installed early in 1948, but it was impossible to obtain the right type of belting owing to the demands of the Ministry of Fuel and Power for the coal mines. These troubles have now been largely overcome and the plant is working perfectly except that we still have to hand feed it and this prevents us from using both units at the same time."

- A Those paragraphs show that there were a series of troubles—what may possibly be described as teething troubles with a machine of this kind—which required adjustments and replacements, but, in my view, those paragraphs greatly lack the kind of evidence which is necessary to establish that the troubles were attributable directly or indirectly to the war. Much more
- B detailed evidence showing the precise connection with the war is, in my view, necessary before a case of this kind can be made out, and I find myself entirely in agreement with the view expressed by WYNN-PARRY, J., that, the further you get from the period of the cessation of hostilities, the more necessary it becomes to have clear and cogent evidence showing that the troubles that are being experienced are in truth and in fact attributable to
- C the war, and showing the precise connection between those troubles and the war conditions which are relied on. My criticism of the whole of the affidavit is that it is far too vague and general in its terms to afford the court the assistance which it would require before coming to the conclusion that a case had been made out under this Act, a case precluding the parties to a contract freely entered into from enforcing the rights given to them under such a contract.
- D Therefore, I come to the conclusion that the decision of WYNN-PARRY, J., that the companies had not discharged the onus which lay on them of proving that the circumstances they relied on were attributable directly or indirectly to the war is right.

- That would be sufficient to dispose of the case, and that was the ground on which the learned judge primarily dealt with it, but I think it is necessary
- E and desirable to refer to the exercise of the court's discretion. If I had come to a contrary view with regard to these matters and had thought that the companies had just brought themselves within the four corners of the language of this Act of Parliament, what would have been the position then? In my view, in a case of this kind there are matters which it would be very material to consider in deciding the manner in which the court should exercise its
- F discretion. First, assuming, as I say, that the immediate circumstances, namely, the behaviour of this machine, to use a convenient phrase, due to all these causes, could be attributed to the war, none the less I think it is most material, with regard to the exercise of the discretion, to bear in mind the conditions which existed at the time the contract was entered into. The general post-war world position and the difficulties with regard to
- G trade and fuel and all those matters had already taken place in October, 1946. The active war had come to an end and people who entered into obligations of this kind did so with their eyes open with regard to many of the existing post-war difficulties resulting from the war. Although in a case of this kind it may be right to say that it is the ultimate immediate circumstance which brings the company within the Act, none the less I think it most
- H material, with regard to the exercise of the discretion, to bear in mind the general conditions which prevailed at the time the contract was entered into. From first to last these companies have never produced any audited accounts at all. It is, furthermore, a fact that they did not keep proper books. Those are statutory requirements and it would ill become them to come to court and seek to rely on the special provisions of the Act of 1943 when they had shown complete disregard of every statutory obligation put on them. Apart from that, I think it is most material to the court, in order to assess the prospects

of these companies and the extent to which their inability to pay is due to the matters of which they complain, that the court should have properly audited accounts before it can decide whether the discretion should be exercised. These companies have deliberately refrained from producing these accounts although they have been requested to do so from time to time. The excuses which have been put forward are very unconvincing, and it is not suggested that any proper audited accounts are forthcoming.

Looking at the case as a whole, I think that the companies have not discharged the onus which lies on them of showing that the circumstances on which they rely were attributable directly or indirectly to the war. Furthermore, on the material before me, speaking for myself, I am by no means satisfied that the optimistic view which was taken—I will assume genuinely taken—with regard to the prospects of these companies would have been realised even if these difficulties had not arisen. I am by no means satisfied on the material before me that the companies would have been in a position to discharge and meet the whole of this heavy liability even if things had gone as well for them as those connected with them expected in their most optimistic moments. Finally, if the view I have taken with regard to the onus of proof were wrong, or should be held to be wrong, none the less, for the reasons I have indicated, this is not a case in which, if I had to exercise my discretion I should exercise it in favour of the companies. For all those reasons I think those appeals fail.

BIRKETT, J.: I am of the same opinion as my Lord that for the purpose of the Act of 1943, the date of the contract is to be taken as Oct. 28, 1946. With regard to the construction of the Act I desire to add nothing further to what my Lord has said, save to say that I agree with the construction which my Lord has placed on it.

The whole conflict has taken place on the question whether the companies have discharged the onus of proof which rests on them to show that their inability to meet their obligations under the document of Oct. 28 arises from circumstances directly or indirectly attributable to the war. With regard to the fuel permits, the more that matter is examined the more difficult it is to draw the inference which counsel for the companies asks us to draw, namely, that those difficulties were directly or indirectly attributable to the war. It is plain that the first difficulty was the shortage of the anthracite French nuts. The companies had proceeded on the basis that anthracite French nuts would be used, and it was found that no supplies were available. There came the suggestion of the use of diesel oil and the temporary permit for its use. After that came the treatment of the heavy oil, because the licence for the diesel oil could not be prolonged. All those things clearly followed from the failure of the supplies of the anthracite French nuts, but how it can be said that it is a matter of necessary inference that the shortage of anthracite French nuts was a circumstance to be attributed directly or even indirectly to the war it is very difficult to see. It may have been indirectly attributable or it may not.

With regard to the fuel cuts, I gather that the real complaint was that they were of such a nature that they delayed the work of the contractor and so necessary machinery for the drying company was delayed with the consequence of loss, but nothing more than that mere statement is before us. Again I find it difficult to draw the necessary inference that those difficulties were directly or indirectly attributable to the war.

The electric load shedding was a matter on which counsel for the companies spent some considerable time. The circular which was exhibited to the affidavit began: "Owing to the shortage of electricity generating plant throughout the country . . .", and we were asked to say that there were no two possible inferences about that—it must be due to the war, directly or indirectly, because

during the war all our efforts were directed elsewhere, there was no money or labour to devote to these matters, and, therefore, generating plant became obsolete and in need of repair. Of course, that may have been the source of the trouble, but equally it may not. All through the circular there is the suggestion that by co-operation the evils which necessarily arise may be minimised, but it by no means states that the lack of generating plant is due to the circumstances of the war. The inference that one would draw from that circular was that, whatever the state of the generating plant, the industrial use of electricity was on such a scale that the generating plant itself was not capable of dealing with it. I find it impossible to draw the necessary inference that the shedding of the load which is complained of in this case was directly or indirectly attributable to the war. Similarly with regard to the shortage of supplies, in my view, the onus of proving those matters being on the companies, they have failed to discharge it.

Without going any further into the case, I should just like to say also that, had it been a matter in which the exercise of discretion had been called for, for the reasons given by my Lord I should also have been of the opinion that the discretion ought not to be exercised in the companies' favour. For those reasons I am of the same opinion as my Lord, that these appeals ought to be dismissed.

Appeal dismissed. An order for costs was not asked for.

Solicitors: *Brown, Turner, Compton Carr & Co.* (for the companies);
Wilde, Sapte & Co. (for the bank).

[*Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.*]

MUNDAY v. METROPOLITAN POLICE DISTRICT RECEIVER.

[KING'S BENCH DIVISION (Pritchard, J.), January 20, 1949.]

Riot—Damage—Compensation—Invasion of private property by crowd wishing to see football match—Riot (Damages) Act, 1886 (c. 38), s. 2 (1).

On the closing of a football ground because it was full to capacity, a crowd waiting to see the match invaded the garden of a neighbouring house, the property of the plaintiff, by bursting through the gates, and some 40 or 50 persons climbed by ladders on to the garage roof. The plaintiff's gardener was knocked down, and, when trying to recover the ladder, he was struck and threatened. The plaintiff's daughter tried to keep people out by holding the gates, but two men held her against the wall and prevented her doing so. She and others were frightened, and the property was damaged.

HELD: the execution of a common purpose by more than three persons with an intent to help each other, by force, if necessary, against any person opposing them and the causing of alarm to at least one person of reasonable firmness and courage having been proved, there had been a riot, and the plaintiff was entitled to recover compensation under the Riot (Damages) Act, 1886, s. 2 (1) in respect of the damage to his property.

Principle in Ford v. Metropolitan Police District Receiver ([1921] 2 K.B. 344; 125 L.T. 18) and *Field v. Metropolitan Police Receiver* ([1907] 2 K.B. 853; 97 L.T. 639), *applied*.

[AS TO COMPENSATION FOR DAMAGE BY RIOT, see HALSBURY, Hailsham Edn., Vol. 25, pp. 359-361, paras. 604-609; and FOR CASES, see DIGEST, Vol. 37, pp. 190-192, Nos. 105-124.]

Cases referred to:

(1) *Ford v. Metropolitan Police District Receiver*, [1921] 2 K.B. 344; 125 L.T. 18; 37 Digest 190, 109.

(2) *Field v. Metropolitan Police Receiver*, [1907] 2 K.B. 853; 97 L.T. 639; 71 J.P. 494; 37 Digest 190, 111.

ACTION for compensation under the Riot (Damages) Act, 1886, ss. 2 (1) and 4 (1).

The plaintiff was a householder whose property was damaged by the intrusion of a crowd intent on seeing a football match on a neighbouring football ground, the gates of the ground having been closed when the ground was filled with spectators. The issue was whether the action of the crowd constituted a riot and so entitled the householder to recover compensation for the damage from the Receiver for the Metropolitan Police District under the Riot (Damages) Act, 1886, s. 2 (1). PRITCHARD, J., found for the plaintiff. The facts appear in the judgment.

Stephen Chapman for the plaintiff.

Elwes for the defendant.

PRITCHARD, J. : The plaintiff, Mr. John Robert Munday, sues the Receiver for the Metropolitan Police District under the terms of the Riot (Damages) Act, 1886, alleging that, as a result of what is called a riot on Nov. 13, 1945, some property which was owned by him and is adjacent to the Stamford Bridge Athletic Ground, the ground of the Chelsea Association Football Club, was damaged by the persons said to have taken part in the riot.

The Riot (Damages) Act, 1886, s. 2 (1) provides :

“Where a house, shop, or building in any police district has been injured or destroyed, or the property therein has been injured, stolen, or destroyed, by any persons riotously and tumultuously assembled together, such compensation as hereinafter mentioned shall be paid out of the police rate of such district to any person who has sustained loss by such injury, stealing, or destruction . . .

Section 3 of the Act provides a mode of awarding compensation, and s. 4 (1) provides :

“Where a claim to compensation has been made in accordance with the regulations, and the claimant is aggrieved by the refusal or failure of the police authority to fix compensation upon such claim, or by the amount of compensation fixed, he may bring an action against the police authority to recover compensation in respect of all or any of the matters mentioned in such claim . . .”

It is admitted that all the preliminary steps have been properly taken which are conditions precedent to the plaintiff bringing this action. By the defendant it is admitted that the only point of the case is whether or not, on the facts which are proved what happened on Nov. 13, 1945, constituted a riot.

It is laid down in *Ford v. Metropolitan Police District Receiver* (1) and *Field v. Metropolitan Police Receiver* (2) what facts must be proved to constitute a riot. From those cases it is clear that there are five necessary elements : (1) The number of persons concerned must be at least three ; (2) they must have a common purpose ; (3) the execution or inception of that common purpose must be proved ; (4) there must also be proved an intent on the part of the persons in question to help one another, by force if necessary, against any person who may oppose them in the execution of that common purpose ; and (5) there must be proved force or violence, not merely used in and about the common purpose, but displayed in such a manner as to alarm at least one person of reasonable firmness and courage. I find each one of these elements proved. There were many more than three persons concerned. They had a common purpose. The execution or inception of the common purpose is clear. I think the persons engaged had the intent to help one another, by force if

necessary, against any person who opposed them in the execution of the common purpose, and I find that not only was there force or violence used for demolishing property, but it was also displayed in such a manner as to alarm at least one person of reasonable firmness and courage.

The matter arose in this way. On Nov. 13, 1945, the Chelsea Football Club were due to play a match on their own ground against a team called the Moscow Dynamos, which at that time was visiting this country from Russia. The match caused considerable excitement among people who followed football, and there was an enormous crowd eager to see it. Some time before the kick-off the gates of the ground were closed because those responsible for the ground had come to the conclusion that it was filled to capacity. Outside the ground many hundreds, if not thousands, of people were waiting to get in, including many with tickets which in the ordinary way ought to have admitted them into the ground, and for which, no doubt, they had paid. Adjacent to the ground are a number of houses—Nos. 402 to 426 (inclusive) Fulham Road. When the gates of the ground were shut it occurred to some of the more enterprising spirits in the crowd outside that they might be able to see the match by invading these houses, and that they did on a very large scale. In the result, the property belonging to the plaintiff was damaged to an amount of £175. The plaintiff's gardener, Mr. James Green, told me what he remembers of that afternoon. He saw a large crowd outside the garden, he saw the garage gate burst open, and hundreds of people rush in, and, he says: "They took my two ladders and they climbed on to the roof of the garage." He tried to rescue his ladders, and he was there on top of the garage with some 40 or 50 men and women, trying to get his ladders back. He was knocked down, and told by one or more members of the crowd on the garage roof that, if he did not put the ladder down, he would be got down himself. He said he was looking after the property he was paid to look after. One man "hit him a bang," and when he got on to the garage roof, apparently a second time, another man hit him with a bottle. It is clear from his evidence that there was a riot, not only in the technical sense, but also in the ordinary sense of that word.

Mr. Green's evidence proves every one of the elements about which I have to be satisfied, except, possibly, the putting in fear of a person of reasonable firmness and courage. Mr. Green says that he was not afraid, but I am rather disposed to think that he was possessed of firmness and courage in a degree which other witnesses did not possess, and I find here that other people were afraid. I am quite satisfied from the evidence of the plaintiff's daughter, Miss Munday, that she was afraid. She went out to try and get some people out of the garden and to keep them out by holding the gates, but two men got hold of her and held her against the wall. She said: "I kicked and cried 'Let me go,' " and she said that she was frightened. Other witnesses have said also that they were frightened, and it is unnecessary to detail their evidence or to go into it any further. I am quite satisfied that the element of fear was present, and, therefore, I hold that what took place was a riot and that the plaintiff is entitled to the compensation of £175 which he claims. I give judgment for him for that amount.

Judgment for the plaintiff with costs.

Solicitors: *Clark & Son* (for the plaintiff); *Ellis & Ellis* (for the defendant).
[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

CARTER v. PICKERING.

[KING'S BENCH DIVISION (Lord Goddard, C.J. and Humphreys, J.), January 14, 1949.]

Intoxicating Liquor—Licence—Justices' licence—Surrender—Application for new licence—Existing licence handed to justices' clerk before hearing—New licence refused—Original licence returned to licensee—Licensing (Consolidation) Act, 1910 (c. 24), s. 65 (1).

The licensee of a public house applied to the licensing justices for the issue of a fresh licence free from certain conditions which had been attached to his existing licence. Before the hearing of the application he handed his existing licence to the justices' clerk to enable the justices to retain it and to issue a new licence (if they were so minded) without there being two licences in force simultaneously. The application was refused and the old licence was handed back to the licensee. He was subsequently prosecuted for having sold intoxicating liquor by retail without holding a justices' licence, contrary to the Licensing (Consolidation) Act, 1910, s. 65, on the ground that the old licence had been surrendered and was no longer in force.

HELD: a licence was surrendered to the justices only if the justices accepted it, and, since the original licence had been returned to the licensee, it was not surrendered, but was still in force.

R. v. Taylor. R. v. Amendt ([1915] 2 K.B. 593; 113 L.T. 167), considered.

[AS TO SALE WITHOUT JUSTICES' LICENCE, see HALSBURY, Hailsham Edn., Vol. 19, pp. 124, 125, para. 293.]

AS TO DURATION OF LICENCES, see HALSBURY, Hailsham Edn., Vol. 19, p. 36, paras. 95-98.]

Case referred to :

- (1) *R. v. Taylor, R. v. Amendt*, [1915] 2 K.B. 593; 113 L.T. 167; *sub nom. R. v. Taylor, Ex. p. A.-G., R. v. Amendt, Ex. p. same*, 79 J.P. 332; 30 Digest 35, 272.

CASE STATED by Sussex justices.

At a court of summary jurisdiction sitting at Hayward's Heath on Aug. 4, 1948, an information was preferred by the appellant, Clarence Richard Carter, a licensed victualler, charging the respondent, Cyril John Pickering, under the Licensing (Consolidation) Act, 1910, s. 65, with having sold by retail intoxicating liquor—namely, beer—which he was not licensed to sell. The appellant contended that the respondent's original justices' licence had been surrendered when it was handed to the justices' clerk before the hearing of an application for the issue of a fresh licence which had been refused. The justices held that the decisions in *R. v. Taylor, R. v. Amendt* (1) had been overruled by the Finance Act, 1947, s. 73 (1), and that the handing in of the old licence (which had subsequently been returned to the respondent) did not amount to a surrender of it and they dismissed the information. An appeal from their decision was now dismissed by the Divisional Court.

Sidney Lamb for the appellant.

Percy Lamb for the respondent.

HUMPHREYS, J.: My Lord has asked me to give judgment first in this case.

The respondent, who held a full public-house licence granted for a term on conditions, desired to have the conditions removed from the licence and applied to the justices at the general annual licensing meeting for their consent thereto. He was represented by a solicitor who was, apparently, of the opinion that he must hand in his existing licence to the justices' clerk before, or at

the time of, the application. His solicitor, therefore, handed in the licence to the justices' clerk with the information that the document would be required in the course of the application then before the court. In my opinion, the effect of handing in the document was merely to assure the justices that they could keep that document if they were minded to issue a different one, *i.e.*, a licence without the conditions indorsed on them. The application to grant the licence without the conditions was refused on its merits, and the piece of paper, which is called the licence and is, in fact, a permission to obtain from the excise authorities a licence to sell liquor at the named premises, was returned by the clerk to the justices to the respondent's solicitor.

After having the document handed back to him, the respondent continued to sell intoxicating liquor. Some time afterwards information was given that persons were served with intoxicating liquor in his premises—and there is no doubt that they were—during lawful hours every day, and a prosecution was instituted against the respondent under the Licensing (Consolidation) Act, 1910, s. 65, which provides :

“(1) . . . a person shall not sell or expose for sale by retail any intoxicating liquor unless he holds a justices' licence authorising him to hold an excise licence for the sale of that intoxicating liquor . . . (2) If any person acts in contravention of this section, he shall be liable . . . ”

to certain penalties. In point of fact, the respondent did hold a justices' licence at the time when he sold intoxicating liquor. He held the original justices' licence, but it was argued by the appellant that, because it had been handed in to the justices' clerk on the application to obtain a new licence, the original licence had become in some way bad and was no longer an authorisation to him to sell liquor.

One finds no justification whatever in the licensing Acts for the assumption that a licensee who has a licence granted to him for a year in the normal case, or, as in this case, for a term of $3\frac{1}{2}$ years, can put an end to that licence merely by handing it to someone and saying : “I do not want it any more.”

There is no justification for saying that the premises in question would thereafter become unlicensed premises in such circumstances. In *R. v. Taylor*, *R. v. Amendt* (1) it was held that, if a person desired to obtain a licence for premises which were already licensed, he had to satisfy the justices that he did not propose to carry on the premises under both licences, as there could not be two licences in respect of one set of premises. Those decisions are, no doubt, still good law, subject to the Finance Act, 1947, s. 73. Therefore, it was a perfectly proper thing for the respondent's solicitor to hand in the licence to the justices on the understanding that the respondent would get it back again unless he was granted a new and different licence. The justices stated the law quite correctly when they said :

“We dismissed the said information, being of opinion that the submission of the respondent before the licensing justices that it was essential for the existing licence to be surrendered before the application for a new licence could be granted was erroneous in law and the handing in of the licence had no valid effect.”

In my opinion, this appeal ought to be dismissed.

LORD GODDARD, C.J. : I agree. One very short answer to the case, I think, would be that a person cannot surrender a licence to the justices unless the justices accept it. It is clear that, whatever the respondent may have said or thought he was doing, he did not surrender his licence because the justices gave it back to him.

Appeal dismissed with costs.

Solicitors : *Jennings, Son & Ash*, agents for *Gates & Co.*, Brighton (for the appellant) ; *Laurence Legg*, Brighton (for the respondent).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

GEORGIUS v. OXFORD UNIVERSITY PRESS (DELEGATES) AND OTHERS.

[COURT OF APPEAL (Bucknill and Denning, L.JJ.), January 17, 18, 1949.]

Libel—Interrogatory—Source of information—Annual reference book.

The plaintiff alleged that he had been libelled in the preface to CROCKFORD'S CLERICAL DIRECTORY, an annual publication, and he brought proceedings against the publishers. He sought to administer an interrogatory to the defendants asking from whom they obtained the information on which the alleged defamatory matter was based. The master disallowed the interrogatory, and his refusal was upheld by the judge.

HELD : there was no reason to interfere with the exercise of the judge's discretion in disallowing the interrogatory.

Per DENNING, L.J. : "There is a rule of practice that such an interrogatory is not allowed in the case of newspapers except in special circumstances. I see no reason for drawing a distinction between newspapers and monthly, quarterly, or annual reviews."

[AS TO INTERROGATORIES IN ACTIONS FOR LIBEL, see HALSBURY, Hailsham Edn., Vol. 10, pp. 416-418, paras. 509-511; and FOR CASES, see DIGEST, Vol. 18, pp. 203-206, Nos. 1512-1544.]

Cases referred to :

- (1) *Lawson v. Odhams Press, Ltd.*, [1948] 2 All E.R. 717; [1949] 1 K.B. 129.
- (2) *Adam v. Fisher*, (1914), 110 L.T. 537; 18 Digest 205, 1533.

APPEAL by the plaintiff from an order of BIRKETT, J., dated Dec. 20, 1948, upholding the decision of a master disallowing an interrogatory as to the source of information on which an alleged libel was based. The Court of Appeal dismissed the appeal.

Stephen Terrell for the plaintiff.

Beney, K.C., and *Marven Everett* for the defendants.

BUCKNILL, L.J. : I will ask DENNING, L.J., to give the first judgment.

DENNING, L.J. : The question in this appeal is whether a certain interrogatory should be administered. It arises in the course of a libel action brought against the delegates of the Oxford University Press in respect of the preface to CROCKFORD'S CLERICAL DIRECTORY. CROCKFORD'S DIRECTORY is published annually and the preface reviews the events of the previous year. The plaintiff alleges that in that preface he has been libelled. The defence is fair comment, pleaded in the form of the "rolled up plea." To make good that defence the defendants will have to prove that the matter was one of public interest, that the facts stated were true, and that the comment was fair. The plaintiff has been allowed to administer to the defendants two interrogatories asking what information they had at the time they published the preface and what steps they took to test its accuracy, but he has not been allowed to administer a third interrogatory : "From whom did you obtain the information?" That interrogatory has been disallowed by the master and by the judge, and the plaintiff appeals to this court from their refusal.

There is a rule of practice that such an interrogatory is not allowed in actions against newspapers except in special circumstances. That rule has become so well established that this court might interfere if it was not observed, but apart from the case of newspapers there is no rule of practice either way. There is no rule that such an interrogatory should be allowed, nor, conversely, is there a rule that it should not be allowed. It is a matter for the discretion of the judge. CROCKFORD'S DIRECTORY is not a newspaper,

and, if the judge here had held himself bound by a rule and not exercised his own discretion, we might have interfered. The judge, however, did not do that. He refused the interrogatory in the exercise of his discretion. The only ground on which the court could interfere would be if there were some manifest injustice caused by the way in which the judge had exercised his discretion. In the absence of those circumstances, this court will not review his discretion : see *Lawson v. Odhams Press, Ltd.* (1).

A Regarding this case apart altogether from any rule of practice relating to newspapers, I see no injustice whatsoever in what the judge has done. The defendants have to prove the facts stated to be true and the comment to be fair. If the comment, objectively considered, is fair comment, that is, if it is fair when considered without regard to the name of the informant, what
B is the plaintiff's object in administering this interrogatory ? He seeks to prove the comment to be unfair by saying : " Although, objectively considered, it is fair, I want to find out the name of the contributor so as to show that he personally may have been actuated by malice, because he may have had some personal spite against me." I see no reason why the plaintiff should be assisted in doing that. If the facts are true and the comment, objectively
C considered, is fair, he has little about which to complain. His only object in administering the interrogatory would be to find out the name of the contributor so as to sue him also, and that is not necessary for justice to be done. His remedy against the publishers is sufficient. So, as a matter of discretion, without regard to any rule of practice one way or the other, it seems to me open to a judge, when considering a case where fair comment
D is pleaded, to refuse to allow an interrogatory as to the name of the informant. I expect that it was for reasons such as these that the rule grew up in respect of newspapers. I should like to say that I see no reason in practice for drawing a distinction between newspapers and monthly, quarterly or annual reviews. We are invited to say here that we so disapprove of the rule protecting newspapers that we should confine it strictly to newspapers and that in the case
E of all other publications the name of the informant should be given. I do not, however, disapprove of the rule, and I think that a judge, when considering publications such as reviews, might, in the exercise of his discretion, well have regard to the rule which exists in respect of newspapers. In my opinion, therefore, BIRKETT, J., was right and this appeal should fail.

F BUCKNILL, L.J. : I agree. It may be that in some future case an interrogatory such as that which has been disallowed here will be necessary so that a right conclusion may be come to, and in that event it will, no doubt, be necessary to decide whether a publication such as CROCKFORD'S DIRECTORY comes within the special rule about newspapers. In the present case I think the learned judge was entitled to disallow this interrogatory on the ground that it is not necessary for the purpose of disposing fairly of the cause or matter.
G In my opinion, when coming to a conclusion on that point, the court is entitled to take into consideration the same arguments that, no doubt, led to the formation of the rule which applies in the case of newspapers. Those arguments have been adumbrated by BUCKLEY, L.J., in *Adam v. Fisher* (2), and they seem to me to be considerations very proper for a judge to consider. I agree that this appeal should be dismissed.

H *Appeal dismissed with costs.*

Solicitors : *R. Crane* (for the plaintiff) ; *Rivington & Son* (for the defendants).
[Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.]

BERNBAUM v. BERNBAUM.

[COURT OF APPEAL (Bucknill and Denning, L.J.J.), January 19, 1949.]

Divorce—Practice—Order of registrar under Married Women's Property Act, 1882 (c. 75), s. 17—Appeal to judge in chambers—R.S.C., Ord. 54, r. 12a—Matrimonial Causes Rules, 1947 (S.R. & O., 1947, No. 523), rr. 59, 82.

Where a husband and a wife are parties to a matrimonial suit, an appeal from an order made by the registrar on an application under the Married Women's Property Act, 1882, s. 17, lies to a judge in chambers under the Matrimonial Causes Rules, 1947, r. 59, notwithstanding the fact that, by r. 82 of those rules, the registrar may exercise all the jurisdiction and powers conferred on a judge by s. 17.

Per curiam: The note to Ord. 54, r. 22a, in THE ANNUAL PRACTICE, 1948, p. 1118, that "where a master tries an issue an appeal from his judgment thereon lies to a Divisional Court" is incorrect.

Decision of BARNARD, J. ([1948] 2 All E.R. 1011), affirmed.

[AS TO APPEAL FROM REGISTRAR, see HALSBURY, Hailsham Edn., Vol. 10, p. 777, para. 1231, and 1948 Supplement.

FOR THE MATRIMONIAL CAUSES RULES, 1947, see RAYDEN ON DIVORCE, 4th Edn., Special Supplement.]

Cases referred to:

(1) *Re Humphery*, [1917] 2 K.B. 72; 117 L.T. 7; 27 Digest 260, 2299.

(2) *Peduzzi v. Peduzzi*, (1948) (unreported).

APPEAL by the husband from a decision of BARNARD, J., dated Nov. 15, 1948, and reported [1948] 2 All E.R. 1011, that the judge in chambers had jurisdiction to hear an appeal from an order of the registrar made on the application of the wife (petitioner in a suit for judicial separation) under s. 17 of the Married Women's Property Act, 1882. The husband had taken a preliminary point before BARNARD, J., that the appeal lay to the Divisional Court and not to the judge in chambers. The Court of Appeal dismissed his appeal.

Seuffert for the husband.

G. L. Hardy for the wife.

BUCKNILL, L.J.: I will ask DENNING, L.J., to deliver the first judgment.

DENNING, L.J.: The question in this case is: To which court does an appeal lie in respect of applications under s. 17 of the Married Women's Property Act, 1882? Under that section:

"In any question between husband and wife as to the title to or possession of property, either party . . . may apply by summons or otherwise in a summary way to any judge of the High Court . . . and the judge of the High Court . . . may make such order with respect to the property in dispute, and as to the costs of and consequent on the application as he thinks fit . . ."

Under that section, until 1937, applications were made in the first instance to the judge of the High Court himself. If he thought it necessary, owing to the amount of detail, to refer the matter for inquiry and report, he did so by reference to a master, but the judge himself retained seisin of it throughout. Indeed, in *Re Humphery* (1), SCRUTTON, L.J., pointed out that the section contemplates that the judge is to keep control of the whole matter and that he himself is to determine it. As the result of experience, however, it was found that these applications between husband and wife often concerned a great deal of detail, such as the ownership of many items of furniture and effects, with different considerations applicable to each. Such applications were unsuit-

able to be dealt with by High Court judges, and in 1937 R.S.C., Ord. 54, r. 12A, was made enabling a master of the Supreme Court to exercise all the jurisdiction and powers conferred on a judge of the High Court by s. 17 of the Act of 1882.

A In the course of the argument, I asked what power the Rules Committee had to make that rule. Section 17 of the Act seemed to me clearly to contemplate that a judge of the High Court should deal with the matter himself. The relevant power of the Rules Committee is that conferred by s. 99 (1) (d) of the Supreme Court of Judicature (Consolidation) Act, 1925, which enables rules to be made :

B "For prescribing what part of the business which may be transacted and of the jurisdiction which may be exercised by judges of the High Court in chambers may be transacted or exercised by masters of the Supreme Court, registrars of the Probate Division, or other officers of the Supreme Court."

C It is clear that, if the jurisdiction under s. 17 was a jurisdiction exercised by judges of the High Court "in chambers," the Rules Committee had power to make a rule enabling a master to deal with it, but is the jurisdiction under s. 17 a jurisdiction exercisable by judges of the High Court "in chambers" ? Under the section a judge "may hear any such application in his private room," but does that make the jurisdiction one which is exercised "in chambers" ? Whatever doubts, however, I might have had if this matter were *res integra*, I am clear that I ought not now to give effect to those doubts. Ever since 1937 masters of the Supreme Court have exercised this jurisdiction.

D The rule has been acted on, titles have been acquired in pursuance of it, and after this length of time this court ought not to say that the rule was *ultra vires*. It must be held to be *intra vires* so that titles should not be invalidated.

E Once it is held that a master may exercise this jurisdiction, to what court lies the appeal from him ? It is plain that in 1937, when the rule was first introduced, the appeal lay to the Divisional Court. Ord. 54, r. 22A then provided :

"(1) There shall be a right of appeal from any finding decision order or judgment arrived at made given directed or entered by any master of the King's Bench Division on the hearing or determination by him of
(a) Any trial or reference of any action cause issue or matter . . .
(2) Such appeal shall be to a Divisional Court . . ."

F

Experience showed, however, that it was most inconvenient that appeals in these matters should be dealt with by the Divisional Court because they involved so much detail. In 1940, therefore, an amendment was made to r. 22A which expressly excluded from appeals to the Divisional Court any appeal in an application under s. 17 of the Married Women's Property Act, 1882. The result of that exclusion was that r. 21 applied. By that rule :
G application under s. 17 of the Married Women's Property Act, 1882. The result of that exclusion was that r. 21 applied. By that rule :

"Any person affected by any order or decision of a master may (except in the cases provided for in r. 22A) appeal therefrom to a judge at chambers."

H In the note to Ord. 54, r. 22A, in *THE ANNUAL PRACTICE*, 1948, p. 1118, it is said :

"From an order directing an issue under the Married Women's Property Act, 1882, appeal lies to a judge in chambers, but where a master tries an issue an appeal from his judgment thereon lies to a Divisional Court."

I do not agree with that note. Under the amended r. 22A, all applications under s. 17 are excluded from the Divisional Court. They come under r. 21 and appeals lie to the judge in chambers. I would add that, sitting as a King's

Bench judge in chambers, I have often heard appeals from masters under s. 17, and there has been at least one appeal from a decision of my own in chambers to this court. No one has suggested that that was not the proper procedure. I am satisfied that in the King's Bench Division, as a result of the rules which I have mentioned, the appeal from a master under s. 17 lies to the judge in chambers and thence, to this court. It was argued, alternatively, by counsel for the husband that if the master is taking the place of a judge under s. 17, the appeal should be direct from the master to the Court of Appeal. The answer is that, r. 12A itself being *intra vires*, r. 21 is also. The provisions of s. 17 have now to be read subject to the modification contained in the rules.

I turn to the position in the Divorce Division. Until recently the practice there was the same as it had been before 1937 in the King's Bench Division. The application was made to a judge of the High Court who referred it to the registrar for inquiry and report. The judge retained seisin of it throughout himself. That procedure was found to be inconvenient just as it had been found previously in the King's Bench Division. Therefore, by an amendment made in 1947, the procedure in the Divorce Division was brought into line with that of the King's Bench Division. By r. 82 of the Matrimonial Causes Rules, 1947, the registrar is given power to exercise all the jurisdiction conferred on a judge of the Supreme Court by the Married Women's Property Act, 1882, s. 17. That being so, the registrar exercises the jurisdiction initially and an appeal from him lies to the judge in chambers, either under r. 59 of the Matrimonial Causes Rules, 1947, whereby appeals from an order or decision of a registrar go to a judge in chambers, or because the ordinary High Court Rules apply. The basis of counsel's argument was that the note in THE ANNUAL PRACTICE was right, namely, that in the King's Bench Division appeals lie to the Divisional Court. Hence he argued that in the Divorce Division appeals also lay to the Divisional Court. He is wrong as to the King's Bench Division, and so his argument falls to the ground. It is interesting to note, as BARNARD, J., noted, that in the Divorce Division the practice hitherto has been to appeal to the judge in chambers and thence to this court. That was done in *Peduzzi v. Peduzzi* (2) and no one suggested that the procedure was wrong. It would not be right for us to interfere with a practice which has prevailed for so long, especially when it is the most convenient, expeditious, and inexpensive way of dealing with the troubles which arise between husband and wife. For these reasons I am of opinion that the decision of the learned judge was right. He had jurisdiction to entertain the appeal from the registrar, and the appeal should be dismissed.

BUCKNILL, L.J. : I agree.

Appeal dismissed with costs.

Solicitors : *Ferris, Roberts, Thomas & Co.* (for the husband) ; *J. C. Clifford Watts* (for the wife).

[*Reported by C. N. BEATTIE, Esq., Barrister-at-Law.*]

Re HOPKINSON (deceased). LLOYDS BANK LTD. *v.* BAKER AND OTHERS.

[CHANCERY DIVISION (Vaisey, J.), January 11, 12, 1949.]

Charitable Purpose—Advancement of adult education—Particular reference to Labour Party's memorandum annexed to the will—Dominating object of trust.

By cl. 5 of his will, a testator gave his residuary estate after the payment of debts, funeral and testamentary expenses and death duties to four prominent members of the Labour Party "as trustees of the educational fund hereinafter mentioned upon trust that they shall stand possessed of the same as an educational fund and shall apply the same both capital

and income at their absolute discretion for the advancement of adult education with particular reference to the following purpose (but in no way limiting their general discretion in applying the fund for adult education), that is to say, the education of men and women of all classes (on the lines of the Labour Party's memorandum headed 'A Note on Education in the Labour Party,' a copy whereof is annexed to this my will and signed by me) to a higher conception of social, political and economic ideas and values and of the personal obligations of duty and service which are necessary for the realisation of an improved and enlightened social civilisation." The court found as a fact that the object of the memorandum annexed to the will was to advance the cause of the Labour Party by improving its methods of propaganda and increasing its electoral efficiency.

HELD: the direction to the trustees to have particular reference to the memorandum dominated the whole trust, forming its overriding and essential purpose, and was not merely intended to serve as a guide in the administration of the fund, and, therefore, the trust was one for the attainment of political objects, and not charitable.

Dicta of LORD PARKER OF WADDINGTON in *Bowman v. Secular Society* ([1917] A.C. 442; 117 L.T. 170), RUSSELL, J., in *Re Tetley* ([1923] 1 Ch. 262), ROXBURGH, J., in *Re Strakosch* ([1947] 2 All E.R. 609; [1948] Ch. 43), and ROWLATT, J., in *Inland Revenue Comrs. v. Temperance Council of Christian Churches of England and Wales* (1926) (136 L.T. 28), *applied*.

[AS TO TRUST FOR POLITICAL PURPOSES, see HALSBURY, Hailsham Edn., Vol. 4, p. 137, para. 178; and FOR CASES, see DIGEST, Vol. 8, p. 265, Nos. 268-272 and Supplement.]

Cases referred to:

(1) *Bowman v. Secular Society, Ltd.*, [1917] A.C. 406; 117 L.T. 161; 8 Digest 265, 270.

(2) *Re Tetley*, [1923] 1 Ch. 258; *affmd.*, *A.-G. v. National Provincial & Union Bank of England*, [1924] A.C. 262; *sub nom. Re Tetley*, 131 L.T. 34; Digest Supp.

(3) *Re Hummeltenberg*, [1923] 1 Ch. 237; 129 L.T. 124; Digest Supp.

(4) *Re Scovcroft*, [1898] 2 Ch. 638; 79 L.T. 342; 8 Digest 247, 68.

(5) *Re Hood*, [1931] 1 Ch. 240; 143 L.T. 691; Digest Supp.

(6) *Re Strakosch*, [1947] 2 All E.R. 607; [1948] Ch. 37; 2nd Digest Supp.

(7) *Bonar Law Memorial Trust v. Inland Revenue Comrs.*, (1933), 17 Tax Cas. 508; Digest Supp.

(8) *Tribune Press, Lahore (Trustees) v. Income Tax Comr., Punjab, Lahore*, [1939] 3 All E.R. 469; Digest Supp.

(9) *Inland Revenue Comrs. v. Temperance Council of Christian Churches of England and Wales*, (1926), 136 L.T. 27; 10 Tax Cas. 748; Digest Supp.

ADJOURNED SUMMONS to determine *inter alia* whether a gift made by a testator in his will was charitable.

The testator directed a trust fund to be held and applied for the advancement of adult education with particular reference to education on the lines of a Labour Party memorandum which was annexed to his will. The testator had signed his name at the foot of the memorandum, as also had the witnesses who attested the will, and the memorandum was effectively incorporated into the will by reference. VAISEY, J., held that the main object of the trust was that of the memorandum, *i.e.*, the advancement of the cause of the Labour Party, and the trust was, therefore, for political purposes and not charitable. The facts appear in the judgment.

H. A. Rose for the plaintiff, Lloyds Bank Ltd., executor and trustee of the will.

Sir Cyril Radcliffe, K.C., and *McNabb* for the first four defendants, named in the will as the trustees of the trust fund.

Sir Andrew Clark, K.C., and *Wilfrid Hunt* for the testator's three children, entitled on intestacy.

D. H. McMullen (Danckwerts with him) for the Attorney-General.

VAISEY, J. : The main question arising on this summons is as to the proper construction of the residuary gift of the will of the testator, Robert Addy Hopkinson, who died on Nov. 14, 1947. If the trusts on which that gift is expressed to be made are charitable in the technical legal sense of that word, the gift is valid and the trusts can and will be carried into effect. If, on the other hand, the trusts do not satisfy the requirement that they must, to be effective, be charitable, then the gift is invalid and the testator's residuary estate passes as on an intestacy to his three children, the defendants, Philip Hopkinson, Alfred Hopkinson, and Kathleen Mary Wilkinson, in equal shares. The other defendants are the four persons to whom the gift is expressed to be made, namely (i) the Right Honourable Philip John Noel Baker, M.P., who at the date of the will was Secretary of State for Air, and, at the date of the testator's death, Secretary of State for Commonwealth Relations; (ii) the Right Honourable Emanuel Shinwell, M.P., who at the date of the will was Minister of Fuel and Power, and, at the date of the death of the testator, Secretary of State for War, and at both dates a member of the Executive Committee of the Labour Party; (iii) the Right Honourable Arthur Greenwood, M.P., who at the date of the will was Minister without Portfolio and was, at that date and also at the date of the testator's death, a member of the Executive Committee of the Labour Party; and (iv) Mr. Morgan Phillips, who at both dates was, and still is, the secretary of the Executive Committee. The last defendant is His Majesty's Attorney-General. The plaintiff is Lloyds Bank Ltd., the executor and trustee appointed by the will. The will with a codicil was duly proved by the plaintiff bank in the Wakefield District Registry on Mar. 8, 1948.

I turn to the will. After the appointment of the plaintiff bank as executor and trustee and certain particular dispositions, to which no allusion need be made, I come to cl. 5, by which, subject to the payment of his debts, funeral, and testamentary expenses, and death duties, the testator gave the whole of his residuary estate to the first four defendants

"as trustees of the educational fund hereinafter mentioned upon trust that they shall stand possessed of the same [the residuary estate] as an educational fund and shall apply the same both capital and income at their absolute discretion for the advancement of adult education with particular reference to the following purpose (but in no way limiting the general discretion in applying the fund for adult education), that is to say, the education of men and women of all classes (on the lines of the Labour Party's memorandum headed 'A Note on Education in the Labour Party,' a copy whereof is annexed to this my will and signed by me) to a higher conception of social, political and economic ideas and values and of the personal obligations of duty and service which are necessary for the realisation of an improved and enlightened social civilisation."

The concluding words, that is to say, from the words "to a higher conception" to the end, may be abridged, fairly I hope, to a more compendious expression such as "to realise the proper duties of good citizenship."

In my judgment, there are two ways of reading the words which I have quoted. They may be read, first, as equivalent to a general trust for the advancement of adult education which, standing alone, would admittedly be charitable, the super-added purpose being treated merely as a rough guide to

be followed or as a hint to be taken as to the kind of adult education which the testator had in mind, the strictly educational main purpose always being adhered to, or, secondly, they may be read as indicating that the first part is to be taken as a general direction and the second part beginning with the words "with particular reference to" as the particular direction dominating the whole of the trust. The second of these alternative views seems to me to be the right one. I think that the particular purpose is the main purpose of the trust, that is to say, while every or any other kind of adult education is within the discretion reposed in the residuary legatees, the particular purpose referred to is, so to speak, the overriding and essential purpose, on the nature of which the validity of the whole trust depends.

A The whole difficulty of this case arises from the terms of the Labour Party's memorandum to which the testator alludes, and which he has, by appropriate words, incorporated in and made part of his testamentary dispositions. I do not think it necessary to refer at any great length to that document. It is dated Sept. 18, 1946, that is to say, about two months before the date of the testator's will. It is marked "Private and confidential." It is headed "Labour Party," and as a sub-heading "A Note on Education in the Labour Party" and the opening words of it are: "The question of education in the Labour Party is emerging as a serious and important matter." The purpose of the document appears to me to be plain on the face of it. Its perfectly legitimate and proper object is, in my judgment, to advance the cause of the Labour Party by improving its methods of propaganda and by increasing its electoral efficiency. In para. 2 the memorandum states:

D "A perusal of this document will, however, show that developments are proceeding which will require the establishment of an educational trust in order to provide for the widening of the scope of this special work in a definitely educational manner and for the necessary separation of its financial aspects and procedure from the normal funds and general administrative work of the party."

E I cannot doubt, going no further than this, that the testator believed that he was responding to this need for the establishment of an educational trust, and was establishing or, at any rate, creating the nucleus of, the educational trust which the memorandum represents as a necessity, and this conviction is strengthened by many other passages in the document, to some of which I will briefly refer.

F Paragraph 2 is the source from which the somewhat lengthy phrase, which I have ventured to summarise as indicating the realisation of the proper duties of good citizenship, is taken. Those words are succeeded by the expression of opinion:

G "... that the immediate practical issue becomes one of providing a comprehensive scheme of education which will give facilities for a graduated but wider knowledge to various categories of persons in the party whose activities and influence have a continuous effect on members and high potency in affecting public opinion."

H Later, there is a reference to the equipment of "men and women to use their knowledge in a serviceable and stimulatory way for the ends of democracy and socialism." The memorandum further says:

"In thus providing for a higher and broader intellectual nurture of these persons in the party, it would be reasonable to expect that the general culture of the party as a whole would be elevated, and the impact on the electorate would become vibrantly educative in character."

A reference is made to the intention of the scheme outlined in the document, which is stated to be

"to give the younger men and women an intellectual nurture which would foster their native talents and develop their personalities through culture so that they can become, not only a credit to the labour movement, but men and women of enlarged and competent outlook, ready to face the complicated issues of this decade and resolute to find the solutions by the application of socialist principles."

The extracts I have quoted give not unfairly the general trend of what is intended to be indicated by the document. A

Political propaganda masquerading—I do not use the word in any sinister sense—as education is not education within the Statute of Elizabeth (43 Eliz., c. 4). In other words, it is not charitable. This principle appears to me to be settled by the authority of the highest tribunal, and it will suffice for me to quote the well known passage from the speech of LORD PARKER OF WADDINGTON in *Bowman v. Secular Society, Ltd.* (1), where his Lordship says ([1917] A.C. 442): B

"... a trust for the attainment of political objects has always been held invalid, not because it is illegal, for every one is at liberty to advocate or promote by any lawful means a change in the law, but because the court has no means of judging whether a proposed change in the law will or will not be for the public benefit, and therefore cannot say that a gift to secure the change is a charitable gift." C

I venture to add as a corollary to that statement that it would be equally true to apply it to the advocating or promoting of the maintenance of the present law, because the court would have no means in that case of judging whether the absence of a change in the law would or would not be for the public benefit. The same principle is stated in clear language by RUSSELL, J., in *Re Tetley* (2) where he said ([1923] 1 Ch. 262): D

"Subsidising a newspaper for the promotion of particular political or fiscal opinions would be a patriotic purpose in the eyes of those who considered that the triumph of those opinions would be beneficial to the community. It would not be an application of funds for a charitable purpose." E

After quoting the words of LORD PARKER, which I have already read, the learned judge goes on:

"To assist the Prime Minister for the time being by paying his income tax, or easing him from any other liability might well be deemed patriotic, but hardly charitable. Other instances need not be given. It is sufficient to say that the court would have no means of judging, in many cases, whether the particular purpose or object selected by the trustees as a patriotic purpose or a patriotic object, was or was not beneficial to the community and therefore charitable. It could not effectively control the trustees in the administration of the trust." F G

The principle that legitimate and proper political aims and ambitions are not charitable is far too well settled for me at this stage to attempt to depart from or refine upon it. I wish to make it clear that the purposes indicated in this memorandum and the purposes indicated by reference thereto in the testator's will are lawful, legitimate, and, from the point of view of those who put them forward, wholly desirable and proper, but they are not charitable. The law has been laid down with clarity over a long period of time, and, if the trust is not charitable, it is one which the court cannot uphold. The reason for that, I think, is partly indicated in what was said, also by RUSSELL, J., in *Re Hummeltenberg* (3), namely, that, if the trust is one which the court could not administer if the trustees disclaimed their duties thereunder, it would be a trust which could not be supported in law. Applying that to the H

present case, supposing the trustees under this will in their discretion thought proper to embark on a scheme of education under the terms of the Labour Party's manifesto, and, for some reason or other, they desired to put the responsibility of the administration on the court, I find it impossible to see how the court could, consistently with the principles which govern this matter, attempt to carry out the administration of the trust.

A I have been referred to other cases, and, in particular, to *Re Scowcroft* (4) and *Re Hood* (5), to which I need only refer by saying that they do not appear to me to impinge in any way on, or limit the effect of, the general proposition to which I have referred. I should like to adopt the observations of ROXBURGH, J., in the very recent case of *Re Strakosch* (6), where a testator left money on trust to be applied for any purposes which, in the opinion of the trustees

B " . . . is designed to strengthen the bonds of unity between the Union of South Africa and the Mother Country and which incidentally will conduce to the appeasement of racial feeling between the Dutch and English speaking sections of the South African community."

In that case ROXBURGH, J., said ([1947] 2 All E.R. 609) :

C "It is, in my judgment, necessary, in all cases where modes of application are indicated, for the court to be satisfied that every possible mode of application which falls within the ambit of the testator's language is in law charitable."

In *Bonar Law Memorial Trust v. Inland Revenue Comrs.* (7) it was held that the Bonar Law Memorial Trust was not a charity, and, therefore, not exempt from income tax. FINLAY, J., who decided that case said (49 T.L.R. 221) :

D "Was it the correct view that this was a trust for education, the duty of carrying out the education being entrusted to a particular party? That would not, in his opinion, invalidate the charitable purpose. If, on the other hand, the trust was one for the Conservative Party, to which the lectures and courses were subsidiary, then the fact that the lectures, etc., were educative would not make it a charity."

E The learned judge concluded by saying :

F "The appellants [the trustees of the Bonar Law Memorial Trust] seemed to be in this difficulty. If the fund was for charitable purposes only, and if the income was being applied for non-charitable purposes, there was a breach of trust. But when one looked at what was being done one could not doubt that this place was being used as an educational centre for the Conservative Party, and that it was to this that the income was being in fact applied."

G Finally, I should like to mention an important case in the Privy Council, *Tribune Press, Lahore v. Income Tax Comr., Punjab, Lahore* (8), where a very different state of law had to be considered, because in that part of India at that time the ambit of permissible trusts had been extended from charitable purposes as we understand them in this country so as to include the advancement of any other object of general public utility. That being the law which had to be applied, the Privy Council there held that the publication of a newspaper, although not charitable in English law, was an advancement of an object of general public utility. The case is, I think, chiefly useful because it contains a very comprehensive summary of the authorities. It H referred to *Inland Revenue Comrs. v. Temperance Council of the Christian Churches of England and Wales* (9) in which ROWLATT, J., said (136 L.T. 28) :

"Any purpose of influencing legislation is a political purpose in this connection. Under these circumstances, this is mainly a trust to secure a certain line of legislation, and if that is so, I do not understand it to be disputed that that would not be a charitable trust. I think the authorities are clear upon it and I am not going to say anything more about it."

Applying that to this case, I should have thought that the testator's object here was plainly to secure, not necessarily a certain line of legislation, but a certain line—and a perfectly proper and permissible line from the point of view of those who advocate it—of political administration and policy. Applying those cases and the principles which they enunciate to the best of my ability, I have come to the conclusion that I am bound to answer the question as to the validity of this particular trust in the negative.

In my judgment, there can be no doubt that the testator's object was, not education in the proper sense of that word, but the furtherance of his political views and the better equipping of those who make it their business to further them. Therefore, I am bound to decide that the trust in cl. 5 of the testator's will does not constitute a valid charitable gift, with the result that the trust fails and the estate now goes to those who are entitled to it under the Administration of Estates Act, 1925.

Order accordingly. Costs of all parties as between solicitor and client to be paid out of the estate.

Solicitors: *Corbin, Greener & Cook*, agents for *Raworth & Co.*, Harrogate (for the executor); *Lyell & Bellion* (for the first four defendants); *Collyer-Bristow & Co.*, agents for *Alf Masser & Co.*, Leeds (for the testator's children); *Treasury Solicitor*.

[Reported by H. McL. MORRISON, ESQ., Barrister-at-Law.]

EDWARDS v. HALL.

[KING'S BENCH DIVISION (Lord Goddard, C.J.), January 14, 1949.]

Agricultural Holding—Notice to quit—Sale since Sept. 3, 1939—Conveyance by tenants in common of their interest in farm to other tenant in common—Defence (General) Regulations, 1939 (S.R. & O., 1939, No. 927), reg. 62 (4A).

After Sept. 3, 1939, one of several tenants in common of a farm acquired the interest of the others and became sole freeholder of the property. Subsequently she gave the tenant of the farm notice to quit.

HELD: the conveyance by the tenants in common of their interest in the land to the other tenant in common was a sale of an interest in land which was personalty and not a sale of an agricultural holding within the meaning of the Defence (General) Regulations, 1939, reg. 62 (4A), and, therefore, the notice to quit did not require the consent of the Minister of Agriculture and Fisheries made necessary by the regulation where there had been a sale of a holding after Sept. 3, 1939.

Re Price ([1928] Ch. 579; 139 L.T. 339), *applied*.

[FOR THE DEFENCE (GENERAL) REGULATIONS, 1939, reg. 62 (4A), (now revoked by S.I., 1948, No. 336), see BUTTERWORTH'S EMERGENCY LEGISLATION SERVICE.]

Case referred to:

(1) *Re Price*, [1928] Ch. 579; 97 L.J.Ch. 423; 139 L.T. 339; Digest Supp.

ACTION for possession.

The plaintiff had been one of several tenants in common of a farm let to the defendant. On Jan. 27, 1944, she acquired the interest of the other tenants in common and became the sole freeholder. On Sept. 26, 1947, she gave the tenant notice to quit on Sept. 29, 1948. The issue was whether the conveyance to her of the interest of the other tenants in common was a sale or contract of sale of the holding within the meaning of the Defence (General) Regulations, 1939, reg. 62 (4A), under which the written consent of the Minister of Agriculture and Fisheries was required to a notice to quit where such a sale had taken place after Sept. 3, 1939. LORD GODDARD, C.J., held that it was a sale of personalty and not a sale of land and the notice to quit was valid.

H. E. Francis for the plaintiff.

R. Dow for the defendant.

LORD GODDARD, C.J. : Regulation 62 (4A) of the Defence (General) Regulations, 1939, provides :

A "Where the whole or any part of an agricultural holding is subject to a contract of sale made since Sept. 3, 1939, or has been sold in pursuance of a contract of sale made since that date, any notice to quit that holding or any part thereof given to the tenant so as to expire at any time after the end of the year 1941 shall be null and void : Provided that this paragraph shall not apply to any notice if (whether before or after the giving thereof) the Minister of Agriculture and Fisheries consents in writing thereto."

B The object of that regulation was to prevent a landowner selling his land with vacant possession when there was a tenant farming the land who was in possession of it at the time of the contract of sale. I do not think the position which arises in this case could ever have been in the mind of the framer of the regulation. The farm which the defendant is farming in this case was the subject of a devise by a man named David Walter Evans who left it to certain nephews and nieces, of whom the plaintiff, Jane Edwards, was one, as tenants in common. The plaintiff wished to be the sole freeholder of the land, and she made an arrangement with the other tenants in common by which she acquired their interest. In my opinion, that was not a sale of land at all, because she, as one tenant in common, had an undivided interest in every piece of the land and so had all the other tenants in common. The land could not be sold without the consent of them all. There was nothing to prevent their selling their interest in the land—which is different from selling the land—to one of themselves. The Law of Property Act, 1925, s. 34 (2) provides that where there is a holding by tenants in common and there are not more than four persons of full age entitled in undivided shares free from encumbrances, the land shall vest in them as joint tenants on the statutory trusts. This land is held on the statutory trusts. Section 35 of the Act of 1925 defines the meaning of "statutory trusts" :

F "For the purposes of this Act land held upon the 'statutory trusts' shall be held upon the trusts and subject to the provisions following, namely, upon trust to sell the same and to stand possessed of the net proceeds of sale, after payment of costs, and of the net rents . . . and subject to such powers and provisions, as may be requisite for giving effect to the rights of the persons . . . interested in the land."

G In *Re Price* (1) CLAUSON, J., held that these undivided shares were personality and, therefore, what the other tenants in common sold to the plaintiff was personality. Quite apart from *Re Price* (1) I should hold that there was never a sale of land here. There was nothing but a sale to one of the tenants in common of the interest of the other tenants in common.

H In those circumstances this regulation does not apply. This is not a case where the whole or any part of an agricultural holding is subject to a contract of sale. The contract here was merely a sale of the interests of the other tenants in common. For these reasons the consent of the Minister of Agriculture was not required, the notice to quit is valid, and the plaintiff must have judgment for possession with mesne profits from Sept. 29 last until possession is given.

Judgment for the plaintiff with costs.

Solicitors : *T. D. Jones & Co.*, agents for *Hugh Williams, Son & Co.*, Llandilo (for the plaintiff); *Kinch & Richardson*, agents for *W. Herbert Lewis & Co.*, Aberayron (for the defendant).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

INLAND REVENUE COMMISSIONERS v. REID'S TRUSTEES.

[HOUSE OF LORDS (Lord Simonds, Lord Normand, Lord Morton of Henryton, Lord MacDermott and Lord Reid), November 30, December 1, 2, 1948, January 20, 1949.]

Income Tax—Capital or income—“Income arising from possessions out of the United Kingdom”—Dividend paid out of capital profits of South African company—Income Tax Act, 1918 (c. 40), sched. D, case V. A

Trustees held as part of the trust fund shares in a company incorporated and carrying on business in South Africa. In March, 1943, the company, which was not authorised by its memorandum of association to trade in the buying and selling of land, sold some of its buildings, then out of date, which it had used as stores and offices. The profit estimated to have been made by the sale was £17,451, and the directors resolved to declare a dividend of 20 per cent. payable from this sum. The trustees received £6,866 in respect thereof. The Crown claimed from the trustees income tax under sched. D, case V, on the £6,866 received by them. B

Held: as the corpus of the assets in the hands of the trustees remained unaltered by the payment of the dividend, the latter must have been income and not capital in their hands, and, therefore, it was “income arising from possessions out of the United Kingdom” within case V, and properly chargeable to income tax. C

(AS TO INCOME TAX UNDER SCHED. D, CASE V, see HALSBURY, Hailsham Edn., Vol. 17, pp. 195-202, paras. 400-418; and FOR CASES, see DIGEST, Vol. 28, pp. 79-81, Nos. 433-450.] D

Cases referred to:

- (1) *Hill (R. A.) v. Permanent Trustee Co. of New South Wales, Ltd.*, [1930] A.C. 720; 144 L.T. 65; Digest Supp.
- (2) *Re Bates*, [1928] Ch. 682; 139 L.T. 162; Digest Supp.
- (3) *Re Doughty*, [1947] 1 All E.R. 207; [1947] Ch. 263; 176 L.T. 173; 2nd Digest Supp. E
- (4) *Forgie's Trustees v. Forgie*, 1941 S.C. 188; 2nd Digest Supp.
- (5) *Gilbertson v. Fergusson*, (1881), 7 Q.B.D. 562; 46 L.T. 10; 1 Tax Cas. 501; 28 Digest 79, 431.
- (6) *Canadian Eagle Oil Co., Ltd. v. R., Selection Trust, Ltd. v. Devitt*, [1945] 2 All E.R. 499; [1946] A.C. 199; 173 L.T. 234; 27 Tax Cas. 206; 2nd Digest Supp. F
- (7) *Bradbury v. English Sewing Cotton Co.*, [1923] A.C. 744; 129 L.T. 546; 8 Tax Cas. 481; 28 Digest 81, 445.
- (8) *Ross's Trustees v. Nicoll*, (1902), 5 F. (Ct. of Sess.) 146.
- (9) *Cull v. Inland Revenue Comrs.*, [1939] 3 All E.R. 761; [1940] A.C. 51; 161 L.T. 173; *sub nom.*, *Inland Revenue Comrs. v. Cull*, 22 Tax Cas. 603; 2nd Digest Supp. G
- (10) *Neumann v. Inland Revenue Comrs.*, [1934] A.C. 215; 150 L.T. 481; 18 Tax Cas. 332; Digest Supp.
- (11) *Barnes v. Hely Hutchinson*, [1939] 3 All E.R. 803; [1940] A.C. 81; 161 L.T. 181; 22 Tax Cas. 655; 2nd Digest Supp.
- (12) *Macaura v. Northern Assurance Co.*, [1925] A.C. 619; 133 L.T. 152; 29 Digest 43, 63. H

APPEAL by the Crown from an interlocutor of the First Division of the Court of Session on a Case stated under the Income Tax Act, 1918, s. 149, by the Special Commissioners of Income Tax.

The Crown claimed income tax under case V of sched. D in respect of dividends paid to recipients in the United Kingdom by a South African company out of

capital profits. The Special Commissioners discharged the assessment, and were upheld by the Court of Session. The House of Lords allowed the Crown's appeal. The facts appear in the opinion of each of their Lordships, except that of LORD MACDERMOTT.

D. H. Johnston, K.C. (S.-G. for Scotland), Donovan, K.C., J. H. Stamp, R. P. Hills and H. A. Shewan (of the Scottish Bar) for the Crown.

A *Millard Tucker, K.C., and C. J. D. Shaw (of the Scottish Bar) for the taxpayers.*

The House took time for consideration.

Jan. 20. The following opinions were read.

B **LORD SIMONDS :** My Lords, this appeal is brought against an interlocutor pronounced by the First Division of the Court of Session as the Court of Exchequer in Scotland on a Case stated under the Income Tax Act, 1918, s. 149. The Case was stated on a requisition by the appellants who were aggrieved by a determination of the Commissioners for the Special Purposes of the Income Tax Acts discharging an assessment on the respondents in a sum of £6,866 in circumstances which I shall shortly narrate. That determination was upheld C in the Court of Session. Hence the appeal to this House.

The respondents are the trustees of the will of Joseph Reid, an iron merchant of Glasgow, who died in the year 1909. The assets of the trust include 3,433 shares of £10 each in a South African company, Reid Brothers (South Africa), Ltd., which had in 1918 been incorporated in the Transvaal under the Companies Act, 1909 (Act No. 31 of 1909). The objects for which it was established were D to purchase and carry on the business of Reid Brothers (Johannesburg), Ltd., which had been incorporated under the Companies (Consolidation) Act, 1908, with its registered office in Scotland, and to carry on the business of iron and steel merchants and kindred businesses which did not include the buying and selling of land. The shares in question are held by the trustees as to one quarter E for each of the three daughters of the truster for their respective life rents, the fee being payable to their respective heirs, and as to the remaining quarter on discretionary trusts for behoof of a son of the truster.

On Oct. 23, 1943, the board of directors of the company recommended a payment of a dividend of 15 per cent. from the trading profits of the company for the year ended June 30, 1943. This dividend was declared accordingly at the annual general meeting of the company on Dec. 14, 1943, and, so far F as it was paid to shareholders in the United Kingdom (including the trustees), it was subjected to deduction of United Kingdom income tax in the hands of the paying agent of the company, one James M. Reid. On the same Oct. 23, 1943, the board of directors also resolved that a dividend of 20 per cent. be declared from capital profits realised on the sale of properties during the past financial year. This dividend also was duly declared and paid. No deduction G of income tax was made in the hands of the paying agent or otherwise. The sum of £6,866 now in question represents this dividend of 20 per cent. on the 3,433 shares held by the trustees. I am content to state thus shortly the facts which are set out in great detail in the Case because I do not understand it to be denied by the Crown that the dividend of 20 per cent. was, in fact, paid out of what are conveniently called "capital profits," that is to say, profits which H were derived from a sale of capital assets at an enhanced value, and would not, if the company were being assessed to tax under case I of sched. D, be included in the computation of its trading profits. It is in these circumstances that the question arises whether the Court of Session, affirming the Special Commissioners, has rightly held that tax is not exigible.

The claim of the Crown is founded on case V of sched. D. They say that this sum of £6,866 is "income arising from possessions out of the United Kingdom," that the shares in a South African company are possessions out of the

United Kingdom, and that the sum in question is income arising from those shares. They say that there is no *tertium quid*. This sum is either capital or income. How can it be capital if the shares remain intact—so many shares of £10 each in the capital of the company? There is a way of distributing a dividend, while leaving the capital intact, and there is a way of returning part of the capital. It is the former course that has here been taken. This, then, they say, is income. When LORD MACNAGHTEN reminded this House in an oft-quoted phrase that income tax is a tax on income, he did not mean that that only was income which fell within case I of sched. D, but he intended a wider and more popular test, a test which is here satisfied by the fact that the sum has been without question treated, not as capital, but as income of the trust, and that this treatment has legal sanction in relevant decisions of high authority: see, e.g., *Hill (R. A.) v. Permanent Trustee Co. of New South Wales, Ltd.* (1), *Re Bates* (2), *Re Doughty* (3), *Forgie's Trustees v. Forgie* (4).

My Lords, this is the short and simple case made by the Crown and I see no answer to it. The learned Lord President accepted an answer which he thus stated:

“The short answer of the trustees, accepted by the Special Commissioners, after investigating the facts, is that this sum is not the income of any one and never was. I agree.”

My Lords, I must say with great respect that I think that this conclusion can only be reached by ignoring that what may be regarded as capital in the hands of the payer may yet be income in the hands of the payee. It is begging the question to say that this sum is not income in the hands of the shareholders. By every practical test it has proved to be income. I will assume that the money out of which the dividend was paid was capital in the hands of the company for the purpose, at any rate, of ascertaining its taxable profit. I think that the commissioners were entitled to find that as a fact, but it was not the fact, and they were not entitled to find as a fact, that the dividend in the hands of a recipient shareholder was not his income. But, it was urged, this will create a strange anomaly. If this was an English company, carrying on its trade in the United Kingdom, and the same series of events occurred—an appreciation of capital assets, a realisation of those assets, and a distribution by way of dividend of so called capital profits—no income tax would be exigible in respect of them in the hands of the company or of its shareholders. My Lords, let it be so. I think it should not be necessary to repeat what has so often been said in this House that the position of a company resident in the United Kingdom (I will call it an English company) and its shareholders is wholly different from that of a foreign company and its shareholders who, being resident here, are taxable in respect of income from their foreign possessions. The most striking difference, which itself cuts at the root of any argument based on a disparity of treatment, is that a shareholder in an English company is not, but a shareholder in a foreign company is, directly assessable to tax in respect of the dividends that he receives. The consequences that flow from this are far-reaching. They led at one time to what was known as the rule in *Gilbertson v. Fergusson* (5), now happily laid at rest. They still produce this anomaly, that, while a shareholder in an English company is not assessable to tax because the company (though not his agent) has “notionally” paid it for him or because his dividend has been “franked” by payment by the company (both expressions are used), yet the shareholder in a foreign company must pay tax on the whole of his dividend under case V, whether or not that dividend has been paid out of profits which themselves had already borne tax in the hands of the company: see *Canadian Eagle Oil Co., Ltd. v. R., Selection Trust, Ltd. v. Devitt* (6). So, too—and it is really another facet of the same proposition—while under r. 20 of the Miscellaneous Rules applicable to sched. D an English company may, if it thinks fit, deduct tax from the

A dividend that it pays, that rule has no application to the case of a foreign company whether or not it has, in fact, paid tax on some part of the profits out of which the dividend is paid. It is not, I think, going too far to say that for the determination of the question whether under case V the dividend payable on the shares of a foreign company is taxable income, it is irrelevant and, more than that, misleading to look to the analogy of an English company. And here too I would remind your Lordships of the observation of LORD PHILLIMORE in *Bradbury v. English Sewing Cotton Co., Ltd.* (7) ([1923] A.C. 770), that in regard to the income arising from foreign possessions "the officers of the Crown do not know and do not care what is the character of the sources from which the money comes."

B I must not be taken as suggesting any inaccuracy or insufficiency in the information which has in this case been furnished by the South African company, but it is obvious that as a general rule the Inland Revenue authorities cannot have the same facilities for investigating the affairs of a foreign company and checking its statement that a dividend is paid out of "capital profits." They must work on a broader basis, and I cannot imagine a safer or better one, where the question is as to income arising from a foreign possession, than to ask whether the corpus of the asset remains intact in the hands of the taxpayer. C That question can in the case of the shares here in question only be answered in the affirmative. The shares the trustees held before the distribution of dividend they still hold intact. The dividend they received was income arising out of those shares. I, therefore, move that this appeal be allowed and the interlocutor of the Court of Session reversed in so far as it affirmed the determination of the Special Commissioners and answered in the negative the question D of law raised by the Case. So far as it related to expenses, the interlocutor will remain undisturbed, and by an arrangement properly made by the Crown they will pay the costs of the trustees of the appeal to this House, such costs to be taxed as between party and party.

E **LORD NORMAND :** My Lords, an assessment under sched. D, case V, of the Income Tax Act, 1918, in the sum of £6,866 for the year 1943-44 was made on the trustees, who appealed to the Special Commissioners. They discharged the assessment and their determination was affirmed by the First Division of the Court of Session, from whose interlocutor this appeal is now taken.

F The respondents are Scottish testamentary trustees, who hold as part of the trust estate 3,433 shares of £10 each of Reid Brothers (South Africa), Ltd., a company incorporated and carrying on business in South Africa as dealers in and suppliers of equipment and appliances for mining. The company is not authorised by its memorandum of association to trade in the buying and selling of property in land. In 1943 the company owned certain stands or parcels of land with buildings which were used as stores and offices. The buildings were, however, out of date and unsuitable for the company's business, and it G was intended to erect suitable store and office premises elsewhere. In March, 1943, therefore, these stands were sold on conditions which entitled the company to remain in occupation pending the erection of the new premises. The estimated profit on the sale was £17,451 19s. 10d., and this sum was transferred first to profit and loss account, and thence to a property suspense account. The value of the properties still held by the company is, in the opinion of the directors, H greater than the balance shown in the property account. On Oct. 23, 1943, the board passed a resolution which is thus worded in the minute of the directors : "It was resolved that a dividend of 20 per cent. be declared payable from capital profits realised on the sale of properties during the past financial year." This dividend of 20 per cent. amounting to £15,604 was, in fact, paid out of the sum of £17,451 19s. 10d. representing the profit on the sale of the properties, and the £6,866 in which the trustees were assessed is their part of the dividend.

My Lords, the argument for the Crown was based on the words of sched. D,

case V, and sought no aid from other provisions of the Income Tax Act. There are two parts of sched. D to be considered. The first is the charging section which provides that tax under the schedule shall be charged in respect of (a) the annual profits or gains arising or accruing (i) to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere. The rest of the section is not material. The second section deals with the several cases under which the tax shall be charged. The tax under case V is "tax in respect of income arising from possessions out of the United Kingdom." It is, therefore, necessary before tax can be charged under sched. D, case V, to show that there is a profit in the nature of income arising from possessions out of the United Kingdom.

The Special Commissioners and the First Division agreed in holding that the dividend in this case is not income. The Special Commissioners' finding is that it is of the same capital nature as the source from which it was paid. The Lord President, delivering the judgment of the First Division, held that it was not the income of any one and never was. He said:

"... no doubt the trustees still hold the same 3,433 shares as they held before this distribution, but part of the fixed assets in which the company's capital had been sunk has disappeared as a result of the sale, and, to the extent of £2 in each share, the trustees have *in substance* received in cash a return of their capital."

I respectfully think that in this passage there may lurk some ambiguity about what are the possessions out of the United Kingdom from which the dividend arises, but it seems to me beyond dispute that "the possessions" are the shares, and that it is incorrect, both in law and in substance, though I would prefer to draw no such distinction, to treat the shareholder as possessing the capital assets of the company. The Lord President also attached importance to the diminution in the value of the company's assets, and, therefore, of the shares in a winding-up, caused by the withdrawal of the sum required to pay the dividend, but, with respect, the same result must follow the withdrawal of money to pay a dividend the source of which is ordinary trading profits.

There are, in my opinion, valid reasons for treating the dividend as taxable income in the trustees' hands. The payment was quite properly described as a dividend, and a dividend is at least *prima facie* income of the recipient. In law capital cannot be returned to shareholders by a mere money distribution, whether called a dividend or by some other name, and there was in this instance no return of capital. The shares of the company remained after the distribution intact and precisely as they were before it. The payment wears on the face of it, therefore, the appearance of an income receipt in the hands of the shareholders. It is not irrelevant to consider how similar dividends have been dealt with in a question between liferenter and fiar or tenant for life and remainderman. It has been held that, according to the law of England, a payment received by way of dividend out of the proceeds of a sale of the company's assets *prima facie* goes to the tenant for life as income of the trust estate. In *Re Bates* (2) the sum distributed represented profits on the sale of steam trawlers previously owned and operated by the company. EVE, J., held ([1928] Ch. 687) that it was a fund which the company

"... could treat as available for dividend and could distribute as profits, or having regard to its power to increase capital could apply to that purpose by, for example, increasing the capital, declaring a bonus and at the same time allotting to each shareholder shares in the capital of the company paid up to an amount equivalent to his proportion of the bonus so declared. Unless and until the fund was in fact capitalised it retained its characteristics of a distributable profit."

In *Hill v. Permanent Trustee Co. of New South Wales, Ltd.* (1), LORD RUSSELL

OF KILLOWEN, delivering the opinion of the Privy Council, expounded the law in a series of propositions of which it is enough here to cite the following ([1930] A.C. 731):

- A “(2) A limited company not in liquidation can make no payment by way of return of capital to its shareholders except as a step in an authorised reduction of capital. Any other payment made by it by means of which it parts with moneys to its shareholders must and can only be made by way of dividing profits. Whether the payment is called ‘dividend’ or ‘bonus’ or any other name, it still must remain a payment on division of profits.
- B (3) Moneys so paid to a shareholder will (if he be a trustee) *prima facie* belong to the person beneficially entitled to the income of the estate. If such moneys or any part thereof are to be treated as part of the corpus of the trust estate there must be some provision in the trust deed which brings about that result. No statement by the company or its officers that moneys which are being paid away to shareholders out of profits are capital, or are to be treated as capital, can have any effect upon the rights of the beneficiaries under a trust instrument which comprises shares in the company.”

- C These two cases were followed in *Re Doughty* (3).

These cases do not turn on any principle which is not common to the law of England and the law of Scotland: *Forgie's Trustees v. Forgie* (4); and they are, I think, entirely congruous with the principle applied by LORD PRESIDENT KINROSS in *Ross's Trustees v. Nicoll* (8). The question there was whether the duplicands of feuduty payable to trustees who held the superiority of certain lands together with the several feuduties and casualties payable to the superior fell to be paid to the liferentrix entitled to the free income of the estate. The Lord President said (5 F. (Ct. Sess.) 148):

- E “The question asked is whether these duplicands of feuduty form part of the income of the trust estate, and I am of opinion that they do. They do not come out of capital, and they leave the capital of the estate untouched.”

This is no more than an application of the civil law conception of *ususfructus* as a *jus alienis rebus utendi fruendi salva rerum substantia* which still plays its part in our law of liferent and fee. Your Lordships are not in this appeal concerned to construe the terms of the trust deed, and I, therefore, express

F no opinion whether the dividend under consideration was properly treated as the revenue of the liferentices, but these authorities show that a distribution of money to shareholders out of profits realised by the sale of the company's assets without any alteration of the share capital is normally a payment of the nature of income.

- G But then the trustees say that, though the dividend may be of the nature of income, it is not taxable income. They say justly that a profit derived from the sale of a capital asset would neither have been taxed in the hands of the company if it had been registered in the United Kingdom, nor have been taxed by deduction when the dividend was paid. The company would not have been taxed on this profit, for it would not have been reckoned part of the profits and gains of the company's business under the rules by which the profits and
- H gains of the company would have been computed if it had been a British company. The shareholder would not have suffered any deduction because the dividend was not paid out of profits and gains brought into charge. The argument for the trustees then attempted an elaborate analogy between the taxation of the British company and its shareholders and the taxation of a foreign company and its shareholders. It assumes an overriding principle of taxation consistently applied both to British and to foreign companies and their respective members. The Income Tax Act is an unpromising field for the argument

from analogy and it has been said in authoritative expositions of the law in this House that there is no analogy between the provisions for taxing the profits of British companies and the provisions for taxing the profits of foreign companies, and no overriding principle common to both.

In *Cull v. Inland Revenue Comrs.* (9) LORD ATKIN states the law applicable to British companies ([1939] 3 All E.R. 763):

"... it is now clearly established that in the case of a limited company, the company itself is chargeable to tax on its profits, and that it pays tax in discharge of its own liability and not as agent for its shareholders. The latter are not chargeable with income tax on dividends, and they are not assessed in respect of them."

The position of the British company and its shareholders in relation to income tax is special: *Neumann v. Inland Revenue Comrs.* (10), per LORD TOMLIN ([1934] A.C. 222); and hinges on the deduction at the current standard rate of income tax from dividends before payment, now authorised by r. 20 of the General Rules, a rule which does not apply to foreign companies: see *Canadian Eagle Oil Co.'s* case (6) ([1945] 2 All E.R. 504), per LORD SIMON, L.C., and per LORD THANKERTON (*ibid.*, 508). As LORD MACMILLAN said in *Cull's* case (9) ([1939] 3 All E.R. 768):

"So far as income tax at the standard rate is concerned, dividends received by the shareholders of a [British] company are regarded as franked by the payment by the company of income tax on its profits or gains."

The position of foreign companies and their shareholders resident in the United Kingdom is entirely different. The foreign company is beyond the jurisdiction and is not assessable and cannot be taxed. The British shareholder is directly assessable and is taxed on the full amount of the dividend received by him: r. I of the Rules Applicable to Case V. In the *Canadian Eagle Oil Co.'s* case (6) LORD SIMON, L.C., said ([1945] 2 All E.R. 503):

"The provision of the Income Tax Act, 1918, by which deduction at the source is authorised in the case of dividends in respect of shares in companies resident in the United Kingdom, stands in sharp contrast to the rules which relate to dividends of foreign companies."

LORD MACMILLAN in the same case pointed out (*ibid.*, 512), that there was a fundamental distinction drawn in the income tax code between income arising from sources in this country and income arising from sources outside the United Kingdom, and observed that

"The topic [*viz.*, the position of a foreign company and of its shareholders] has been darkened rather than illuminated by a false analogy which it has been sought to draw with the case of the taxation of the income of United Kingdom companies and their shareholders."

LORD SIMONDS said (*ibid.*, 517):

"The shareholder in an English company is not taxed upon his dividend, but he goes untaxed because on the true construction of the Income Tax Act no tax is imposed on his dividend. He does not escape tax because some overriding principle says that he shall not be taxed... But in the case of the foreign company's dividend the Act imposes tax in unambiguous terms. It is impossible to escape it by some overriding principle."

In *Barnes v. Hely Hutchinson* (11), a case dealing with the liability to tax of a British shareholder in a foreign company, LORD WRIGHT said ([1939] 3 All E.R. 808):

"I do not think, for several reasons, that the analogy of dividends of an English company applies, and I see no sufficient ground in a case like the

present for relieving the respondent from what is expressed to be his liability under case V."

These citations may suffice, though it would be easy to add to their number, to show that the argument from analogy has no validity.

A The liability to tax of a British shareholder of a foreign company depends, therefore, on the proper construction of sched. D, case V, which is not affected by the provisions for exemptions or abatements or for the assessment of surtax. For the reasons which I have already given my conclusion is that the trustees are liable under sched. D, case V, and I would allow the appeal.

B **LORD MORTON OF HENRYTON :** My Lords, the respondents hold, as trustees of the trust disposition and settlement of Joseph Reid, decd., 3,433 shares of £10 each, fully paid, in Reid Brothers (South Africa), Ltd., a company incorporated and registered in South Africa, hereafter referred to as "the company." During the year in question, the trustees received two dividends in respect of these shares. One was a dividend of 15 per cent. declared as "payable from the company's trading profits for the year ending June 30, 1943." The other was a dividend of 20 per cent., or £2 a share, and the Special Commissioners found as a fact that this latter dividend was paid "out of profits realised from the sale of capital assets, to wit, four properties in Johannesburg which belonged to the company and were occupied by it as warehouse and office premises." That sale took place in March, 1943. It is not disputed that the former dividend is chargeable to income tax in the United Kingdom and the tax thereon has already been paid. It is contended by the Crown that the latter dividend also is chargeable to income tax in the United Kingdom as being "income arising from a possession out of the United Kingdom" within case V of sched. D to the Income Tax Act, 1918. This contention is disputed by the trustees, who were successful before the Special Commissioners and in the First Division of the Court of Session.

E Was this sum of £6,866 received by the trustees on Dec. 14, 1943, "income arising from a possession out of the United Kingdom" within case V? If the trustees had owned the four properties in Johannesburg which were sold in March, 1943, and if their agents in South Africa had remitted part of the proceeds of sale to the trustees, there would be no doubt that these moneys would form part of the capital of the trust and would not come within case V. In that event the trustees would merely have transformed one form of capital, the four properties, into another form of capital, cash, which would have to be invested as part of the trust capital. The trustees did not, however, own these four properties. They were owned by a different entity, namely the company. The trustees owned the 3,433 shares, and the "possession" from which the sum of £6,866 "arose" was the shares. This sum must be either income arising from that possession or part of the capital of that possession. Despite the ingenious argument of counsel for the trustees, I am clearly of opinion that it cannot be part of the capital of that possession. No part of that possession has been sold. No part of the capital paid up on that possession has been returned. Before the payment was made, the trustees held 3,433 shares of £10 each, fully paid, in the company. After the payment was made their holding was exactly the same. All that happened was that certain cash belonging to the company, and representing part of the profit realised by the sale of a capital asset belonging to the company, was paid away as a dividend. Your Lordships are not concerned to consider whether the company could or could not have given its shareholders the benefit of this profit in a form which would have been capital in the hands of the trustees. The directors, having this sum in their hands representing a profit which they were at liberty to distribute, very naturally decided to utilise it in paying a dividend.

H For the reasons which I have briefly stated, I must reject the contention that this dividend came to the trustees as part of the capital of the "possession."

It follows, I think, inevitably that the dividend is income arising from the "possession." *Prima facie* a dividend paid on shares is income. It has been held that, even if a distribution by way of dividend has been made out of profits arising from some dealing with the company's capital assets, the distribution is income as between the persons beneficially interested in capital and income respectively: see *Re Bates* (2), *Hill v. Permanent Trustee Co. of New South Wales Ltd.* (1), *Re Doughty* (3). None of these cases is binding on your Lordships' House, but I see no reason to differ from any of them. These cases are not decisions as to the incidence of income tax, and, of course, the destination of sums paid to the trustees of a will must depend on the language used by the testator. The decisions are, however, helpful as showing that the word "income," when used in its ordinary sense, includes a dividend paid out of a profit of the kind that is sometimes called a "capital profit."

My Lords, I see no good reason for giving to the words "income arising from possessions out of the United Kingdom" some special meaning which would exclude from their scope the dividend now in question. This dividend is, I think, income according to the ordinary use of the word. It is part of the income of the trust estate in the hands of the trustees, and in holding it to be income within the meaning of this taxing provision your Lordships would in no way be disregarding the fact that income, and not capital, is the proper subject of taxation under an Income Tax Act. Counsel for the trustees sought to base an argument, by analogy, on the position which would have arisen if the company had been incorporated in the United Kingdom, had sold capital assets in the United Kingdom, and had paid this dividend out of a profit arising from such sale. In my view, this argument only leads to confusion, for reasons which have already been fully stated.

I regret to find myself unable to accept the reasoning of the learned Lord President, with which the other two judges of the First Division agreed. Accepting the finding of the Special Commissioners that the sum in question was paid out of profits realised from the sale by the company of capital assets, I would agree that this sum, while it remained in the hands of the company, was not income of the company, but I must respectfully part company with the Lord President when he says "this sum is not the income of *anyone*, and never was." The italics are mine. For the reasons I have already stated, I think that it became income of the trustees when it was paid to them. The tree owned by the trustees, whereof this sum was the fruit, was their holding of 3,433 shares, and they have treated that fruit, rightly, in my view, as belonging beneficially to the persons entitled to the income of the trust estate. If the sum in question were not the income of anyone, it surely could not rightly be so treated. I would allow the appeal.

LORD MACDERMOTT: My Lords, had Reid Brothers (South Africa), Ltd., been a British company, the trustees would not have been called on to pay the tax now in dispute. They would have been shielded by the taxation of the company in respect of its profits, and in assessing that taxation the Crown, recognising the basic principle that income tax is not a tax on capital, would have ignored that part of the profits arising from the realisation of the appreciated capital assets, such realisation, as was conceded, not being in the way of trade. The result, on this hypothesis of a British company, would, therefore, have been that the tax claimed by the Crown in these proceedings would not have been sought of anyone—company, trustees or beneficiaries. It is of importance to note, however, that this deliverance would not have flowed merely from the distinction observed between capital and income according to what I shall call the "true income" rule. It would also have been due to the state of the law in this country, which, by a merciful, if somewhat anomalous, dispensation, disregards in this connection the juristic personality of the incorporated company, and, in effect, treats its taxation as the taxation of its

members. This principle, which finds reflection in the definition of "body of persons" in s. 237 of the Act of 1918, I shall call the "representative" rule for lack of a better description. It has its limitations, but these are not now material.

A A return to the situation as it exists finds the trustees claiming that they are not assessable to tax on the dividend of 20 per cent. "payable," as the relevant resolution has it, "from capital profits realised on the sale of properties during the past financial year." They rely on the true income rule and they are entitled to do so because it is a fundamental and pervading principle. They also call in aid the representative rule, but this they are not entitled to do for no assessment has or could have been made on the South African company, and no theory based on the collective taxation of a number of persons is, therefore, available. The field of enquiry is thus considerably narrowed. The B peculiarities of the law relating to the taxation of "bodies of persons" in this jurisdiction, and the authorities bearing on that and cognate subjects, may, therefore, be put to one side, leaving as the matter for determination the question whether this "capital profits" dividend is subject to charge, as the Crown claims, under case V of sched. D which provides for "tax in respect of income arising from possessions out of the United Kingdom."

C Now case V does not, of course, extend the scope of the schedule as delineated by r. 1 thereof, and what I have called the true income rule remains applicable. It is also clear that "possessions" in case V must here refer to the shares held by the trustees in the company. That was conceded, and properly so, for in the absence of any evidence to the contrary it must be assumed that this company, which is incorporated and registered in South Africa, has the general D characteristics of a British company incorporated under the Companies Acts, and, accordingly, that the proprietary interest of its members is limited to their shareholding and does not include, at all events while the company is a going concern and its capital structure remains unaltered, "any right to any item of property owned by the company": see *Macaura v. Northern Assurance Co.* (12), *per* LORD BUCKMASTER ([1925] A.C. 626). This dividend, then, was E income arising from the trustees' shareholding, and the question, accordingly, reduces itself to this: Is it permissible, in order to determine the liability of the dividend to tax in the hands of the respondent shareholders, to look beyond the immediate source, the shareholding, and to examine the make-up of the profits out of which the dividend has been declared? In my opinion, the answer must be in the negative. Apart from the difficulties of ascertaining F in the United Kingdom the facts relating to the internal management of a foreign company, the process of exploring payments beyond their immediate source, if once admitted for this purpose, would have no end. The matter, however, does not rest merely on considerations of convenience or expediency. The trustees and the company are distinct entities, and must be so regarded, but, if the answer to the question now under discussion were in the affirmative, the G words of case V "income arising from possessions" would have to be read as relating to the possessions of the person charged or, at his option, to the possessions of someone else instead, and that is a construction for which I am unable to find any justification either in principle or authority. If I am right in this, it means that the application of the true income rule has to be determined by reference to the dividend and the shareholding alone, but here the H shareholding, which was the only relevant capital in the trustees' hands, rested as it was, and the dividend cannot, therefore, be said to have contained an element of capital. No doubt, the shares abated in market value after the payment of the dividend, but they nevertheless remained intact. The ripe tree loses weight and worth when it sheds its fruit, but the fruit remains fruit and no more unless in its fall it has taken part of the tree with it. For these reasons I am of opinion that the dividend in question fell within case V and is subject to tax. I would, therefore, allow the appeal.

LORD REID : My Lords, I think that the decision of this case depends on the question whether a dividend from a foreign company which comes to a shareholder in this country must in all cases be held to be received by him as income within the meaning of the Income Tax Acts. In this case the trustees held more than one-third of the shares in a company incorporated and registered in the Union of South Africa. That company does not trade in land. It held a considerable amount of land in or near Johannesburg and sold a part of this land which it did not need. A sum of over £17,000 was estimated as profit on this sale, and the greater part of this sum was distributed as a dividend. This dividend was declared by minute of the directors to be "payable from capital profits realised on the sale of properties during the past financial year." It is not disputed that if this had been a British company no income tax would have been payable by the company in respect of such profits. The phrase "capital profits" is not an accurate description of such profits, but it is a convenient short name for them, and I shall use it as such. A

The main argument for the trustees depended on a comparison with the position which arises when a British company distributes capital profits as dividend. In that case there is no liability on the shareholders to pay income tax either at the standard rate or in the form of surtax on such a dividend, but the reason for that is not that what the shareholder receives is capital. It is that a shareholder is never directly assessable in respect of any dividend paid by a British company and that the surtax provisions in the Income Tax Acts do not impose any liability to pay surtax in respect of dividends paid by a British company out of profits which were not of a kind which is taxable in the hands of the company. It has frequently been pointed out that the Income Tax Acts treat payments by foreign companies quite differently from payments by British companies. I need only refer in this matter to the *Canadian Eagle Oil Co.* case (6). I think that little or no assistance towards the decision of the present case can be got from statutory provisions or authorities dealing with similar dividends paid by British companies. C D

The assessment in the present case was made under case V of sched. D in respect of income from possessions out of the United Kingdom. I do not think that there can be any doubt that the trustees' shares in the South African company were possessions out of the United Kingdom or that the dividend in question arose from those shares. The only question is: Was that dividend received by the trustees as income within the meaning of sched. D? The question whether a capital dividend is capital or income in the hands of the shareholder who receives it may arise in trust administration. If a trustee, without giving any special directions to his trustees, merely directs them to hold a fund including certain shares for one beneficiary in life and for another in fee, does a capital dividend from those shares go to the life tenant or must it be retained as part of the capital of the trust fund? It has been held in England that it goes to the tenant for life: *Re Doughty* (3); and Scottish authority points to the same result: *Forgie's Trustees v. Forgie* (4). In some cases the dividing line between capital and income is not the same for the purposes of income tax as for trust administration, but I see no reason why that should be so in this case. If a dividend ought to be regarded as income as between life tenant and fee, I think that that points to its being income within the meaning of the Income Tax Act, but it is not conclusive. E F G

The crucial question in this case must, therefore, be decided with little direct assistance from authority. The contention for the Crown has the merit of extreme simplicity, if that be a merit in questions of income tax. It is that the dividend cannot be capital because the trustees' foreign possessions, the shares, remain intact, and, therefore, the dividend must be income. It is admitted that, if the money had been paid by way of reduction of the share capital, that would not have been income. The shares would not have remained the same. It H

is also admitted that, if the surplus profits had been used to create bonus shares, or even it may be bonus debentures, there would have been no receipt of income. New capital assets would have been created. But it is said that so long as the capital asset abroad remains the same anything received by the shareholder in this country must be income subject to assessment under case V of sched. D. This may seem a technical argument which neglects the real fact that the capital value of the trustees' foreign asset has been reduced by the making of the payment, but a company can, and often does, reduce considerably the market value of its shares by paying a dividend out of accumulated trading profits, and there can be no doubt that such a dividend would fall within case V if it came from a foreign company. There are many ways in which a company can deal with its profits. If it adopts certain methods, the result is the creation of new capital assets. If it adopts other methods, the result is the receipt of income by its shareholders. In either case it is immaterial whether the profits were trading profits or capital profits. It is true that, owing to the special provisions of the Income Tax Acts which distribute liability for income tax (including surtax) between a British company and its shareholders, a dividend paid by a British company out of its capital profits is not taxable, but there are no provisions applicable to a foreign company which bring about this result. I can find no satisfactory alternative to the view that, if a foreign company chooses to distribute its surplus profits as dividend, the nature and origin of those profits does not and cannot be made to affect the quality of the receipt by the shareholder for the purpose of income tax. I, therefore, agree that this appeal should be allowed.

Appeal allowed. The trustees' costs of this appeal as between party and party to be paid by the Crown by agreement.

Solicitors: Solicitor for Scotland of the Board of Inland Revenue, and Solicitor for England of the Board of Inland Revenue; Ince, Roscoe, Wilson & Griggs, agents for Boland King & Stewart, Glasgow, and Simpson & Marwick, W.S., Edinburgh (for the trustees).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

NOOR MOHAMED v. R.

[JUDICIAL COMMITTEE OF THE PRIVY COUNCIL (Lord Uthwatt, Lord du Parcq, Lord Oaksey, Sir Madhavan Nair and Sir John Beaumont), November 16, 17, 18, 1948, January 19, 1949.]

Criminal Law—Evidence tending to show commission of other crimes—Murder—Evidence of previous death in similar circumstances.

The appellant was convicted of the murder by poisoning of a woman, A., with whom he had gone through a ceremony of marriage after the death of his first wife, G. There was no direct evidence that he had administered the poison. At the trial evidence was admitted tending to show that the appellant had also murdered G. in the same manner on the ground that it tended to rebut the possible defences that the woman, A., had committed suicide or had taken poison accidentally. He had never been charged with the murder of G.

HELD: the evidence should not have been admitted. If the appellant had been proved to have administered poison to A. in circumstances consistent with accident, then proof that he had previously administered poison to G. in similar circumstances might well have been admissible, but there was no direct evidence in either case that the appellant had administered the poison.

Principles in Makin v. A.-G. for New South Wales ([1894] A.C. 57; 69 L.T. 778), applied.

Per the JUDICIAL COMMITTEE: In Thompson v. R., LORD SUMNER

said ([1918] A.C. 232; 118 L.T. 421). "Before an issue can be said to be raised, which would permit the introduction of [evidence of previous offences] so obviously prejudicial to the accused, it must have been raised in substance if not in so many words, and the issue so raised must be one to which the prejudicial evidence is relevant. The mere theory that a plea of Not Guilty puts everything material in issue is not enough for this purpose. The prosecution cannot credit the accused with fancy defences in order to rebut them at the outset with some damning piece of prejudice." Their Lordships respectfully agree with what they conceive to be the spirit of LORD SUMNER's words, and wish to say nothing to detract from their value. On principle, however, and with due regard to subsequent authority, their Lordships think that one qualification of the rule laid down by LORD SUMNER must be admitted. An accused person need set up no defence other than a general denial of the crime alleged. The plea of Not Guilty may be equivalent to saying: "Let the prosecution prove its case, if it can," and, having said so much, the accused may take refuge in silence. In such a case it may appear (for instance) that the facts and circumstances of the particular offence charged are consistent with innocent intention, whereas further evidence, which incidentally shows that the accused has committed one or more other offences, may tend to prove that they are consistent only with a guilty intent. The prosecution could not be said, in their Lordships' opinion, to be "crediting the accused with a fancy defence" if they sought to adduce such evidence. It is right to add, however, that in all such cases the judge ought to consider whether the evidence which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed, to make it desirable in the interest of justice that it should be admitted. If, so far as that purpose is concerned, it can in the circumstances of the case have only trifling weight, the judge will be right to exclude it. Cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible. The decision must then be left to the discretion and the sense of fairness of the judge.

Rule laid down by LORD SUMNER in Thompson v. R. ([1918] A.C. 232; 118 L.T. 421), *qualified*.

Dictum of LORD GODDARD, C.J., in R. v. Sims ([1946] 1 All E.R. 701; [1946] K.B. 539; 175 L.T. 74), *doubted*.

[AS TO EVIDENCE OF RELEVANT FACTS, see HALSBURY, Hailsham Edn., Vol. 9, pp. 183-188, para. 267-270; and FOR CASES, see DIGEST, Vol. 14, pp. 366-403, Nos. 3875-4233.]

Cases referred to:

- (1) *Makin v. A.-G. for New South Wales*, [1894] A.C. 57; 69 L.T. 778; 58 J.P. 148; 14 Digest 371, 3924.
- (2) *Maxwell v. Director of Public Prosecutions*, [1935] A.C. 309; 151 L.T. 477; 98 J.P. 387; Digest Supp.
- (3) *Thompson v. R.*, [1918] A.C. 221; 118 L.T. 418; 82 J.P. 145; 14 Digest 360, 3810.
- (4) *R. v. Sims*, [1946] 1 All E.R. 697; [1946] K.B. 531; 175 L.T. 72; 2nd Digest Supp.
- (5) *R. v. Bond*, [1906] 2 K.B. 389; 95 L.T. 296; 70 J.P. 424; 14 Digest 371, 3921.

APPEAL against conviction.

The appellant was convicted before the Supreme Court of British Guiana of murdering a woman with whom he had gone through a ceremony of marriage following the death of his first wife. In both cases death was due to poisoning

by potassium cyanide. At the trial evidence was admitted as to the circumstances of the death of the first wife. The Judicial Committee now held that this evidence was irrelevant and should not have been admitted and advised His Majesty that the appeal should be allowed. The facts appear in the judgment.

The case is reported in view of the qualification by the Board of the rule laid down by LORD SUMNER in *Thompson v. R.* ([1918] A.C. 232 ; 118 L.T. 421) and their LORDSHIPS' criticism of the judgment of the Court of Criminal Appeal **A** in *R. v. Sims* ([1946] 1 All E.R. 697 ; [1946] K.B. 531 ; 175 L.T. 72).

Page, K.C., T. B. W. Ramsay, and A. Stone for the appellant.
Gahan for the Crown.

Nov. 18, 1948. After hearing the arguments of counsel for the appellant and for the Crown, their Lordships announced that they would advise His Majesty that the appeal should be allowed and the conviction of the appellant **B** quashed, and would state their reasons for tendering this advice at a later date.

Jan 19, 1949. The following advice was delivered by

LORD DU PARCQ : The appellant was tried before the Supreme Court of British Guiana on a charge of murdering a woman commonly known, and referred to during the trial, as Ayesha. The jury found him Guilty, and he was **C** sentenced to death. Evidence was admitted at the trial to which objection was taken by the appellant's counsel on the ground that it tended to show that the appellant had murdered another woman, his wife Gooriah. It was said on behalf of the appellant that the evidence ought to be excluded as being prejudicial to him and irrelevant. For the Crown it was contended, on grounds **D** attending the two deaths made evidence concerning the earlier of them relevant to the charge. It was properly conceded at their Lordships' Board on behalf of the Crown that, if the evidence were found to have been wrongly admitted, it would follow, according to the settled principles by which their Lordships are guided in criminal cases, that the appeal must be allowed.

The evidence which related directly to the charge of murdering Ayesha may **E** be summarised as follows. The appellant's wife, Gooriah, died on May 17, 1944. At some time in that year Ayesha had left her husband and gone to live with the appellant. They lived together as man and wife, and there was evidence that in 1945 they went through a ceremony of marriage according to the rites of the Mohammedan religion, although Ayesha's husband was still living. After the first few weeks of their union, their life together had not been **F** happy. It was said that the appellant had often beaten Ayesha, and had sometimes driven her from his house. On one occasion she had lived apart from him for two weeks, though she seems to have continued to feel affection for him and to have been anxious to return to him. The earlier quarrels were due to the fact that the appellant suspected and accused her of infidelity. Later, he made a different charge against her. On a day in August, 1946, a neighbour **G** named Mildred James, who employed Ayesha to do some dress-making, witnessed an assault on her by the appellant. She tried to rescue Ayesha, whereupon the appellant said, according to the witness : "Through this woman people got to say I kill my first wife. She must go away." Ayesha refused to go, and the appellant was alleged to have threatened her with the words : "If you can't go alive, you got to go dead." There was also evidence of a quarrel **H** and a threat by the appellant to kill Ayesha on the night of Sept. 16, 1946. On the morning of the following day, Ayesha died of poisoning by potassium cyanide. It must here be stated that the appellant is a goldsmith by trade and used a solution of potassium cyanide in the ordinary course of his business. He kept it in a press or cupboard. This cupboard was usually locked, but the padlock in use was defective, and it was not difficult to force the cupboard door. Potassium cyanide is a poison which acts quickly and causes loss of consciousness in a few seconds.

Ayesha was said to have been seen alive at or after 9 a.m. on the morning of Sept. 17. A witness called for the Crown swore that he had then seen her go with the appellant into the house in which they lived. This evidence was inconsistent with statements made by the appellant. According to him, his daughter, a child of fourteen, had awakened him shortly before 9.30 a.m. from a sleep which followed a drinking bout, and had told him that Ayesha "was frothing." He said that he had found the woman unconscious. After some delay, he had reported this to a chemist in the neighbourhood. It appeared that he had told this chemist that he had gone to fetch a doctor, but had not found him at home. He was advised to take his "wife" to hospital and did so between 9 and 10 a.m. The appellant, at the request of the assistant dispenser there, had produced a sheet on which Ayesha had vomited. There was a stain on it which the appellant said smelled like gold solution. The assistant dispenser said he could smell nothing. Ayesha was given a stimulant by the assistant dispenser, and the appellant was advised to take her to the doctor. At 11 o'clock the appellant arrived at a doctor's surgery, bringing with him what the doctor found to be the dead body of Ayesha. A post-mortem examination showed without doubt that death was due to cyanide poisoning. It also indicated that there had been exaggeration in some of the evidence as to the more recent assaults on Ayesha by the appellant, since, although some "bruise blood" was found near the right kidney, there were no external signs of violence. This evidence having been given, the question was argued, in the absence of the jury, whether evidence tendered as to the death of Gooriah should be admitted. The learned judge, after an elaborate argument, decided to admit it. At this stage the defence had put forward no theory as to the manner in which the poison had been taken by, or administered to, Ayesha. Later, in his final address to the jury, counsel for the defence suggested that the facts were consistent with suicide. A

Counsel for the appellant at their Lordships' Bar laid stress on the fact that at the trial counsel for the Crown, in the course of his submission that the evidence complained of was admissible, stated, according to the note of his submission, that the appellant had said to Ayesha: "I will get rid of you as I got rid of my first wife." This sentence certainly occurs in the notes, but their Lordships think that it must have been intended and understood as a gloss or comment on the facts proved rather than an allegation of fact. If it had been intended as a quotation from a statement made by the appellant it would have been easy for the appellant's counsel to point out, what, indeed, the learned judge would himself have observed, that there was no evidence that he had used the words imputed to him. B

Their Lordships do not find it necessary to set out in any detail the evidence relating to Gooriah's death. It is sufficient to quote in full para. 7 of the respondent's Case which is as follows:—

"The prosecution then called a great deal of evidence relating to Gooriah's death, including evidence of the following facts:—(1) The appellant believed Gooriah to be unfaithful and used to beat her. (2) The appellant had said of Gooriah to Ayesha's husband: 'Buddy ah got a mind to poison this bitch.' (3) Gooriah on the day of her death, May 17, 1944, went to the nearby house of the appellant's brother-in-law, carrying a piece of folded white paper wrapped in her hand. She had had toothache and the appellant was overheard to say to her: 'You must drink this; it will do you good.' (4) Shortly after a boy ran for the appellant shouting: 'Pawah Gooriah dead.' The appellant went to the house and summoned Dr. Besson, who was passing. (5) The appellant went to the window and called a boy to bring him a paper, similar to that which Gooriah had had in her hand, from the yard. The boy brought the paper which the appellant handed to Dr. Besson saying it smelt of cyanide. The doctor found that the paper had no substance G

on it and had no smell. A little later the appellant brought the doctor an enamel cup saying : ' This cup smells of cyanide.' The cup was empty and had no smell. (6) Gooriah died, and Dr. Besson's examination showed her death to be consistent with potassium cyanide poisoning. On analysis two grains of potassium cyanide were found in Gooriah's stomach. Dr. Besson stated that her death was caused by cyanide poisoning."

- A Their Lordships now turn to the important question of law raised by this appeal. By the terms of the Criminal Law (Procedure) Ordinance in force in British Guiana the practice and procedure there are in general the same as the practice and procedure in force in criminal causes in the High Court of Justice and Courts of Assize in England. There are no special provisions in the Ordinance to which their Lordships find it necessary to refer.
- B The first comment to be made on the evidence under review is that it plainly tended to show that the appellant had been guilty of a criminal act which was not the act with which he was charged. In *Makin v. A.-G. for New South Wales* (1), LORD HERSCHELL, L.C., delivering the judgment of the Board, laid down two principles ([1894] A.C. 65), which must be observed in a case of this character. Of these the first was :
- C " It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried."
- D In *Maxwell v. Director of Public Prosecutions* (2) ([1935] A.C. 317, 320) this principle was said by LORD SANKEY, L.C., with the concurrence of all the noble and learned Lords who sat with him, to be "one of the most deeply rooted and jealously guarded principles of our criminal law" and to be "fundamental in the law of evidence as conceived in this country." The second principle stated in *Makin's* case (1) was ([1894] A.C. 65) :
- E "... the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused."
- F The statement of this latter principle has given rise to some discussion. A plea of Not Guilty puts everything in issue which is a necessary ingredient of the offence charged, and if the Crown were permitted, ostensibly in order to strengthen the evidence of a fact which was not denied, and, perhaps, could not be the subject of rational dispute, to adduce evidence of a previous crime, it is manifest that the protection afforded by the "jealously guarded" principle
- G first enunciated would be gravely impaired. This aspect of the matter was considered by the House of Lords in *Thompson v. R.* (3). Their Lordships need not allude to the facts of that case. It is enough to say that the evidence there admitted was held to be relevant as one of the indicia by which the accused man's identity with the person who had committed the crime could be established : see per LORD PARKER of WADDINGTON ([1918] A.C. 231).
- H In the words of LORD ATKINSON (*ibid.*, 230) it rebutted the defence of an alibi which otherwise would have been open. Nothing of the kind can be suggested in the present case. The value of the case for the present purpose is that LORD SUMNER dealt particularly with the difficulty to which their Lordships have referred, and stated his conclusion thus (*ibid.*, 232) :

" Before an issue can be said to be raised, which would permit the introduction of such evidence so obviously prejudicial to the accused, it must have been raised in substance if not in so many words, and the issue so raised

must be one to which the prejudicial evidence is relevant. The mere theory that a plea of Not Guilty puts everything material in issue is not enough for this purpose. The prosecution cannot credit the accused with fancy defences in order to rebut them at the outset with some damning piece of prejudice."

Their Lordships respectfully agree with what they conceive to be the spirit of LORD SUMNER's words, and wish to say nothing to detract from their value. On principle, however, and with due regard to subsequent authority, their Lordships think that one qualification of the rule laid down by LORD SUMNER must be admitted. An accused person need set up no defence other than a general denial of the crime alleged. The plea of Not Guilty may be equivalent to saying: "Let the prosecution prove its case, if it can," and, having said so much, the accused may take refuge in silence. In such a case it may appear (for instance) that the facts and circumstances of the particular offence charged are consistent with innocent intention, whereas further evidence, which incidentally shows that the accused has committed one or more other offences, may tend to prove that they are consistent only with a guilty intent. The prosecution could not be said, in their Lordships' opinion, to be "crediting the accused with a fancy defence" if they sought to adduce such evidence. It is right to add, however, that in all such cases the judge ought to consider whether the evidence which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed, to make it desirable in the interest of justice that it should be admitted. If, so far as that purpose is concerned, it can in the circumstances of the case have only trifling weight, the judge will be right to exclude it. To say this is not to confuse weight with admissibility. The distinction is plain, but cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible. The decision must then be left to the discretion and the sense of fairness of the judge.

Their Lordships have considered with care the question whether the evidence now in question can be said to be relevant to any issue in the case. They have asked themselves, adopting the language of LORD SUMNER in *Thompson v. R.* (3) ([1918] A.C. 236; "What exactly does this purport to prove?" At the trial the learned counsel for the Crown, when submitting that the evidence should be admitted, referred to the possible defences of accident and suicide. In his address to the jury he said, according to the note, that the evidence was led "to meet the defence of suicide," and pointed out that the circumstances surrounding the deaths of the two women "followed a similar pattern." At their Lordships' Bar it was submitted that this similarity of circumstances would lead to the inference that the appellant administered poison to Ayesha with felonious intent.

There can be little doubt that the manner of Ayesha's death, even without the evidence as to the death of Gooriah, would arouse suspicion against the appellant in the mind of a reasonable man. The facts proved as to the death of Gooriah would certainly tend to deepen that suspicion, and might well tilt the balance against the appellant in the estimation of a jury. It by no means follows that this evidence ought to be admitted. If an examination of it shows that it is impressive just because it appears to demonstrate, in the words of LORD HERSCHELL, L.C., in *Makin's case* (1) ([1894] A.C. 65), "that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried," and if it is otherwise of no real substance, then it was certainly wrongly admitted. After fully considering all the facts which, if accepted, it revealed, their Lordships are not satisfied that its admission can be justified on any of the grounds which have been suggested or on any other ground. Assuming that it is consistent with the evidence relating to the death of Ayesha that she took her own life, or that she took poison accidentally (one

of which assumptions must be made for the purposes of the Crown's argument at the trial) there is nothing in the circumstances of Gooriah's death to negative these possible views. Even if the appellant deliberately caused Gooriah to take poison (an assumption not lightly to be made, since he was never charged with having murdered her) it does not follow that Ayesha may not have committed suicide. As to the argument from similarity of circumstances, it seems on analysis to amount to no more than this, that, if the appellant murdered one woman because he was jealous of her, it is probable that he murdered another for the same reason. If the appellant were proved to have administered poison to Ayesha in circumstances consistent with accident, then proof that he had previously administered poison to Gooriah in similar circumstances might well have been admissible. There was, however, no direct evidence in either case that the appellant had administered the poison. It is true that in the case of Gooriah there was evidence from which it might be inferred that he persuaded her to take the poison by a trick, but this evidence cannot properly be used to found an inference that a similar trick was used to deceive Ayesha, and so to fill a gap in the available evidence. The evidence which was properly adduced as to Ayesha shows her to have been acquainted, as were, it may be supposed, most of the inhabitants of the village in which the appellant lived, with the fact that suspicion rested on him in respect of Gooriah's death, and the theory that Ayesha was deceived into taking poison by a similar ruse to that which is supposed to have succeeded with Gooriah seems to their Lordships to rest on an improbable surmise. The effect of the admission of the impugned evidence may well have been that the jury came to the conclusion that the appellant was guilty of the murder of Gooriah, with which he had never been charged, and, having thus adjudged him a murderer, were satisfied with something short of conclusive proof that he had murdered Ayesha. In these circumstances the verdict cannot stand, notwithstanding the care with which the learned judge summed up the case, and the fairness with which the trial was conducted in all other respects.

Their Lordships are aware that their statement of the principles to be applied to such a case as this, and of the right way of applying them, may not accord with some at least of the *dicta* contained in a recent decision of the Court of Criminal Appeal in England, to which counsel rightly directed their attention. In *R. v. Sims* (4) LORD GODDARD, C.J., delivering judgment, expressed the opinion of the court as to the proper method of approaching a question concerning the admissibility of evidence of other offences than that charged in these words ([1946] 1 All E.R. 701) :

"If one starts with the assumption that all evidence tending to show a disposition towards a particular crime must be excluded unless justified, then the justification of evidence of this kind is that it tends to rebut a defence otherwise open to the accused ; but if one starts with the general proposition that all evidence that is logically probative is admissible unless excluded, then evidence of this kind does not have to seek a justification but is admissible irrespective of the issues raised by the defence, and this we think is the correct view. It is plainly the sensible view."

With all due deference to the Court of Criminal Appeal, their Lordships feel bound to say that they are not convinced that the method of approach which it thus approved has any advantage over that which it rejected as incorrect. The expression "logically probative" may be understood to include much evidence which English law deems to be irrelevant. Logicians are not bound by the rules of evidence which guide English courts, and theories of probability sometimes cause a clash of philosophic opinion. It would, no doubt, be wrong to interpret the observations of the Court of Criminal Appeal as meaning that evidence can sometimes be admitted merely for the reason that it shows a propensity in the accused to commit crimes of the nature of that with which

he is charged. It cannot be supposed that the court intended to lay down a proposition which would conflict with principles which have been laid down, or approved, by the House of Lords. It may be assumed that it is still true to say, as LORD SUMNER said in *Thompson v. R.* (3) ([1918] A.C. 232) :

"No one doubts that it does not tend to prove a man guilty of a particular crime to show that he is the kind of man who would commit a crime, or that he is generally disposed to crime and even to a particular crime."

If all that the court in *R. v. Sims* (4) meant to say was that evidence of the kind specified in the first of the principles stated in *Makin's* case (1) may be admitted if it is relevant for other reasons, then the *dictum* has no novelty. It does seem, however, that the passage quoted was intended at least to bear the meaning that evidence ought to be admitted which is in any way relevant to a matter which can be said to be in issue, however technically, between the Crown and the accused, because a little later in the judgment the following passage occurs ([1946] 1 All E.R. 701) :

"In any event, whenever there is a plea of Not Guilty, everything is in issue and the prosecution have to prove the whole of their case, including the identity of the accused, the nature of the act and the existence of any necessary knowledge or intent."

The Court of Criminal Appeal would thus appear to have rejected altogether the opinion of LORD SUMNER which, although, as their Lordships have said, they believe that it must in one respect be somewhat qualified, has hitherto been generally accepted as a governing principle. Recent *dicta* of the Court of Criminal Appeal, though carrying great weight, do not necessarily out-weigh earlier *dicta* in the House of Lords or the Court of Crown Cases Reserved or in the Court of Criminal Appeal itself, and, if their Lordships have correctly understood those which they have quoted, they can only regard them as in some degree inconsistent with settled principle.

Their Lordships think that a passage from the judgment of KENNEDY, J. ([1906] 2 K.B. 398) in the well-known case of *R. v. Bond* (5), may well be quoted in this connection :

"... if, as is plain, we have to recognise the existence of certain circumstances in which justice cannot be attained at the trial without a disclosure of prior offences, the utmost vigilance at least should be maintained in restricting the number of such cases, and in seeing that the general rule of the criminal law of England, which (to the credit, in my opinion, of English justice) excludes evidence of prior offences, is not broken or frittered away by the creation of novel and anomalous exceptions."

Their Lordships respectfully approve this statement, which seems to them to be completely in accord with the later statement of LORD SANKEY, L.C., in *Maxwell's* case (1) when he said ([1935] A.C. 320) :

"It is of the utmost importance for a fair trial that the evidence should be *prima facie* limited to matters relating to the transaction which forms the subject of the indictment and that any departure from these matters should be strictly confined."

They would regret the adoption of any doctrine which made the general rule subordinate to its exceptions. They must add, however, that, though they had been unwilling to adopt the approach to the problem which the Court of Criminal Appeal has recommended, they, of course, refrain from expressing any opinion as to the propriety of the actual decision in *Sims's* case (4). It is unnecessary, and, therefore, undesirable, that they should do so.

Appeal allowed.

Solicitors: *Hy. S. L. Polak & Co.* (for the appellant); *Burchells* (for the Crown).

[Reported by H. McL. MORRISON, Esq., Barrister-at-Law.]

R. v. O./C. DEPOT BATTALION, R.A.S.C., COLCHESTER.

Ex parte ELLIOTT.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Finemore, JJ.), January 18, 19, 1949.]

A *Habeas Corpus*—Court martial—Deserter arrested abroad—Detention in England—Non-compliance with rule of military procedure—Delay in convening court martial—Recall from reserve—Army Act, s. 45 (1) ; s. 154 (1)—Armed Forces (Conditions of Service) Act, 1939 (c. 17), s. 4 (5).

B On Aug. 29, 1946, authority was given to the applicant, who was a private in the Royal Army Service Corps, to go into the reserve on compassionate grounds for a period of two months. On Oct. 29, 1946, the day before he should have reported under his orders of recall, he left the country, and for two years evaded arrest until, on Oct. 9, 1948, he was arrested at Antwerp by British officers accompanied by two Belgian police officers. Having been detained in a police station in Antwerp until Oct. 11, he was escorted to British Army quarters in Germany, and thence to England where he was charged with desertion and detained at Colchester Barracks without a court martial being convened. On Dec. 22, 1948, the applicant applied for a writ of *habeas corpus*, alleging that he was not a person subject to military law and that he was wrongfully held in custody. The writ issued, and on the return it was submitted that the arrest and subsequent detention of the applicant by the military authorities was illegal because

D (i) he was arrested in Belgium contrary to Belgian law and (ii) his arrest was not in compliance with the provisions of s. 154 of the Army Act. It was also contended that the delay in bringing the applicant to trial was oppressive.

E HELD : (i) if a person is arrested abroad and is brought before a court in this country charged with an offence which that court has jurisdiction to hear, the court has no power to go into the question, once that person is in lawful custody in this country, of the circumstances in which he may have been brought here, but the court has jurisdiction to try him for the offence in question, and, therefore, in the present case the court martial had jurisdiction to deal with the applicant and the High Court would not interfere.

F *Ex parte Scott* (1829) (9 B. & C. 446) and *Sinclair v. H.M. Advocate* (1890) (12 R. (Ct. Sess.) 38), *applied*.

(ii) The arrest of the applicant was justified by s. 45 (1) of the Army Act, and the procedure prescribed by s. 154 (1) for the arrest of a suspected deserter or absentee and bringing him before a court of summary jurisdiction did not apply.

G (iii) if, in military proceedings, there had been such delay in bringing a man to trial as to amount to oppression the High Court could interfere, and admit him to bail.

H (iv) in considering whether there had been gross and oppressive delay the court would take into account the regulations which were laid down on the subject, but the mere fact that those regulations might not have been observed was not a matter for the court once it was shown that a man was subject to military law.

R. v. *Secretary of State for War. Ex parte Martyn* ([1949] 1 All E.R. 242), *applied*.

Per curiam : If a man is released for a definite period and has given an address to which he is proceeding so that the officer in charge may know where to send the recall papers, and he leaves that address without indi-

cating where those papers are to be forwarded, he cannot be heard to say he did not receive the orders of recall.

[FOR THE ARMED FORCES (CONDITIONS OF SERVICE) ACT, 1939, s. 4 (4), see HALSBURY'S STATUTES, Vol. 32, p. 954.]

Cases referred to :

- (1) *Ex p. Scott*, (1829), 9 B. & C. 446 ; 4 Man. & Ry. K.B. 361 ; 2 Man. & Ry. M.C. 308 ; 14 Digest 188, 1684. A
- (2) *Sinclair v. H.M. Advocate*, (1890), 17 R. (Ct. Sess.) 38.
- (3) *Williams v. Secretary of State for War*, (1947), unreported.
- (4) *Blake's Case*, (1814), 2 M. & S. 428 ; 105 E.R. 440 ; 39 Digest 343, 288.
- (5) *Jenkes's Case*, (1676), 6 State Tr. 1190 ; 2 Swan. 12, 43 ; 36 E.R. 518, 524 ; 16 Digest 256, 577. B
- (6) *R. v. Secretary of State for War, Ex p. Martyn*, [1949] 1 All E.R. 242.

MOTION for *habeas corpus*.

A writ was issued on the allegation that the applicant was not a person subject to military law and that he was wrongfully held in custody by the military authorities. On the return of the writ it was conceded that the applicant was subject to military law, but it was contended that his arrest and detention were illegal. The Divisional Court held that the detention was lawful and discharged the rule. The facts appear in the judgment of LORD GODDARD, C.J. C

Collard for the applicant.

The Attorney-General (Sir Hartley Shawcross, K.C.) and H. L. Parker for the Crown. D

LORD GODDARD, C.J., delivered the following judgment of the court. On Dec. 22, 1948, the applicant, Richard Arthur Elliott, by his counsel, moved for a writ of *habeas corpus*, alleging that he was not a person subject to military law and that he was wrongfully held in custody. The court, on the charges stated in his affidavit, and especially as it appeared that he had been in custody for some 70 days, ordered the writ to issue and that he might be brought before the court on the next day, when the court admitted him to bail. If we had known as much of the case as we do now, we should not have directed the writ to issue, for the applicant supported his application by an affidavit which, I do not hesitate to say, was deliberately untrue to his knowledge. In para. 3 of his affidavit the applicant stated that he was called up for military service in 1944, and then in para. 4, the material paragraph, he says : E

" In May, 1946, I was discharged from the Army on a ' W.T.' release, which meant I was released from the Army to follow my civil occupation and that I was no longer subject to military law. Such release can be terminated by the service of recall papers, but none was ever served on me." F

I will now deal with the charges which are disclosed and are not seriously challenged. During May, 1946, an application for compassionate leave was made by the applicant, who, incidentally, had already received a sentence of 12 months for desertion and had been absent without leave five times, and may, therefore, fairly be described as a persistent offender against military law, the ground for the application being that he might be enabled to attend to his personal matters. Later, he submitted medical certificates with regard to the woman with whom he was living. The matter was considered by the competent authority, and on Aug. 29 an authority was given to his commanding officer allowing him to be sent to the reserve on compassionate grounds for a period of two months. Men who are called up for service under the Military Service Acts are treated in the same way as Territorial soldiers and under the Armed Forces (Conditions of Service) Act, 1939, s. 4 (4) it is provided : G

H

" At any time during the present period of embodiment any officer or man belonging to an embodied part of the Territorial Army may, by order of the competent military authority, be released from the obligations which he is under by reason of the embodiment of that part of the Territorial Army ; and, so long as the order remains in force, he shall be in the position in which he would be if that part of the Territorial Army were not embodied. . . ."

In other words, from the time he is released he has civilian status. The section continues :

" Any such order may be revoked by the competent military authority.

(5) On revoking an order under the last preceding sub-section, the competent military authority may, if the person with respect to whom the order was made is still an officer or man of the Territorial Army, give directions requiring him to attend at the place and time fixed by those directions ; and, for the purposes of s. 20 of the Territorial and Reserve Forces Act, 1907 (which provides for the punishment of a person failing to appear at the time and place appointed for assembling on embodiment) those directions shall have effect as if they were directions under s. 17 of that Act directing the embodiment of a part of the Territorial Army to which that person belonged."

It is unnecessary for the purposes of this judgment to refer in any detail to the Territorial and Reserve Forces Act, 1907. Suffice it to say that, if a man does not obey the orders to appear at the place to which he is directed, he becomes liable to trial by court-martial, and in the opinion of this court as soon as the man does receive his orders of recall he reverts to the position that he had occupied before he was granted the privilege of going into the Reserve for a certain time and he is a soldier and subject to military law. About that the court has no doubt whatever. The reason why men who are treated

as embodied Territorials are put into the Reserve instead of being given ordinary leave where it is a question of compassionate release, is because, if they were given ordinary leave, they would be entitled to pay, and if they obtain compassionate leave to attend to domestic or business affairs, they are giving no service to His Majesty and there is no reason why His Majesty should pay them for that time. In the present case the applicant was given permission

to go into the Reserve for two months. The court is satisfied that he was given a form which is given to all these men who are released from service on compassionate grounds. It is a form which it is very important he should have, in case he is picked up by the civil or military police as a deserter, because by it he can show permission to be at large. The form says : " This is to certify, " then it gives his number, rank, name, and unit, " has been relegated

to . . .,"—in this case it is Class W with a " T " indicating Territorial Reserve—for a period, giving the dates from which, and to which, he is released. A notice which was sent under the regulations to the regimental paymaster was exhibited and showed that the applicant was discharged for a period of eight weeks. On the back of the form which was sent to the applicant there are certain printed instructions by which he was told : " Any change in your address must be

immediately notified to the officer in charge of records on " a post-card " which is supplied to you for the purpose. You will receive instructions shortly before you are recalled to rejoin the colours and you must then report as directed bringing this form with you. With the order of recall to the colours you will receive (a) a travelling warrant to enable you to proceed to the station of the unit you are to join, and (b) a postal order for 5s." Then in big letters is printed : " A release for a definite period. Should instructions not be received by you within seven days of the expiration of a definite period of release you should

inform your officer in charge of records accordingly and await his instructions."

We are quite willing to accept that a man who is relegated for the time being to the Reserve commits no offence if he does not report directly on the expiration of the period and may wait until he gets orders of recall, but he is told, that if he has been released for a definite period and does not get his orders of recall he should communicate with the officer in charge of records. What the applicant did was that, having been relegated to the Reserve, he returned to the place where the woman with whom he was living resided, stayed with her for two days, and then went off. He visited the house where she was living from time to time for short periods, and an order of recall was sent to that house which was the address he had given to the military authorities as the address to which they could send the papers. If it were necessary, the court would have no hesitation in holding that, if a man is released for a definite period and has given an address to which he is proceeding so that the officer in charge may know where to send the recall papers and he leaves that address without indicating where those papers are to be forwarded, he cannot be heard to say he did not receive the orders of recall. Otherwise a man could give any address he liked and then deliberately go and stay a couple of streets away so that he did not receive the recall. If a man chose to behave like that, he would be rightly charged as a deserter. In the present case the court is satisfied that the applicant did receive the recall papers.

On Oct. 29, 1946, the day before he should have reported under his orders of recall, the applicant left this country in possession of a passport which was stamped on that date. He evaded arrest until he was arrested at Antwerp on Oct. 9, 1948, by Major Latimer and a corporal who were accompanied by two Belgian police officers. He was detained in the police station until Oct. 11, when he was escorted by Major Latimer, Warrant Officer Vivian, and an army sergeant to British Army quarters in Germany. He was then brought to England and, after being taken to the Tower of London, which is a place of detention for soldiers, he was removed to Great Scotland Yard, also a military establishment (it was not New Scotland Yard as he seemed to think), and thence he was taken to the detention barracks at Colchester where he was charged with being a deserter.

On the applicant's behalf two points have been taken. It is said that his arrest was illegal because (i) the British authorities had no authority to arrest him in Belgium and he was arrested contrary to Belgian law, and (ii) his arrest was not in compliance with the provisions of s. 154 of the Army Act. The point with regard to the arrest in Belgium is entirely false. If a person is arrested abroad and he is brought before a court in this country charged with an offence which that court has jurisdiction to hear, it is no answer for him to say, he being then in lawful custody in this country: "I was arrested contrary to the laws of the State of A or the State of B where I was actually arrested." He is in custody before the court which has jurisdiction to try him. What is it suggested that the court can do? The court cannot dismiss the charge at once without its being heard. He is charged with an offence against English law, the law applicable to the case. If he has been arrested in a foreign country and detained improperly from the time that he was first arrested until the time he lands in this country, he may have a remedy against the persons who arrested and detained him, but that does not entitle him to be discharged, though it may influence the court if they think there was something irregular or improper in the arrest. Once he is before the court, it can hold him to bail until his trial and conviction. The point has been dealt with in these courts before. The headnote in *Ex parte Scott* (1) is:

"A rule *nisi* had been obtained for a *habeas corpus* to bring up Susannah Scott in the custody of the marshal, in order that she might be discharged. It appeared by the affidavits that a bill of indictment for perjury had been

found against her, and on Feb. 11, LORD TENTERDEN, C.J., granted a warrant for her apprehension, in order that she might appear and plead to the indictment, etc., Ruthven, a police officer, to whom the warrant was specially directed, apprehended Scott at Brussels; she applied to the English ambassador there for assistance, but he refused to interfere, and Ruthven conveyed her to Ostend, and thence to England, and on Apr. 9, she was brought before LORD TENTERDEN, and by him committed to the King's Bench prison."

That was to await trial on the indictment which had been found against her, and it was argued that she should be discharged on *habeas corpus* because she was illegally arrested. LORD TENTERDEN, C.J., said (9 B. & C. 448):

"The question, therefore, is this, whether if a person charged with a crime is found in this country, it is the duty of the court to take care that such a party shall be amenable to justice, or whether we are to consider the circumstances under which she was brought here. I thought, and still continue to think, that we cannot inquire into them. If the act complained of were done against the law of the foreign country, that country might have vindicated its own law. If it gave her a right of action, she may sue upon it. I am not, indeed, aware of any cases where the government of a foreign country has interposed, in order that a person might be brought here on a charge of misdemeanor. In cases of felony, I know it has been done."

I refer, to show how generally accepted this statement of the law is, to a more recent case in Scotland, *Sinclair v. H.M. Advocate* (2). There a person was brought before the Court of Justiciary who had been arrested in Portugal. The Lord Justice-Clerk (LORD MACDONALD), who gave the judgment, said (17 R. (Ct. Sess.) 41):

"It is said that the government of Portugal did something wrong, and that the authorities in this country are not to be entitled to obtain any advantage from this alleged wrongdoing. As I have said, we cannot be the judges of the wrongdoing of the government of Portugal. What we have here is that a person has been delivered to a properly authorised officer of this country, and is now to be tried on a charge of embezzlement in this country. He is therefore properly before the court of a competent jurisdiction on a proper warrant. I do not think we can go behind this. There has been no improper dealing with the complainer by the authorities in this country, or by their officer, to induce him to put himself in the position of being arrested, as was the case in two of the cases cited."

LORD M'LAREN put the matter extremely shortly and clearly in a judgment in which he said (*ibid.*, 45):

"With regard to the competency of the proceedings in Portugal, I think this is a matter with which we really have nothing to do. The extradition of a fugitive is an act of sovereignty on the part of the state who surrenders him. Each country has its own ideas and its own rules in such matters. Generally it is done under treaty arrangements, but if a state refuses to bind itself by treaty, and prefers to deal with each case on its merits, we must be content to receive the fugitive on these conditions, and we have neither title nor interest to inquire as to the regularity of proceedings under which he is apprehended and given over to the official sent out to receive him into custody."

That, again, is a perfectly clear and unambiguous statement of the law administered in Scotland. It shows that the law of both countries is exactly the same on this point and that we have no power to go into the question, once a prisoner is in lawful custody in this country, of the circumstances in which he may

have been brought here. The circumstances in which the applicant may have been arrested in Belgium are no concern of this court.

The second point which was urged in favour of the applicant is, in my judgment, equally groundless. Under s. 45 of the Army Act it is provided :

"The following regulations shall be enacted with respect to persons subject to military law when charged with offences punishable under this Act :—(1) Every person subject to military law when so charged may be taken into military custody."

and then there are provisions with regard to a report and so on. I have already stated the reasons of the court for saying that the applicant is subject and has been subject to military law ever since Oct. 30, 1946, on which day he was due to report.

Section 154 provides :

"With respect to deserters and absentees without leave the following provisions shall have effect :—(1) Upon reasonable suspicion that a person is a deserter or absentee without leave, it shall be lawful for any constable, or if no constable can be immediately met with, then for any officer or soldier or other person, to apprehend such suspected person, and forthwith to bring him before a court of summary jurisdiction."

It is said that, as this procedure was not followed in this case, the applicant was in unlawful custody. In my opinion, that sub-section deals with an entirely different state of affairs, viz., where there is a reasonable suspicion that a person is a deserter, and its main object is to give the same protection to a person arresting a deserter for the offence of desertion as is given by the common law to a police officer, or to use the old expression, a peace officer, when apprehending a person on reasonable suspicion that a felony has been committed. The law of arrest for felony is that a peace officer can arrest a person on suspicion that a felony has been committed and having a reasonable suspicion that the person he arrests is the felon, whereas a private person who arrests can arrest a person on suspicion that he has committed a felony if a felony has, in fact, been committed, but, if a felony has not in fact been committed, he cannot justify the arrest. This sub-section gives to any person the same protection that a police officer has. If he reasonably suspects that a person is a deserter, a constable, a soldier or any other person may arrest that person and then must bring him before a magistrate. If this section applied to all deserters, as the Army Act is not limited territorially, but applies wherever the Army happens to be, you would have the absurd situation that, if a man had deserted from the army in Germany, North Africa, Burma, or wherever His Majesty's Forces were fighting during the late war, he would have had to be brought before a court of summary jurisdiction. Section 45 deals with persons who are subject to military law. If one of those persons is arrested, the arrest will be justified by that section, but if a soldier arrests a person who is not liable to military law, he has no defence to an action for false imprisonment. If a man subject to military law could not be arrested, another absurd situation might arise. An officer or a non-commissioned officer might see a man stealing out of barracks and going in the direction of the railway station without permission. Is it to be said that he cannot pursue him and bring him back as a deserter? Section 45 of this Act allows the man, if he is subject to military law, to be arrested in those circumstances. That obviously was the opinion of the court who heard *Williams v. Secretary of State for War* (3). The point, however, seems to me to be clear and not to require authority to support it.

We have, therefore, established that the applicant was a deserter in that he had, although released for two months, received his orders of recall and had disobeyed them, and we have also held that he was properly brought in custody

to this country and that neither the High Court nor the court martial are concerned in any way with the circumstances attendant on his apprehension in Belgium. We are also of opinion that it was unnecessary to take any proceedings under s. 154 of the Army Act, since s. 45 amply justified the arrest.

- It now remains to deal with the only point in which there was any substance in this application, and that is whether there has been such delay that this
- A court ought to interfere. Let me say at once that it is not denied by the Attorney-General, and, indeed, there is authority, although it may be an old case—the authority of LORD ELLENBOROUGH, C.J., in *Blakes' Case* (4) (2 M. & S. 431)—that, if there has been such delay in bringing a man to trial as to amount to oppression, this court will interfere. There is only one way in which it can interfere. There is no provision in the Army Act—and it is not for this
- B court to express any opinion whether there should or should not be—for admitting prisoners to bail. There is a somewhat similar proceeding in the result in that it is in the discretion of the commanding officer to decide whether a man is to be kept under close arrest or under open arrest, and the difference between close arrest and open arrest is not unlike the difference between the position of a man remanded in custody and a man remanded on bail. If a
- C man is kept an unreasonable time awaiting trial to such an extent that this court thinks it is oppressive, they can interfere and admit him to bail—as, indeed, this court, on the untruthful affidavit which the applicant put forward, did in the present case—the condition of the bail being that he shall surrender at the court martial when he receives notice that that court is to proceed. That is the utmost extent to which this court could go. I do not wish any-
- D body to be under the impression that in a case such as this a release on *habeas corpus* is an acquittal. It is not. On an application for *habeas corpus* the court does not go into the merits so far as the offence is concerned. It only deals with the man's detention in prison. Anyone who has knowledge of the law of *habeas corpus* knows that the most frequent use to which the writ was put in the eighteenth century, at any rate, was to obtain bail where a
- E bailable offence was alleged, but the prisoner was detained in custody for a long period. The Habeas Corpus Act, 1679, sets out how the object of the writ was often evaded, so that it had to lead to the issue of an *alias* and in some cases the issue of a *pluries*, and if one reads *Jenkes' Case* (5), which is supposed to have given rise to the statute of Charles II (though I do not know if that is accurate) one sees that the most common use which was made of the writ in those
- F days was to bring up a man who had been charged, perhaps by order of the Council or by *speciale mandatum regis*, and was held in prison and not brought to trial, and to bail him until he could be brought to trial. The question whether he was or was not guilty of the offence was never dealt with. What we were asked to do in the present case, and the most we could have been asked to do, was to admit the prisoner to bail until the court was ready to
- G try him.

- Another thing I want to emphasise is this. Our attention was called, very properly, by counsel for the applicant, to the various rules of procedure which have been made under the provisions of the Army Act relating to the time within which prisoners are to be brought for trial by court martial, the various reports which are to be made to the various authorities, and matters of that
- H sort. In our opinion, they only have this materiality, that, in considering whether there has been gross and oppressive delay, the court would naturally take into account the regulations which are laid down on the subject, but that is only one matter to be taken into account, and the mere fact that those regulations may not have been observed is not a matter for this court once it is shown that the man is subject to military law. Whether he may have a remedy or not merely because the eight, fifteen or sixty-one day report, is not sent in, is not a matter with which this court can deal. In fact, in *R. v.*

Secretary of State for War, Ex parte Martyn (6), we said ([1949] 1 All E.R. 243):

"Once it is conceded, as it has been in this case, that he was a soldier, a court martial had jurisdiction to try him. If the court martial in the present case has not observed the proper rules of procedure, that is a matter for the convening officer and, if necessary, the Judge Advocate General to deal with, but it is not a matter for this court, which can only interfere with military courts and matters of military law in so far as the civil rights of the soldier or other person with whom they deal may be affected."

That there has been considerable delay in this case is conceded on all hands. When the case came before the court on Dec. 22 and the court ordered the writ to issue, the applicant had been in custody for something over 70 days. Whether or not there has been excessive delay, let alone oppressive delay, must depend on the circumstances of each particular case. I need not stress how desirable it is, especially when a man is under close arrest, that he should be brought to trial at the earliest possible moment and as soon as a court martial can be convened. I know that by the committee which was presided over by LEWIS, J., and whose findings are contained in the REPORT OF THE ARMY AND AIR FORCE COURTS-MARTIAL COMMITTEE, 1946 (Cmd. 7608) a great deal of attention was paid to the desirability of getting cases promptly disposed of, and I have the permission of LEWIS, J., to mention that cases were brought to their attention in which there had been delay which seemed to the committee to call for the most rigorous inquiry. Each case, however, must depend on its own particular circumstances. For instance, these rules apply equally in time of peace or in time of war. They apply to the Army at home and to the Army abroad. There may be many difficulties which arise in a particular case, more especially where either the prisoner's unit or the units to which the witnesses belong have moved with the result that it is not possible to trace and secure the attendance of witnesses. In the present case it seems to the court that the real cause of the delay has been the case which the applicant himself set up. I am satisfied that the officers who were concerned had before them matters which made it a complicated case and one which it was difficult for them to decide. It is impossible for this court to say that the detention of the applicant has been due to any negligence or improper conduct on the part of the officers concerned. It is suggested that the delay has been such that this court ought to interfere. This court will not interfere, and the order of the court is that the applicant be remanded.

Rule discharged.

Solicitors: *Bundy & Bundy* (for the applicant); *Treasury Solicitor* (for the Crown).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

HOLMES v. BRADFIELD RURAL DISTRICT COUNCIL.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Finnemore, JJ.), January 20, 1949.]

Town and Country Planning—Revocation of permission to develop—Compensation—“Expenditure in carrying out work which is rendered abortive by the order”
—Plans prepared, but no building operations carried out—Plans prepared before permission obtained for building—Town and Country Planning (Interim Development) Act, 1943 (c. 29), s. 7 (2) (3).

The Town and Country Planning (Interim Development) Act, 1943, s. 7, provides: “(2) Where any permission for the development of land is revoked or modified by an order under this Act, then . . . if any person has, before the date of the order, incurred expenditure in carrying out any work which is rendered abortive by the order . . . he shall be entitled to recover from the interim development authority by way of compensation an amount equal to the expenditure so incurred . . . (3) For the purposes of this section, any expenditure incurred in the preparation of plans for the purpose of any work, or upon other similar matters preparatory thereto, shall be deemed to be included in the expenditure incurred in carrying out that work, but except as aforesaid no compensation shall be paid under sub-s. (2) of this section in respect of any work carried out before the date on which the permission was granted . . .”

In December, 1945, the claimant was refused permission under the Town and Country Planning Act, 1932, and the Town and Country (Interim Development) Act, 1943, to erect bungalows on certain plots of land. In January, 1946, he appealed to the Minister of Town and Country Planning, but on Mar. 1, 1946, he withdrew his appeal, it being agreed that his rights under the Act of 1943 to compensation for the refusal of permission should be preserved. In August, 1946, he was granted permission to build the bungalows, but, in June, 1947, before any physical work had been done on the building site, this permission was revoked. In a claim under s. 7 (2) of the Act of 1943 for compensation for work rendered abortive by reason of the revocation, it was sought to include the cost of plans which had been prepared before the withdrawal of the appeal on Mar. 1, 1946, and, therefore, at a time when the claimant had no permission to build.

HELD: the expenditure incurred in the preparation of the plans might, in the assessment of compensation, be “deemed to be included in the expenditure incurred in carrying out” the work within s. 7 (3) of the Act of 1943 although (i) the work for the purpose of which the plans were prepared was not begun before the making of the order revoking the permission which had previously been given for the performance of the work, and (ii) the plans had been prepared before Mar. 1, 1946, when the appeal against the refusal of permission was withdrawn.

[EDITORIAL NOTE. The Town and Country Planning Act, 1932, and the Town and Country Planning (Interim Development) Act, 1943, are now repealed by the Town and Country Planning Act, 1947, but s. 22 of the last-named Act contains a provision corresponding to s. 7 (2) and (3) of the 1943 Act involved in this case.

AS TO THE RIGHT TO COMPENSATION UNDER THE TOWN AND COUNTRY PLANNING ACTS, see HALSBURY, Vol. 32, pp. 247-252, paras. 380-387; and FOR CASES, see DIGEST Supp., Title Public Health.]

SPECIAL CASE stated by an arbitrator.

The claimant, a builder, claimed compensation under the Town and Country Planning (Interim Development) Act, 1943, s. 7 (2), from the local planning

authority for expenditure incurred on work rendered abortive by the revocation of permission for development. The claim was referred to arbitration under the Acquisition of Land (Assessment of Compensation) Act, 1919, s. 6 (1). The issue was whether compensation was recoverable in respect of professional work (the preparation of plans) although no building operations had been carried out on the site and although the plans had been prepared before the withdrawal of an appeal against an earlier decision of the local planning authority refusing permission for the same development. The court held that the compensation was payable. The facts appear in the judgment of the court.

Kekwick for the claimant.

Squibb for the local authority.

FINNEMORE, J., delivered the following judgment of the court. This is an award in the form of a Special Case stated by the official arbitrator in an arbitration in which the claimant, John Herbert Holmes, claimed compensation from the respondents, the Bradford Rural District Council, in connection with the proposed building of certain bungalows.

Under the Town and Country Planning Act, 1932, if a person proceeded to build in an area where a resolution had been passed to adopt a scheme or where a scheme was already operative, he did so at his own risk, and the authority might stop him. On the other hand, he could obtain permission to build. If he obtained permission, the authority could still revoke that permission, but, subject to certain provisions, he would be entitled to compensation. Under the Town and Country Planning (Interim Development) Act, 1943, the position was somewhat the same, but the Act of 1943 applied to the whole of the country, which was put, as it were, under a kind of national planning scheme.

In September, 1945, the claimant applied to the appropriate local authority for permission to erect a bungalow on plot No. 1 of the land concerned in this case. He was granted permission. In November, 1945, he applied for permission to erect 10 more bungalows on plots Nos. 2 to 11. In December, 1945, the local authority indicated that they were prepared to give him permission to erect bungalows on plots Nos. 2, 3 and 4, but they refused the application so far as it related to the other plots. In January, 1946, the claimant appealed to the Minister of Town and Country Planning and the Minister of Transport, and, on Mar. 1, 1946, after some negotiations the appeal was withdrawn, subject to his being granted the right to carry on the building of bungalows on plots 2, 3 and 4, and also preserving whatever rights to compensation he had with regard to plots 5 to 11. On Jan. 22, 1946, he was granted the formal consent to erect bungalows on plots 2, 3 and 4. On Aug. 23, 1946, he was granted permission by the local authority to build bungalows on plots 5 to 11. Then the Minister intervened, and on Oct. 15, 1946, by his direction the local authority served on the claimant a notice of intention to apply to the Minister for confirmation of an order revoking the consent dated Aug. 23, 1946. Ultimately, in June, 1947, the permission to build the bungalows 5 to 11 was revoked. It is with those bungalows alone that we are concerned in the present case.

The claimant thereupon claimed compensation under the Town and Country Planning (Interim Development) Act, 1943, s. 7 (2) and (3). Sub-section (2) provides :

“ Where any permission for the development of land is revoked or modified by an order under this Act, then, without prejudice to the provisions of s. 4 (4) of this Act, if any person has, before the date of the order, incurred expenditure in carrying out any work which is rendered abortive by the order, or entered into a contract for the purpose of any work which is abandoned by reason of the order, he shall be entitled to recover from the interim development authority by way of compensation an amount equal to the expenditure so incurred or, as the case may be, to any sums reason-

ably paid by him in discharge of any liability arising under the contract in respect of the abandonment of that work."

By sub-s. (3) :

A "For the purposes of this section, any expenditure incurred in the preparation of plans for the purpose of any work, or upon other similar matters preparatory thereto, shall be deemed to be included in the expenditure incurred in carrying out that work, but except as aforesaid no compensation shall be paid under sub-s. (2) of this section in respect of any work carried out before the date on which the permission was granted, or in respect of any liability arising under a contract made before that date."

B The official arbitrator raises two questions for decision by this court—(i) whether, in s. 7 (2) of the Town and Country Planning (Interim Development) Act, 1943, the words "work which is rendered abortive by the order" include work on the preparation of plans which is so rendered abortive although no building work has actually been begun, and (ii) whether, in the circumstances of the withdrawal by the claimant of his appeal in March, 1946, the claimant is entitled to compensation under s. 7 (2) of the Act in respect of work done C before Mar. 1, 1946, being the date of the withdrawal of the appeal.

The point which has been argued is : What is the meaning of "work" ? It would seem, reading s. 7 (2) of the Act of 1943 and referring to other sections, both in the Act of 1943 and in that of 1932, that when the word "work" is used, as it usually is used, in connection with the word "building," it refers to the actual building on the site and *prima facie* does not include the professional D services involved in the preparation of plans. Section 7 (2) of the Act of 1943, however, deals not only with a person who has incurred expenditure in carrying out any work which is rendered abortive by a revocation order, but also with one who has entered into a contract for the purpose of any work which is abandoned by reason of such an order, and in s. 7 (3) special provision is made for this very matter—"expenditure incurred in the preparation of plans"—which, E the sub-section says, "shall be deemed to be included in the expenditure incurred in carrying out that work." Counsel for the claimant has argued that the professional charges which his client has had to pay were incurred under the terms of a "contract for the purpose of any work which is abandoned . . ." within s. 7 (2). Further he refers to sub-s. (3)—"plans for the purpose of any work" or "other similar matters preparatory thereto"—and he contends that F sub-s. (3) provides in plain terms that these charges are to be deemed to be included in the expenditure incurred in carrying out the work. He says that the claimant had the plans prepared ; that in August, 1946, he obtained permission to carry out the work ; that subsequently an order was made revoking that permission ; and, therefore, he is entitled to be compensated for his expenditure on the plans because it is to be "deemed to be included in the expenditure G incurred in carrying out" the work.

Counsel for the rural district council, on the other hand, argues that only when some kind of physical work is done on the site can one add the expenditure incurred in making the plans for that work. If the order revoking the permission is made before any physical work has been done on the land, one cannot, he says, be compensated for expenditure on plans which have been prepared in con- H templation of the work, because the cost of the plans cannot be included in the expenditure on physical work which has not been carried out. That would lead, as it seems to the court, to a very unfortunate and absurd position, for it would mean that a man who has prepared plans and has done a mere hour's work on the site is entitled to compensation for the preparation of the plans, while another man who has had similar plans prepared and incurred the same expense, but has not actually started the work on the site, is not entitled to include the cost of the plans in "the expenditure incurred in carrying out"

the work. The mere fact that the results of a statute may be unjust or absurd does not entitle this court to refuse to give it effect, but, if there are two different interpretations of the words in an Act, the court will adopt that which is just, reasonable and sensible rather than that which is none of those things. We can see nothing inappropriate in applying the words in s. 7 (3), "shall be deemed to be included in the expenditure incurred in carrying out that work," to plans which have been made, even though the physical work has not been started. The sub-section does not say that the expenditure on plans is necessarily to be added to something else, or can only be included in the expenditure incurred in carrying out the work if there are other items to be included with them. Part of the expenditure incurred in carrying out the work is incurred in the preparation of plans, and, in the opinion of this court, the reasonable interpretation of the words of the sub-section is that, if plans are prepared for the purpose of carrying out work for which permission is subsequently given, and that permission is revoked before the actual building work has been begun the expenditure incurred on those plans is to be "deemed to be included in the expenditure incurred in carrying out that work."

The second question is whether expenditure on plans incurred before the claimant obtained permission for the building can be considered for the purposes of compensation in the circumstances of this case. It is clear that by s. 7 (3) he is entitled to include plans which had been produced before the date of the permission for the work in August, 1946. The local authority, in effect, argue that because the claimant had had these plans prepared before March, 1946, and because he then withdrew his appeal relating to the work which the plans were to carry out, no further regard must be paid to them. Later, however, the claimant was given permission for work to be done according to those plans, and they, therefore, become plans which he had prepared for the purpose of the work within s. 7 (3). That work has been rendered abortive by the subsequent revocation, and, therefore, he is, in our opinion, entitled to include the cost of the plans in his application for compensation. Accordingly, we answer both the questions put by the arbitrator in the affirmative.

Award in favour of the claimant affirmed with costs of the special case and argument.

Solicitors: *Whitlock & Storr* (for the claimant); *Layton & Co.*, agents for *Collins, Dryland & Thorowgood*, Reading (for the council).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

COOK v. COOK.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Pearce, J.), January 21, 1949.]

Condonation—Return of wife to matrimonial home as housekeeper.

The husband had been living with another woman for a considerable time and the wife had gone to live with her parents. Early in 1948, the husband's mistress left him and he asked his wife to return and act as his housekeeper. This she did, it being arranged that the husband would pay her for her services. After some three months, during a dispute about the amount of the payments to the wife, the husband asked her: "When are you going home?" to which she replied: "On Monday or Tuesday," and, in fact, she returned to her parents' home at the end of that week. On a summons against the husband for a maintenance order being taken out by the wife before justices, in which the wife alleged *inter alia* adultery by the husband, it was held that the wife, by returning to the matrimonial home with the knowledge of the husband's adultery, had

condoned that adultery and the summons was dismissed. On an appeal by the wife,

HELD: the wife had been received back into the matrimonial home as a housekeeper and had not been reinstated as a wife, and, therefore, there had been no condonation of the husband's adultery.

Dictum of LORD SIMON, L.C., in Henderson v. Henderson ([1944] 1 All E.R. 45; [1944] A.C. 52; 170 L.T. 84), *applied*.

A *Per LORD MERRIMAN, P.*: Reconciliation involves a bi-lateral intention on the part of both spouses to be reconciled.

Dictum of LORD MERRIMAN, P., in Mummery v. Mummery ([1942] 1 All E.R. 555; [1942] P. 109; 166 L.T. 344), *approved*.

B *Dictum of WILLMER, J., in Wilmot v. Wilmot and Martin* ([1948] 2 All E.R. 125), *disapproved*.

[AS TO CONDONATION, see HALSBURY, Hailsham Edn., Vol. 10, pp. 679-682, paras. 1004-1009; and FOR CASES, see DIGEST, Vol. 27, pp. 339, 340, Nos. 3184-3203.]

Cases referred to:

- C (1) *Keats v. Keats and Montezuma*, (1859), 1 Sw. & Tr. 334; 32 L.T.O.S. 321; 27 Digest 336, 3166.
- (2) *Henderson v. Henderson and Crellin*, [1944] 1 All E.R. 44; [1944] A.C. 49; 170 L.T. 84; 2nd Digest Supp.
- (3) *Tilley v. Tilley*, [1948] 2 All E.R. 1113.
- (4) *Churchman v. Churchman*, [1945] 2 All E.R. 190; [1945] P. 44; 173 L.T. 108; 2nd Digest Supp.
- D (5) *Mummery v. Mummery*, [1942] 1 All E.R. 553; [1942] P. 107; 166 L.T. 343; 2nd Digest Supp.
- (6) *Pulford v. Pulford*, [1923] P. 18; 128 L.T. 256; 27 Digest 307, 2846.
- (7) *Wilmot v. Wilmot and Martin*, [1948] 2 All E.R. 123.

E APPEAL by the wife from a decision of Grimsby justices, dated July 1, 1948, dismissing a summons taken out by her by which she asked for a maintenance order on the ground of her husband's adultery and his wilful neglect to provide reasonable maintenance for her. The justices held that the adultery had been condoned by the wife. The Divisional Court now allowed her appeal. The facts appear in the judgment of LORD MERRIMAN, P.

F *T. H. K. Berry* for the wife.
Swanwick for the husband.

LORD MERRIMAN, P.: This is an appeal by a wife against the dismissal by the Grimsby borough justices of her summons for maintenance against her husband based, first, on the ground of his adultery, and, secondly, on the ground of his wilful neglect to provide reasonable maintenance for her. The G justices decided, on a submission by the husband that there was no case to answer, that both charges should be dismissed on the ground that the husband's adultery had been condoned by the wife. The only witness in the case was the wife. As, in my opinion, we have only one course in this case open to us, namely, to send it back for a rehearing, I desire to say nothing which will embarrass the justices on the rehearing of the facts, but, at the same time, I wish to give H such guidance as I can on the principles which should inform their decision, for it is plain that they have completely misapprehended the law on this subject.

This was not a case in which there was merely an isolated act of adultery on the part of the husband. He had been living with another woman for a long time. In 1948 this other woman left him. According to the wife, that occurred about the time when the husband's mother, who was an old woman, had fallen ill. In those circumstances, the husband having been deserted by his mistress and his mother being unable to look after him, he asked the wife

to go and attend to him as his housekeeper. She did so on March 1, 1948. On Sunday, May 9, when she demanded more money than he was minded to give her and told him plainly that she did not intend to be an unpaid servant (which implied clearly that she had regarded herself, so far, as being nothing but a paid servant), and after a controversy about the amount which had been arranged, the husband asked: "When are you going home?", to which the wife replied: "On Monday or Tuesday," and, in fact, she left on the Thursday or Friday of that week. Her case, in other words, was that there was no resumption of anything which could be called cohabitation. She merely went to help her husband out of a difficulty. That is her case. On that it was submitted that she must be held to have condoned the adultery, and we are told that no less than eight leading cases were cited in support of that proposition. I do not know what they were, but in the end the justices found that the wife returned to the matrimonial home on March 1, 1948, with full knowledge of her husband's adultery, and in doing so was reinstated as the husband's wife, and, therefore, she had condoned his adultery. We have been pressed to say that we are obliged to support the justices because they saw the witness and we have not seen her and passages in the evidence can be selected or underlined which would support their finding. I will assume all that without deciding it, but it is one thing to say that on a proper direction to themselves on the issues involved the justices have found the facts on evidence which could possibly support their conclusions, and, therefore, the findings should not be interfered with by this court, and another thing to say that where justices have misdirected themselves on a point of law they can compel this court to support them merely by stating that they have found the issue against the appellant as a question of fact.

To my mind this submission and this judgment that there was no case for the husband to answer were wholly misconceived. I am not going to deal with the whole law of condonation. I propose to content myself with two or three passages from cases some of which are so well-known and well-established as to need no quotation. I preface my short examination of the authorities by saying that I read the judgment of the justices as meaning that the fact that this woman returned physically, as she did for three months or thereabouts, to the matrimonial home, with knowledge of her husband's adultery, *ipso facto* reinstated her as the husband's wife, and was, therefore, as a matter of law, conclusive that she had condoned his adultery. I am going to begin with one short passage at the end of the judgment in *Keats v. Keats and Montezuma* (1). I do not think it necessary to read the earlier part of the judgment, because I suggest that the whole of what goes before, including this passage, is succinctly summarised in a couple of sentences in LORD SIMON's speech in *Henderson v. Henderson* (2). In *Keats v. Keats and Montezuma* (1) LORD CHELMSFORD, L.C., says (1 Sw. & Tr. 357):

"I see no reason at all to differ with the Judge Ordinary in the way in which he has stated the law of condonation to the jury; but with him I think that the forgiveness which is to take away the husband's right to a divorce must not fall short of reconciliation, and that this must be shown by the reinstatement of the wife in her former position, which renders proof of conjugal cohabitation, or the restitution of conjugal rights, necessary."

In *Henderson v. Henderson* (2) LORD SIMON, L.C., said ([1944] 1 All E.R. 45):

"Condonation in connection with the law of divorce has been defined in a variety of phrases in many previous judgments. The essence of the matter is (taking the case where it is the wife who has been guilty of the matrimonial offence) that the husband with knowledge of the wife's offence should forgive her and should confirm his forgiveness by reinstating her as his wife. Whether this further reinstatement goes to the length of

connubial intercourse depends on circumstances, for there may be cases where it is enough to say that the wife has been received back into the position of wife in the home, though further intercourse has not taken place. But where it has taken place, this will, subject to one exception, amount to clear proof that the husband has carried his forgiveness into effect."

- A The key to that passage is in the word "wife." The wife has been received back into the position of *wife* in the home, and all I need say at the moment is that, in the present case, there is ample evidence by the wife to justify her assertion that she was never received as a wife at all. She was received as a housekeeper, and she refused to stay unless, as a housekeeper, she was given the money which, she said (though the husband disputed it), it had been agreed she should be paid as such. The evidence that the husband asked the wife :
- B "When are you going home?"—not "How long are you going to stay at home?"—seems to me to be evidence of anything but a set of circumstances which could properly be described as showing that the wife had been received back into the position of wife in the home, or, to refer again to *Keats v. Keats and Montezuma* (1) that the reinstatement of the wife in her former position had occurred because it was proved that there had been at least conjugal cohabitation
- C or the restitution of conjugal rights. I would like to add that, for reasons with which I am completely in accord, DENNING, L.J., in *Tilley v. Tilley* (3) explained that the position in relation to the burden of proof of condonation is *mutatis mutandis* precisely the same as that in relation to connivance which was explained in the decision of the Court of Appeal in *Churchman v. Churchman* (4).
- D Reference has been made to a passage in my own judgment in *Mummery v. Mummery* (5), delivered when I was sitting as a judge of first instance. I should not have referred to it but for the fact that our attention has been directed to a judgment of WILLMER, J., which appears to conflict with it. I need not go into the very remarkable circumstances of *Mummery v. Mummery* (5). In a sentence the question was whether the desertion of a wife by a husband
- E was either condoned, or the continuous flow of the period of desertion interrupted, by the fact that, she having welcomed him home from the horrors of Dunkirk in 1940, they had slept together that night and had sexual intercourse, she fervently desiring reconciliation, and the husband making it as plain as words could possibly make it the next morning that he had not, and never had had, the slightest intention of contemplating reconciliation. With regard to those
- F facts I said ([1942] 1 All E.R. 555) :

- "... the whole question turns on what cohabitation means ... LORD MERRIVALE said more than once that no judge has ever attempted a comprehensive definition of desertion and that no judge would ever succeed in doing so. Among the descriptions of desertion which he gave was one which has always appealed to me. He said that desertion was a withdrawal, not from a place, but from a state of things (*Pulford v. Pulford* (6) ([1923] P. 21)). Similarly, I doubt whether any judge could give a completely exhaustive definition of cohabitation, and certainly I am not going to attempt to do so. At least a resumption of cohabitation must mean resuming a state of things—that is to say, setting up a matrimonial home together. That involves, so it seems to me, a bi-lateral intention on the part
- H of both spouses so to do."

I do not recede from a word of that. Indeed, it seems to me that the very word "cohabitation" involves the conception that it must be bi-lateral, and so does "reconciliation," but I see that in a judgment in *Wilmut v. Wilmut and Martin* (7) WILLMER, J., says ([1948] 2 All E.R. 125) :

"The proposition that it takes two to bring about condonation, in the same way as it takes two to make a quarrel, is one of such simplicity that,

if it were sound in law, I should have expected it to be well-founded in authority, but, although I have asked for authority for the proposition, I have had none. No case has been cited to me which lays down, as a matter of law, that condonation, before it can be operative, must be something joint between the two parties, or that there can be no condonation unless the guilty party consents to being condoned."

I confess that I am not perfectly clear what that passage actually means. If it means that, if the parties consent to a state of things from which in law the inference of condonation ought to be drawn, it is immaterial whether they consent to the drawing of the conclusion of condonation, I have nothing more to say about it, but if it means that the mutual or bi-lateral element is not required in the reconciliation, reinstatement, conjugal cohabitation, or restitution of conjugal rights (to quote four of the phrases which have been used in one or other of the well-known authorities to which I have already referred), then I respectfully dissent from it and from the statement that there is no authority in support of it, because I have read a passage which I think is authority in support of it. At any rate, by this judgment I intend to make *Mummery v. Mummery* (5), so far as this court can, an authority which may be cited as decisive of this point, although it is a judgment of my own given as a judge of first instance, and, what is more particularly to the point, I intend that the justices who are to rehear this case shall be guided by it and not allow themselves to be misled into thinking that a man who takes his wife back as a housekeeper, or acts in such a way as to make her think she is being taken back as a housekeeper, necessarily produces the legal result that all his past misdoings are condoned.

As I have already said, I do not intend to decide the merits of this case. They need a good deal more careful consideration by the next bench of justices than they were given by those who have already decided this matter, and I hope (and I say this particularly because we are told that it is impossible for us to send the case back to any other petty sessional division or any other clerk), there will be no feeling that they must support their late decision on the next occasion. Our order, therefore, is that the appeal will be allowed, the order set aside with costs to the wife of this appeal and costs below in any event, for the whole of this unfortunate business results from the fact that a submission, entirely misconceived, was made at the close of the wife's case. The costs of the rehearing will be at the discretion of the justices who hear the case, and the husband will provide £10 security for the wife's costs of the hearing.

PEARCE, J. : I agree. The passage from his judgment in *Mummery v. Mummery* (5), which the learned President has read is, in my view, a clear and correct expression of the law. The words "resumption of cohabitation" must mean resuming a state of things, that is to say, a setting up of a matrimonial home together and that involves a bi-lateral intention on the part of both spouses so to do. That is an important principle which I do not think the justices can have appreciated. There is nothing in the evidence on which the justices could find a reconciliation or a bi-lateral intention on the part of both these spouses to set up a matrimonial home together. I agree with the order that my Lord has suggested.

Appeal allowed with costs here and below.

Solicitors : *Taylor, Jelf & Co.*, agents for *James Young*, Grimsby (for the wife) ; *G. Warr & Co.*, agents for *John Barker*, Grimsby (for the husband).

[Reported by R. HENDRY WHITE, ESQ., Barrister-at-Law.]

ERITH CORPORATION v. HOLDER.

[COURT OF APPEAL (Bucknill and Denning, L.JJ., and Vaisey, J.), January 20, 1949.]

Requisition—Land—Dwelling-house—Purchase of requisitioned premises—Right of purchaser to possession—Defence (General) Regulations, 1939 (S.R. & O., 1939, No. 927 (as amended)), reg. 51 (1).

A Under reg. 51 of the Defence (General) Regulations, 1939 (as amended), the Minister of Health has power to take possession of any land and to delegate such power. In accordance therewith the Minister delegated his powers by means of "circulars." Circular No. 138 of 1945 gave local authorities power to requisition unoccupied houses, not only for persons rendered homeless by enemy action, but also for persons who were inadequately housed, unless the owner, within fourteen days of the notice of intention to requisition, notified the local authority that it was his intention to occupy the house. By Circular No. 5 of 1946 it was provided that "all houses at present requisitioned by local authorities may in future be used as a general pool of accommodation for the inadequately housed." By Circular No. 141 of 1946 the operation of Circulars Nos. 138/45 and 5/46 was extended for a further period, subject to the following modification:—

B "In the present shortage of housing accommodation it is necessary to ensure as far as possible that all houses are reasonably fully occupied, and this is the main intention of the requisitioning powers which the Minister has delegated to the clerks of local authorities. Accordingly, where an owner notifies his intention to occupy the house by himself or his family the clerk to the local authority is authorised under Circular 141 to retain possession of the premises if the local authority are satisfied that to release the house for occupation by the owner or his family would result in serious under-occupation of the house, subject to the owner, if he so desires, being allowed to occupy such proportion of the premises by himself or his family as the local authority deem reasonable for his needs and on such terms as to payment and otherwise as the local authority may approve."

C

D

E The plaintiff corporation requisitioned a certain dwelling-house in 1941, and put in as occupiers a family which had been rendered homeless by enemy action. Shortly before that family vacated in 1947, the defendant purchased the property, and, when the occupying family quitted, he entered into occupation. The corporation, thereupon, sought to eject him as a trespasser. It was contended by the defendant that, as he had notified his intention to occupy the house by himself and his family, the local authority were only authorised under Circular 141 to retain possession of the premises if they were satisfied that the release of the house for occupation by the defendant would result in its serious under-occupation, and there was no evidence that they were so satisfied.

F

G HELD: Circular No. 141 applied, not to premises which were already under requisition (as was the house in the present case), but only to a house the requisition of which the local authority were contemplating.

[FOR THE DEFENCE (GENERAL) REGULATIONS, 1939, REG. 51, see HALSBURY'S STATUTES, Vol. 40, pp. 1362-1363.]

Cases referred to:

- H (1) *Blackpool Corpn. v. Locker*, [1948] 1 All E.R. 85; [1948] 1 K.B. 349; 112 J.P. 130.
- (2) *Westminster (Duke) v. Swinton*, [1948] 1 All E.R. 248; [1948] 1 K.B. 524.
- (3) *Progress Building, Ltd. v. Westminster City Corpn.*, [1947] 1 All E.R. 684; 111 J.P. 300; 2nd Digest Supp.
- (4) *Gordon, Dadds & Co. v. Morris*, [1945] 2 All E.R. 616; *sub nom., Gordon, Dadds & Co. v. Minister of Health*, 174 L.T. 136; 110 J.P. 119; 2nd Digest Supp.

APPEAL by the defendant from an order of His Honour JUDGE SIR GERALD HURST, K.C., made at Dartford County Court on June 10, 1948, granting possession of a certain dwelling-house to the plaintiff corporation. The Court of Appeal dismissed the appeal. The facts appear in the judgment of BUCKNILL, L.J.

Cleworth, K.C., and *Sofer* for the defendant.
Simes, K.C., and *Squibb* for the corporation.

A

BUCKNILL, L.J.: In my judgment, this appeal should be dismissed. The plaintiffs are the mayor, aldermen and burgesses of the borough of Erith, and the defendant is Mr. John Raymond Holder. By the particulars of claim, which were filed in the Dartford County Court, the plaintiffs claimed the recovery of a certain dwelling-house, No. 68, Amberley Road, Abbey Wood, London, S.E.2, which they alleged was in the wrongful occupation of the defendant. The nature of the plaintiff corporation's claim was that:

B

"The premises are in the legal possession of the Minister of Health by virtue of reg. 51 of the Defence (General) Regulations, 1939, and the plaintiffs are, under the authority of the Minister, using the said premises for purposes authorised by the said regulation. The defendant wrongfully, and without the consent of the Minister or the plaintiffs, went into occupation of the said premises on Dec. 16, 1947, and has since remained in occupation."

C

To that the defendant delivered a defence in which he alleged that he was lawfully in possession of the dwelling-house. The question which the learned judge had to decide was whether at the time when the defendant went into physical possession of the premises the house was under requisition by the plaintiffs.

D

The house was originally requisitioned in February, 1941, when notice was given by the town clerk to the then owner, a Mr. Ashdown, that he, the town clerk, in exercise of the powers delegated to him by the Minister of Health under the Defence (General) Regulations, 1939, "had this day taken possession of the premises." That requisition has been extended right up to the time when the dispute arose in the present case. On Aug. 11, 1947, the defendant wrote to the town clerk of Erith a letter in which he said he was purchasing 68, Amberley Road, and wished to apply for the property to be de-requisitioned when it was vacated by the existing occupants. They were the people who went into the house when it was requisitioned and stayed in it until the defendant moved in. I need not read the rest of the defendant's letter except to say that he points out that he is married, has served in His Majesty's Forces for some years, and is a proper person to have a house if he can get one. To that letter the housing manager of the borough of Erith replied saying:

E

F

"I regret that I am not in a position to say whether it will be possible to release the above property from requisition when the present occupiers move to their own house. Your application will be considered at that date, but the matter depends on the state of emergency which may exist at that time."

G

The defendant, therefore, in August, 1947, had full notice that his desire to obtain occupation of this house might not be gratified. On Aug. 20, 1947, the defendant wrote to the Ministry of Health saying he was negotiating for the purchase of the house and wished to have it released from requisition when it was vacated by the existing tenants, and he said:

H

"This house which I wish to occupy was built in 1937 at a cost of £600, and is being sold to me for £1,050. If it were sold with vacant possession it

would most probably fetch £1,800, which figure would be beyond my resources."

To that the Ministry of Health replied :

A " It is noted that you have no previous residence within the borough of Erith, and in these circumstances and having regard to the great number of necessitous families that the authority are committed to re-house, together with the limited amount of accommodation at their disposal, the Minister regrets that he cannot question the decision of the council to retain the premises under requisition until the housing position eases."

On Dec. 8, the defendant wrote to the corporation saying :

B " I am now the owner of this property and wish to apply for the property to be released from requisition as soon as it is vacated by the present tenants. I have already informed you that I desire this property for occupation by my wife, daughter and self, and I wish to emphasize that my need for possession is very great. We are at present lodging with my parents in law, and the only accommodation we have is the bedroom which we occupy. I served in the army for the period Dec. 12, 1939, to June 3, 1946, and was abroad in South-east Asia from 1943 until my demobilization in 1946, so that you will appreciate that it was impossible for me to obtain any housing accommodation during that time. At present, I am employed as a clerk in the Royal Arsenal, Woolwich, where I have been since 1937, except for my army service. I, therefore, request that you will give this matter due consideration and release the property, and I would add that I am prepared to take possession at the shortest possible notice."

D In reply to that the housing manager of the borough of Erith replies :

" In reply to your letter of Dec. 8, I regret that I am unable to give you any information as to when the above property may be released from requisition."

E On Dec. 17, 1947, the licensees moved out of the house, and the defendant moved in with his furniture.

The question now arises whether he is justified in moving in or whether the plaintiffs are entitled to possession of the house. The only point now taken by counsel for the defendant is based on Circular No. 141, dated June 28, 1946, issued by the Ministry of Health to all local authorities and county councils

F in England. It is as follows :

G " I am directed by the Minister of Health to refer to Circular 5/46 and to say that he has decided to extend and hereby extends the operation of Circular 138/45 as amended by Circular 5/46 until Dec. 31, 1946, subject to the following modification. In the present shortage of housing accommodation it is necessary to ensure as far as possible that all houses are reasonably fully occupied, and this is the main intention of the requisitioning powers which the Minister has delegated to the clerks of local authorities. Accordingly, where an owner notifies his intention to occupy the house by himself or his family the clerk to the local authority is authorised to retain possession of the premises if the local authority are satisfied that to release the house for occupation by the owner or his family would result in serious under-occupation of the house, subject to the owner, if he so desires, being allowed to occupy such proportion of the premises by himself or his family as the local authority deem reasonable for his needs and on such terms as to payment and otherwise as the local authority may approve."

H On behalf of the defendant it is argued that Circular No. 141 of 1946 applies to the present case and the corporation were only authorised under it to retain possession of the house in certain circumstances, namely, if they were satisfied

that to release it for occupation by the owner or his family would result in serious under-occupation of the house and so on. It is argued that there was no evidence that the corporation ever were so satisfied and, therefore, they were not authorised to retain possession. That argument would be one of weight if this circular applied to the present case, but, in my opinion, when one studies it—and still more when one studies Circular 138 of 1945 and Circular 5 of 1946—it becomes clear that the Ministry are dealing in the circular with unoccupied houses which they are contemplating requisitioning and that the circular has no application to houses which have already been validly requisitioned at the relevant time. The circular refers at the very outset to the requisitioning of unoccupied houses. It seems clear that if the circular applies to such a case as the present, any requisitioned house could be de-requisitioned by some stranger buying it and persuading the occupant to go out, subject, of course, to the right given to the local authority to retain possession if satisfied that release from requisition would result in serious under-occupation of the house. I asked counsel for the defendant when it was he said the house became de-requisitioned, and, as I understood his answer, he said it became de-requisitioned as soon as the defendant had bought it. If that is sound, it would greatly hamper the efforts of local authorities to house applicants in a fair way, according to their time of waiting and according to their needs.

We were referred in argument to *Blackpool Corpn. v. Locker* (1), and there is a passage in the judgment of SCOTT, L.J., which I think I might profitably read, dealing with this question of occupied and unoccupied houses ([1948] 1 All E.R. 90) :

“ Before I approach the history of the ways in which in the present case the corporation, on the one hand, and the Ministry, on the other, sought to use or misuse the provisions of the circulars, it is necessary to consider their true legal effect. As I have already indicated, they seem to me to have been well drafted for the purpose of effecting a considerate and fair adjustment between the public duty of housing the homeless and the private rights of the individual householder in possession, carefully differentiating between the occupied and the unoccupied, the furnished and the unfurnished, house . . . ”

I think the contention of the corporation is right, and, therefore, Circular No. 141 does not apply to this case, the defendant had no right to go in, he is a trespasser, and the plaintiffs are entitled to possession.

DENNING, L.J. : I agree. I approach this case, as I think it should be approached, on the footing that the corporation, relying as they do on special powers to turn a man out of his house, must prove their case beyond any possibility of doubt. If there is any doubt, the benefit should be given to the owner of the house.

The essential feature is that when the defendant bought this house it was requisitioned and had been requisitioned since February, 1941. On July 3, 1940, the Minister of Health, under powers conferred by the Defence (General) Regulations, 1939, reg. 51, delegated to local authorities or their clerks powers to take possession of buildings for the accommodation of persons rendered homeless by enemy bombing. On Feb. 19, 1941, in pursuance of that power the town clerk of Erith requisitioned this house. On Feb. 27, 1941, the Minister of Health confirmed that action of the corporation. There can be no doubt that that requisition was lawful under the Defence Regulations then in force. In pursuance of it, the corporation put into the house a family which had been rendered homeless by enemy action. That family remained there until December, 1947. A few weeks before they left, Mr. Ashdown agreed to sell it to the defendant, and, when the occupying family quitted on Dec. 16, 1947, the defendant went into possession. Between 1940 and 1946 the Minister had delegated more,

extensive powers to local authorities. Some of them are set out in the report of *Blackpool Corpn. v. Locker* (1). In particular, in July, 1945, by Circular No. 138, owing to the very difficult housing situation which then existed, the Minister delegated to local authorities the power to requisition unoccupied houses, not only for persons rendered homeless by enemy action, but also for persons who were inadequately housed. In delegating that power he laid down a number of conditions for the protection of the owners of the unoccupied houses. The local authority were to give the owner 14 days' notice of their intention to requisition, and, if the owner within those 14 days notified the authority that it was his intention to occupy the house, the authority were to hold their hands and not proceed with the requisition. In June, 1946, the Minister issued Circular No. 141. It had been found that the owner of a large house, suitable for five or six families, might prevent it being requisitioned by saying that he wished to occupy a small part of it himself, as in *Westminster (Duke) v. Swinton* (2). Accordingly, by Circular No. 141 the Minister said: "If the owner intends to occupy only a part of the house, the local authority need not release the requisition, but they must allow the owner to occupy a reasonable part of the house if he so desires." That, in my opinion, is the true construction of Circular 141. It is simply a modification placed on Circular No. 138. Whereas under Circular No. 138 the owner of an unoccupied house could prevent the requisition by saying that he intended to occupy himself, under Circular No. 141 he could only so do if he really needed the whole house for himself and his family.

Counsel for the defendant, however, argued that Circular No. 141 was independent of Circular No. 138; that, even after the 14 days had elapsed—indeed, long after the local authority had put a homeless family into occupation—the owner could claim the benefit of Circular No. 141; and, accordingly, that, if the owner notified the local authority of his intention to occupy the house, the authority could not retain possession but had to turn out the family and give up the house to the owner. That would mean, as counsel for the defendant was forced to admit, that any person who had sufficient money could buy a requisitioned house and determine the requisition by notifying the local authority that he intended to occupy it himself. If that were correct, it would destroy the whole policy of housing the homeless. That is not the true construction of the circular. The defendant got this house much cheaper than he otherwise would, solely because it was requisitioned. He now seeks to be in as good a position as if he had bought with vacant possession. He cannot do that.

During the argument I asked counsel for the corporation whether the corporation had any right to retain the house after the occupying family had quitted. In other words, when a local authority are authorised to requisition a house for a certain purpose, does not the requisition determine automatically as soon as that purpose ceases? Counsel gave answers to these questions which convinced me. He agreed that, if it could be affirmed that the original purpose has, in fact, ceased, the local authority would *prima facie* have no right to continue the requisition, but would have to make a fresh requisition. This is recognised by Circular No. 138 itself which says that, if the purpose of the requisition is changed, as, for instance, from warehouse purposes to housing purposes, the local authority ought to go through the procedure afresh of giving the owner 14 days' notice, and so forth. The local authority must make a new requisition for the new purpose. If that had been necessary here, the defendant, after the family had quitted, would have received the usual 14 days' notice and would have been entitled to occupy the house himself. The answer which counsel for the corporation gave was that in this case the original purpose had not ceased. Erith was heavily bombed and the corporation may still require the house to house families rendered homeless by enemy action. Counsel also pointed out that in January, 1946, by Circular No. 5 of 1946, the Minister said:

"... all houses at present requisitioned by local authorities may in future be used as a general pool of accommodation for the inadequately housed."

That means that thenceforward the houses which had been requisitioned by the local authorities for the early purposes, such as to house refugees from enemy attack, could be retained by them for the general purpose of the inadequately housed. By Circular No. 5, therefore, the Minister authorised the local authority to retain houses for the inadequately housed without making a fresh requisition. I think those answers are correct. It was clearly within the power of the Minister to change the purpose without a fresh requisition: see *Progress Building, Ltd. v. Westminster City Corpn.* (3), and so, too, he was within his rights in authorising the local authority to retain the houses for the inadequately housed: *Gordon, Dadds & Co. v. Morris* (4). So long as the corporation retain the house for that purpose, the defendant has no right to be there. He must wait until the corporation release it from the requisition. For these reasons I am of opinion that this appeal should be dismissed.

VAISEY, J. : At first sight it is surprising that the true owner of this property is in no better position than any other deserving and meritorious person who is, as he is, homeless, either owing to bomb damage or to the prevailing housing shortage otherwise occasioned. But only at first sight, because, in my judgment, the whole scope and intention of the relevant legislative provisions is to place requisitioned property at the unrestricted disposal of local authorities as the accredited delegates of the Ministry of Health. I find Circular No. 141 somewhat obscure in its expression and not altogether easy to interpret in conjunction with the other circulars to which reference has been made, but I have come to the conclusion that it applies only to the initial stages of a requisition. In my judgment, this property was validly requisitioned in 1941 and never ceased to be requisitioned property, and Circular No. 141 has no application to the present case. One point was adverted to in argument to which no reference has been made by my Lords. The fact that Circular No. 141 was included in the list of circulars put forward by the plaintiff corporation as relevant to the issue in the action and in this appeal cannot possibly operate as a kind of estoppel so as to preclude the corporation from alleging, as they now do, that it is nothing to do with the case. I agree that this appeal fails.

Appeal dismissed with costs.

Solicitors: *Thomas (H. E.) & Co.* (for the defendant); *Sharpe, Pritchard & Co.*, agents for *J. A. Crompton*, town clerk, Erith (for the corporation).

[Reported by C. N. BEATTIE, Esq., Barrister-at-Law.]

BEESTON & STAPLEFORD URBAN DISTRICT COUNCIL AND ANOTHER v. SMITH.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Finnemore, J.J.), January 20, 21, 1949.]

Solicitor—Unqualified practitioner preparing instruments—Clerk to local authority—Mortgage deeds for advances under Small Dwellings Acquisition Act, 1899 (c. 44), s. 1 (1)—Right of authority to charge mortgagors—"Fee, gain or reward"—"Public officer"—Solicitors Act, 1932 (c. 37), s. 47 (1), (3) (a)—Local Government Act, 1933 (c. 51), s. 188 (1).

An urban district council, acting under s. 1 (1) of the Small Dwellings Acquisition Act, 1899, advanced money to residents within their area to enable them to acquire the ownership of the houses in which they lived. In the course of these transactions the titles of the houses had to be investigated and mortgage deeds prepared for execution by the borrowers

who paid to the council certain charges which the council made for this work. The council employed to do the work their clerk who was not a solicitor or other qualified person specified in s. 47 (1) of the Solicitors Act, 1932.

A HELD: (i) the expense of preparing the deeds was not a "liability falling to be discharged by the council" within s. 188 (1) of the Local Government Act, 1933, and so was not to be discharged out of the general fund of the council, but was rightly charged on the mortgagors.

(ii) the council had prepared the deeds for "fee, gain or reward" within s. 47 (1) of the Solicitors Act, 1932, although the charges paid by the mortgagors were paid into the general fund of the council.

B (iii) the clerk was not a "public officer" within the exemption to the provisions of s. 47 (1) contained in s. 47 (3) (a), the expression "public officer" in that paragraph being confined to the officer of a department of State whose salary is paid out of national, as distinct from local, funds.

[AS TO UNQUALIFIED PERSONS, see HALSBURY, Hailsham Edn., Vol. 31, pp. 312-317, paras. 346-351; and FOR CASES, see DIGEST, Vol. 42, pp. 411-416, Nos. 4724-4784.]

C Cases referred to:

(1) *Lyne Regis Corpn. v. Henley*, (1834), 1 Bing. N.C. 222; 8 Bli. N.S. 690; 2 Cl. & Fin. 331; 1 Scott, 29; 44 Digest 83, 642.

(2) *Re Mirams*, [1891] 1 Q.B. 594; 5 Digest 725, 6297.

CASE STATED by Nottinghamshire justices.

D At a court of summary jurisdiction sitting at Nottingham on March 22, 1948, informations were preferred by the respondent, Robert James Tull Smith, a solicitor, on behalf of the Law Society, under s. 47 of the Solicitors Act, 1932 (as amended by s. 23 of the Solicitors Act, 1941), against the first appellants, Beeston and Stapleford Urban District Council, for that on various dates between Apr. 7, 1947, and Oct. 11, 1947, they, not being a barrister, solicitor, law agent, writer to the signet, notary public, special pleader, or draftsman in equity, for or in expectation of fee, gain, or reward indirectly or directly did draw or prepare instruments relating to real estate, namely, certain mortgage deeds. The second appellant, Charles Harold Wragg, who was the clerk to the first appellants, was charged on further informations with drawing the deeds in question. These deeds were drawn in connection with advances made by the first appellants under the Small Dwellings Acquisition Act, 1899, to residents in houses to enable them to acquire the ownership thereof. The justices convicted the appellants and fined them each 10s. on each information. The appellants appealed, and the Divisional Court now dismissed their appeals.

Fitzgerald, K.C., and *Cotes-Freedy* for the appellants.

Paull, K.C., and *Cumming-Bruce* for the respondent.

G LORD GODDARD, C.J.: The appellant council has adopted the Small Dwellings Acquisition Act, 1899, as amended by the Local Government Act, 1933. Under those Acts they can act much in the same way as a building society acts—they can make advances to ratepayers in their district to enable them to buy the houses in which they reside, and they repay the loans over a period of instalments, the council taking a mortgage on the property by way of security. For some years past the council employed solicitors to do the conveyancing business rendered necessary by the taking of the mortgage—the investigation of the title and the drawing of the mortgage deed. In many of these cases, no doubt, the drawing of the mortgage deeds is a very simple matter, because a printed form is used, and so also is the investigation of title, now that we have registration of title.

H The Solicitors Act, 1932, s. 47 (1) (as amended by the Solicitors Act, 1941 s. 23),

provides that an unqualified person, *i.e.*, any person who is not a barrister, solicitor, conveyancer, and so forth

“ . . . who, unless he proves that the act was not done for or in expectation of any fee, gain or reward, either directly or indirectly, draws or prepares any instrument relating to real or personal estate . . . ”

commits an offence. In this case, the local authority, finding that they were losing money over the transactions under the Small Dwellings Acquisition Act, 1899, sought to recoup themselves in respect of their losses by instructing their clerk to do the mortgage business and the conveyancing attached to it, instead of instructing solicitors. Their clerk is not one of the qualified persons mentioned in the Solicitors Act, 1932, s. 47, although I have no doubt that, so far as his duties as clerk to a local authority are concerned, he is a highly skilled official. The justices have stated two findings in the Case. They express the opinion, first, that it was *ultra vires* the local authority to make any charge. With all respect to the justices, who evidently gave great attention to this case, I think that they were quite wrong on this point, and counsel for the respondent does not seek to uphold the convictions on that ground. By the Small Dwellings Acquisition Act, 1899, s. 9 (3) :

“ All expenses of a local authority in the execution of this Act shall be paid in the case of a county out of the county rate, and in the case of a county borough out of the borough fund or borough rate, and in the case of any urban or rural district out of any fund or rate applicable to the general purposes of the Public Health Acts . . . ”

That was repealed by the Local Government Act, 1933, s. 307, and sched. XI, pt. IV, and s. 188 (1) of the Act of 1933 provides that all liabilities falling to be discharged by the council shall be discharged out of the general rate fund. The justices, I think, took the view that these conveyancing charges were a liability of the council, which, of course, they were not. The charges are a liability which the mortgagor has to discharge. In the present instance the mortgagors paid the charges to the solicitor employed by the council when the council employed solicitors, and they paid them to the council when the council appointed their clerk to do the business instead of employing solicitors. Counsel for the appellants submitted that they did not act for any fee, gain or reward, because the fee, gain or reward went into the general rate fund. We cannot accept that contention. The council are a corporation, and, by the Solicitors Act, 1934, s. 1, for the present purpose they are a “ person ” within the meaning of s. 47 (1) of the Solicitors Act, 1932. They can, of course, only act by their servants, and they are responsible for the acts of their servants and the instructions which they may give their servants. They made a charge which the mortgagor had to pay, and, therefore, they were acting for a “ fee, gain, or reward.” It matters not into what banking account or fund the money found its way when it had been received by them.

The justices further held that the clerk was a public officer within the exemption from the provisions of s. 47 (1) of the Solicitors Act, 1932, contained in s. 47 (3) (a). Therefore, they said, if it had not been for the fact that they had held that making the charges was *ultra vires* the council, they would have dismissed the summons. We think that they were wrong in that view also. The Solicitors Act, 1932, s. 47 (3) provides :

“ This section shall not extend to (a) any public officer drawing or preparing instruments in the course of his duty . . . ”

The words “ public officer ” are words to which different meanings can be given according to the statute in which they occur. For instance, in the course of the argument I called attention to the expression “ public officer ” which is to be found in the Country Bankers Act, 1826. In that Act,

country bankers who were carrying on business in partnership had to appoint for certain purposes certain members of the partnership who were to be known as "public officers." Under that Act one did not have to consider whether a public officer was paid out of public funds. In the case of the Solicitors Act, 1932, s. 47 (3), however, we have to consider whether the expression "public officer" refers to any clerk of a local authority or whether it must not be given a stricter interpretation, *i.e.*, an officer of a public department.

- A Our attention was called to *Lyme Regis Corpn. v. Henley* (1), but that case merely decided that where a corporation had a grant of land which imposed a duty to keep it in good order any member of the public who was injured by failure to fulfil that duty could maintain an action in the same way as a member of the public who uses the highway and is injured by an act of misfeasance has a cause of action against the public authority who is responsible for the maintenance of the road. *Lyme Regis Corporation* were public officers for that purpose. In the present case we have to remember that the object of the Solicitors Act, 1932, s. 47 (1), is to ensure that conveyancing matters are carried out by qualified persons. We ought not, therefore, to give a very wide meaning to the word "public officer" in s. 47 (3) (a), because that would, perhaps, open the door to a great number of people claiming the right to do conveyancing which it was not intended by Parliament that they should do.

- C The expression "public officer" is again used in the Solicitors Act, 1933, s. 4 (1). The definition which follows in s. 4 (2)—and which is, it is true, limited to the particular section—is :

- D "In this section the expression 'public officer' means an officer whose remuneration is defrayed out of—(a) moneys provided by Parliament ; or (b) the revenues of the Duchy of Cornwall or the Duchy of Lancaster ; or (c) the common fund of the Ecclesiastical Commissioners ; or (d) the general fund of Queen Anne's Bounty ; or (e) the fund of the Electricity Commissioners ; or (f) the Forestry Fund ; or (g) the Development Fund ; or (h) any other revenues or fund for the time being prescribed by the Treasury."

- E A "public officer" within the meaning of s. 47 (3) (a) is an officer of a public department, one of the departments of State or one of the departments which is set out as a public department under various Acts of Parliament, whose salary is charged on national as distinct from local funds. That is supported by the opinion of CAVE, J., in *Re Mirams* (2). In that case CAVE, J., sitting in bankruptcy, had to consider whether the assignment of the salary of a chaplain of a workhouse and workhouse infirmary was void as being against public policy, because it had been held in many cases that a public officer, that is to say, an officer who was paid out of national funds, could not assign his salary. CAVE, J., said ([1891] 1 Q.B. 596) :

- G "In this case it is true that the salary is paid out of a poor rate, and that the chaplain, although appointed by the guardians, can only be dismissed by the Local Government Board ; but I am of opinion that this is no solid ground of distinction. To make the office a public office, the pay must come out of national and not out of local funds, and the office must be public in the strict sense of that term."

- H There, as I say, the judge was, no doubt, considering whether a certain transaction was void as being against public policy, but it seems to me that those words equally apply to this case, and I have no doubt the words "public officer" in this sub-section should be limited to a public officer in the strict sense, that is to say, an officer of a public department whose salary is charged on national and not local funds.

For these reasons, the appeal fails. The convictions must be held to be right, but on different grounds from those on which the justices convicted, which we think were wrong.

HUMPHREYS, J. : I agree.

FINNEMORE, J. : I also agree.

Appeal dismissed with costs.

Solicitors : *Savery, Stevens & Nutt*, agents for *R. A. Young & Pearce*, Nottingham (for the appellants) ; *Hempsons* (for the respondent).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

d. R. v. MATTHEWS. [1950]
R.137.

RUSE v. READ.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Finnemore, JJ.), January 17, 26, 1949.]

Larceny—Original taking a trespass—Subsequent animus furandi.

On June 30, 1948, the respondent was staying at his mother's home at S. An amusement fair was being held at S. on that day, and at about 9.30 p.m. one P. rode his bicycle to the fair and left it against the wall on the side of the entrance to the fair ground, into which he went. On returning at 9.45 p.m. he found the bicycle missing. That evening the respondent had visited several public houses, where he had drunk a quantity of liquor, before he went to the fair ground. He saw the bicycle, took it and rode it for about two hours. He had by then become sober and, not knowing what to do with the bicycle, he took it home with him and put it in the lane behind his mother's house. Next morning, being in a "panicky" condition and not knowing what to do with the bicycle, he took it to S. railway station and consigned it by rail, addressing the label : "Mr. R., Y. railway station, to be collected." The respondent, being charged before justices with the larceny of the bicycle, gave evidence that, when he took the bicycle, he did not realise, in consequence of his condition, the significance of what he was doing, and that his object in sending it to Y. was to get it out of his possession. He had no intention of going to Y. to collect the bicycle. The justices held that at the time of taking the bicycle the respondent had no intention of permanently depriving the owner of his property and was incapable of forming such an intention, and, consequently, that he was Not Guilty of the offence charged. Accordingly, they dismissed the information. On an appeal by the prosecutor,

HELD : the original taking of the bicycle by the respondent being wrongful, *i.e.*, a trespass (though not felonious because of an absence of any *animus furandi*), the misappropriation of the machine on the following day, when the respondent clearly intended to deprive the owner permanently of his property, amounted to larceny, and the respondent should have been convicted.

R. v. Riley, (1853) (Dears. C.C. 149 ; 20 L.T.O.S. 228), followed.

[AS TO INTENTION TO DEPRIVE OWNER OF GOODS, see HALSBURY, Hailsham Edn., Vol. 9, pp. 498, 499, para. 857 ; and FOR CASES, see DIGEST, Vol. 15, pp. 884-990, Nos. 9702-9768.]

Cases referred to :

- (1) *Public Prosecutions Director v. Beard*, [1920] A.C. 479 ; *sub nom.*, *R. v. Beard*, 122 L.T. 625 ; 84 J.P. 129 ; 14 Digest 65, 306.
- (2) *R. v. Riley*, (1853), Dears. C.C. 149 ; 20 L.T.O.S. 228 ; 17 J.P. 69 ; 15 Digest 878, 9634.
- (3) *R. v. Ashwell*, (1885), 16 Q.B.D. 190 ; 53 L.T. 773 ; 50 J.P. 181 ; 15 Digest 877, 9627.
- (4) *R. v. Hudson*, [1943] 1 All E.R. 642 ; [1943] K.B. 458 ; 169 L.T. 46 ; 107 J.P. 134 ; 2nd Digest Supp.

CASE STATED by Devon justices.

At a court of summary jurisdiction at Sidmouth an information was preferred by the appellant, Ruse, a police officer, charging the respondent, Ivan Steward Read, with the larceny of a pedal bicycle, the property of R. A. M. Purchase, contrary to s. 2 of the Larceny Act, 1916. The justices dismissed the information. The Divisional Court now allowed an appeal by the prosecutor. The facts appear in the headnote and the judgment of the court.

- A *Malcolm Wright* for the appellant (the prosecutor).
Dewar for the respondent.

Cur. adv. vult.

Jan. 26. HUMPHREYS, J., read the following judgment of the court. This is a Case stated by justices of Devon sitting at Sidmouth on a question of law arising on the hearing of an information whereby the respondent was charged at the instance of the appellant, a police sergeant, for that he, on June 30, 1948, stole a pedal bicycle with a pump and a dynamo lighting set, the property of one Raymond Purchase. The respondent elected to be tried summarily and the justices dismissed the information.

- C It was proved that the bicycle in question was wrongfully taken by some person between 9.30 and 9.45 p.m. on June 30 from the entrance to an amusement fair being held at Yard Mead Meadow, on the Sidford road within two or three miles of Sidmouth. The respondent was an electrical artificer in the Fleet Air Arm stationed at Warrington, in Lancashire, but on June 30 he was on leave and living in his mother's house at Sidmouth. He was 19 years of age and of good character. His connection with the bicycle in question is best told in the words of the Case. Paragraph 4, sub-paras. (3) and (4) of the Case state :

- E “ (3) On the same evening the respondent who had visited at least five public houses and had been drinking a quantity of rough cider and beer walked to the fair ground and round the various side shows there. On leaving the fair ground he noticed the bicycle belonging to Raymond Purchase leaning against the wall. It was noticeable and because of its bright red colour he was attracted to it. He took the bicycle and rode about on it in the neighbourhood for about two hours. He had by then sobered up, and, not knowing what to do with the bicycle, he went home and put it in the lane behind his mother's house in which he was then living and went straight to bed. (4) On July 1, 1948, at about 9 a.m. he was, as he said in his sworn evidence, in a ‘panicky’ condition and wondered what to do with the bicycle. He had told no one that he had taken it, but to get it away from his mother's house he removed the dynamo and pump from the bicycle. The dynamo he then sent by registered post addressed to himself at H.M.S. ‘Ariel,’ West Warrington. The pump he left at his home. At 10.45 a.m. at Sidmouth railway station he consigned the bicycle by rail for the sum of 12s. 2d. to York labelled ‘Mr. Read, York railway station, to be collected’.”

Paragraph 5 says :

- H “ On the same day at 4.30 p.m. Arthur Thomas White, a schoolboy returning home from school, saw the bicycle at Sidmouth railway station, recognised it as belonging to Raymond Purchase, and the police were informed.”

That evening the respondent was seen by a police constable. He then made a statement to the effect stated in para. 4, sub-paras. (3), (4), and added :

“ My purpose in sending it (the bicycle) to York was to get rid of it as I didn't know what to do with it after sobering up. I thought if I sent it away and as I was returning to my station on Friday, July 7, no one would know anything about it.”

On the hearing of the information the respondent gave evidence on oath to the same effect as his statement to the police. In the course of his evidence he said that when he sent the bicycle to York he had no intention of going to York to collect it. The opinion of the justices is :

" We carefully considered all the evidence, including that of the respondent and his manner and demeanour in giving it. We came unanimously to the conclusion that at the time of the taking he had no intention of permanently depriving the owner of his property and was incapable of forming one, and that, consequently, he was not guilty of the offence charged and dismissed the same."

The question which the court is asked to answer is whether on this statement of facts the justices came to a correct decision in point of law, which we construe as meaning whether there was any evidence to support the finding which I have just read.

This court is always loth to disturb a finding of fact by justices, and, particularly, where the finding is in favour of an accused person, but the decision in this case, having regard to the evidence, does seem to us a startling one. It is to be observed that no attempt was made to show that the respondent formed any intention at the time of the taking, such as an intention to borrow the machine and then return it to its owner. The argument accepted by the justices was that by reason of drunkenness he was incapable of forming any intention at all. The only evidence in support of that finding was (i) that after leaving the public house he walked to the fair ground and round the various side shows, (ii) that he was considerably under the influence of drink when he took the bicycle, (iii) that he rode the bicycle, apparently without accident, for two hours, and (iv) that he rode it home and then secreted it in the lane behind his mother's house. The respondent in the witness box did not put his case higher than that at the time of taking the bicycle, " in consequence of his condition, he did not realise the significance of having taken it," whatever that may mean.

The decision of the House of Lords in *Director of Public Prosecutions v. Beard* (1) shows that on the question of intention evidence of a state of drunkenness rendering the accused incapable of forming the intent necessary to constitute the particular crime should be taken into consideration with the other facts of the case, not because drunkenness in itself is an excuse for the crime, but because the state of drunkenness may be incompatible with the actual crime charged, and may, therefore, negative the commission of that crime. Can it be said that a man who is able to mount and ride a bicycle for two hours is yet so incapable drunk that he is unable to apply his mind to the simple question whether he intends to take the machine away for good or to borrow and return it ? Had there been no other question to be considered, the court would have found it very difficult to uphold this decision, but counsel for the appellant has drawn our attention to another aspect of the case—perhaps, of more general importance. Whatever may have been the state of mind of the respondent on the night of June 30, it is clear beyond dispute that on the next morning, not only did he fail to take any steps to return the bicycle to the place from which he had taken it or to inform the police or anyone else that he was in possession of the machine, but, on the contrary, he did everything in his power to prevent the discovery by the owner of either the machine or the accessories. Nothing could be more indicative of his then intention to deprive Mr. Purchase permanently of his property. It is equally clear that on the previous evening in taking away the bicycle he had committed a trespass since he had no permission from the owner.

The question then arises : Even if the taking on June 30, though unlawful, was not felonious because of the absence of the essential intention, did it become

so when that intention was manifested on the following day? Counsel for the appellant relies on *R. v. Riley* (2). That was a case in which Riley had put into a field belonging to one Clark 29 of his own lambs, there being already there 10 lambs belonging to one Burnside. Early in the morning Riley drove away his 29 lambs and with them one lamb belonging to Burnside. He sold his lambs, and, it being pointed out by the purchaser, that there were 30 lambs, he completed the sale and received the price of the 30 lambs which he appropriated to his own use. He later denied having done so and told other untruths about the matter. He was indicted for stealing the lamb of Burnside, and the jury returned a verdict as follows (Dears C.C. 151):

" . . . at the time of leaving the field the prisoner did not know that the lamb was in his flock, and that he was guilty of felony at the time it was pointed out to him."

On a Case reserved the Court for Crown Cases Reserved unanimously held that the conviction was right. In the course of the argument PARKE, B., put the matter succinctly as follows (*ibid.*, 156):

"The taking being a trespass; when there is the *animus furandi* it becomes a felony."

Without calling upon counsel for the Crown, POLLOCK, C.B., delivered judgment, distinguished some earlier cases and said (*ibid.*, 158):

"In the case now before the court, the prisoner's possession of the lamb was from the beginning wrongful. Here the taking of the lamb from the field was a trespass . . . if the original possession be *rightful*, subsequent misappropriation does not make it a felony; but if the original possession be *wrongful*, though not felonious, and then a man disposes of the chattel, *animus furandi*, it is larceny."

PARKE, B., in his judgment observed (*ibid.*):

"The original taking was not lawful. The prisoner being originally a trespasser, he continued a trespasser all along . . . and, being a trespasser, the moment he took the lamb with a felonious intent, he became a thief. He at first simply commits a trespass; but as soon as he entertains a felonious intent that becomes a *felonious trespass*."

WILLIAMS, J., TALFOURD, J., and CROMPTON, J., concurred in that decision. In the case put, where the original possession was rightful, regard must, of course, be had to-day to the provision now embodied in the Larceny Act, 1916, making larceny by a bailee punishable, otherwise *Riley's* case (2) stands. It was not new law in 1853. SIR MATTHEW HALE in his HISTORY OF THE PLEAS OF THE CROWN, vol. 1, p. 509, writes:

" . . . if my servant without my privity, takes my horse, and rides abroad 10 or 12 miles upon his own occasions, and returns again, it is no felony, but if in his journey he sells my horse, as his own, this is a declarative of his first taking to be felonious and *animus furandi*."

SIR MATTHEW HALE would apparently have approved the decision in *Riley's* case (2). That decision is treated by SIR JAMES STEPHEN in his DIGEST OF THE CRIMINAL LAW, 8th ed., p. 329, art. 366, as part of the law of England. In that authoritative work, POSSESSION IN THE COMMON LAW, by POLLOCK and WRIGHT, SIR FREDERICK POLLOCK, who wrote Part 2, states at p. 114 that:

" . . . the judgment of PARKE, B., in *Riley's* case (2) . . . has now been accepted as authoritative, though not always without reluctance, for more than 30 years."

In Part 3, written by SIR ROBERT WRIGHT, afterwards R. S. WRIGHT, J., at p. 142 the case is fully discussed as an important authority apparently with approval. *R. v. Ashwell* (3), where the fourteen judges were equally divided

(though, as afterwards appeared, the difference of opinion was rather on the facts than on the law), was also referred to by counsel for the appellant. The facts in that case were that Ashwell asked Keogh for the loan of a shilling. Keogh gave him what he believed to be a shilling and Ashwell took it under the same belief. Some time afterwards Ashwell discovered that the coin was a sovereign. He then and there fraudulently appropriated it to his own use. Ashwell, being convicted of larceny of the sovereign, DENMAN, J., reserved the question for the judges. The only one of the judges who referred to the case of *Riley* (2) was LORD COLERIDGE, C.J., who observed (16 Q.B.D. 226) that the conviction in that case was upheld on a ground extremely technical, but regarded it as

A

"... an authority under circumstances hardly different from those in the present case for upholding this conviction."

B

The only other case to which our attention was drawn was the decision of this court in *R. v. Hudson* (4). In that case the appellant had received by post an envelope intended for some other person. He kept it for some days and then on opening it he found inside a cheque drawn to J. Hudson, but intended, as he knew, for some other person. He then fraudulently appropriated the cheque. Being convicted of larceny of the cheque, he appealed to the Court of Criminal Appeal. The argument on his behalf was to the effect that, as he had no *animus furandi* when he received the envelope containing the cheque, he could not be convicted. The court upheld the conviction on the ground that the effective taking of the cheque by the appellant was when he opened the envelope and at once appropriated the contents since, as CHARLES, J., said ([1943] K.B. 462), in the course of delivering the judgment of the court,

C

D

"At that moment, for the first time, he was in a position—in which he had not been before—to form an intent."

We agree with that decision. Being of opinion that the decision in *Riley's* case (2) is still good law and binding on this court and that the case is not distinguishable from the present one, our judgment is that the justices misdirected themselves and should have found the offence proved. The case must go back to them with that expression of opinion.

E

Appeal allowed. Case remitted with direction that offence proved.

Solicitors: *Crawley and de Reya*, agents for *J. C. M. Dyke, McLusky and Hughes*, Exeter (for the appellant); *Gibson and Weldon*, agents for *Chard and Corwell*, Sidmouth (for the respondent).

F

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

Lied. WHITTY v. SCOTT-RUSSELL.
[1 All E.R. 884.]

LANGFORD PROPERTY CO., LTD. v. GOLDRICH.

G

[COURT OF APPEAL (Lord Greene, M.R., Somervell and Singleton, L.JJ.), January 20, 21, 24, 1949.]

Rent Restriction—"Dwelling-house"—Two separated flats let together—Rateable value of the dwelling-house—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), s. 16 (1)—Rent and Mortgage Interest Restrictions Act, 1939 (c. 71), ss. 3 (1), 7 (1).

H

Estoppel—Landlord's assumption of applicability of Rent Acts—Subsequent denial.

By an agreement, dated July 1, 1941, two flats, which up to that date had been let separately, were let together to one tenant on a quarterly tenancy commencing on Sept. 1, 1941. The flats were on the same floor, but were separated by other flats. On Apr. 1, 1939, the rateable value

of one flat was £98 and of the other £92. At no time were the two flats assessed together as one dwelling-house.

HELD : (i) the flats together constituted a dwelling-house within the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 16 (1).

Sheehan v. Cutler ([1946] K.B. 339; 174 L.T. 411) and *Selwyn v. Hamill* ([1948] 1 All E.R. 70), *distinguished*.

(ii) although the two flats were first let as one dwelling-house in 1941 the rating valuation list in April, 1939, showed the rateable value of the dwelling-house for the purposes of ss. 3 (1) and 7 (1) of the Act of 1939 in that the separate value of each flat appeared and the aggregate of their separate values exceeded £100 and, therefore, the dwelling-house was outside the Rent Acts.

Vaughan v. Shaw ([1945] 2 All E.R. 52; [1945] K.B. 400; 173 L.T. 6), *considered*.

(iii) the landlords were not estopped, by their assumption throughout most of the negotiations that the Rent Acts applied, from pleading that they were inapplicable.

Decision of BIRKETT, J. ([1948] 2 All E.R. 439; [1948] 2 K.B. 423), *affirmed*.

[AS TO PREMISES WITHIN THE RENT RESTRICTIONS ACTS, see HALSBURY, Hailsham Edn., Vol. 20, pp. 312-316, paras. 368-373; and FOR CASES, see DIGEST, Vol. 31, pp. 557-559, Nos. 7042-7067.]

Cases referred to :

(1) *Sheehan v. Cutler*, [1946] K.B. 339; 174 L.T. 411; 2nd Digest Supp.

(2) *Selwyn v. Hamill*, [1948] 1 All E.R. 70.

(3) *A.-G. v. Mutual Tontine Westminster Chambers Assocn., Ltd.*, (1876), L.R. 1 Exch. D. 469; 35 L.T. 224.

(4) *Vaughan v. Shaw*, [1945] 2 All E.R. 52; [1945] K.B. 400; 173 L.T. 6; 2nd Digest Supp.

APPEAL by the tenant from a judgment of BIRKETT, J., dated June 11, 1948, and reported [1948] 2 All E.R. 439.

The landlords claimed possession of two flats which, by an agreement dated July 1, 1941, had together been demised to the tenant on a quarterly tenancy commencing on Sept. 1, 1941. The tenant counterclaimed for money paid in excess of the standard rent. BIRKETT, J., found that the Rent Restrictions Acts did not apply since (1) the flats did not constitute a "separate dwelling-house"; (2) even if they did, the rateable value on Apr. 1, 1939, exceeded £100; and he further held that (3) the landlords were not estopped by their assumption over a period that the Acts did apply. He, therefore, gave judgment for the landlords. The Court of Appeal differed from BIRKETT, J., as regards (1), but agreed with his holdings (2) and (3), and dismissed the appeal. The facts appear in the judgment of SOMERVELL, L.J.

Scott Henderson, K.C., and *I. H. Jacob* for the tenant.

Beney, K.C., and *Heathcote-Williams* for the landlords.

LORD GREENE, M.R. : SOMERVELL, L.J., will deliver the first judgment.

SOMERVELL, L.J. : The landlords sought possession of certain premises, 13 and 15, West Heath Court, Golders Green, London, and garage No. 24, from the tenant. Those premises had been let to the tenant under successive tenancy agreements, the first of which was dated July 1, 1941, and the last of which had been duly determined at the time when the proceedings were brought. The tenant claimed the protection of the Rent Restrictions Acts, and the landlords disputed his right to do so. If any Rent Restrictions Act applies to protect the tenant, it is common ground that it is the Rent and Mortgage Interest Restrictions Act, 1939.

The premises consisted of two flats which had previously been separately let. They were on the same floor of a block of flats, though not next to each other. They were first let by a memorandum of agreement dated July 1, 1941 :

"The landlord agrees to let and the tenant agrees to take all those dwelling-rooms and premises being on the fourth floor and numbering 13/15 of the messuage and tenement known as West Heath Court North End Road Golders Green in the county of London together with garage No. 24."

It is not disputed that the tenant took these two flats as a home for himself and some relatives. The judge decided that he was not entitled to the protection of the Rent Restrictions Acts.

The first point taken by counsel for the landlords was that this was not a letting of a dwelling-house within the definition of "dwelling-house" in s. 16 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, that section being incorporated in the Act of 1939 by appropriate words which occur in s. 7 of the latter Act. The definition of "dwelling-house" in s. 16 of the Act of 1933 is :

" 'Dwelling-house' has the same meaning as in the principal Acts, that is to say, a house let as a separate dwelling or a part of a house being a part so let."

Counsel for the landlords submitted that two self-contained flats capable of being let, and, in fact, having been previously let, as separate flats cannot be let as a separate dwelling. I think the learned judge accepted this contention, although he decided the case on another ground ; but, if he did accept it, with respect I do not agree. It is plain that the words in the definition "dwelling-house . . . that is to say, a house," include and cover a flat. Under the Interpretation Act, 1889, the singular includes the plural unless the context otherwise requires. In my opinion, if the facts justify such a finding, two flats or, indeed, so far as I can see, two houses, could be let as a separate dwelling-house within the meaning of the definition. Here the tenant wished to accommodate in his home the relatives to whom I have referred and he wanted more accommodation than could be conveniently found in one flat. He, therefore, took the two flats and made those two flats his home. Counsel for the landlords suggested at one time that there might be some absurdity, if, say, a man took under a single lease (which does not seem very probable) two flats in widely separated districts, but that case can be dealt with when it arises.

I turn to the judgment of BIRKETT, J., because on this point he relied on two cases which dealt with a different subject-matter—the question whether the accommodation which a landlord seeking possession was offering was suitable alternative accommodation, and the provisions of s. 3 (1) and s. 3 (3) of the Act of 1933 had to be construed and applied. Those are the familiar provisions which provide that in certain circumstances no order for possession can be made unless the court is satisfied that suitable alternative accommodation will be available to the tenant when the order or judgment takes effect. Sub-section (3) sets out certain requirements which have to be fulfilled if the accommodation is to be considered suitable alternative accommodation. In both those cases what in effect was being offered was accommodation in a house supplemented by a room in another and separate house. BIRKETT, J., after citing passages from the judgment of MORTON, L.J., in *Sheehan v. Cutler* (1), summed up the *ratio decidendi* of the decision in that case thus ([1948] 2 All E.R. 441) :

"The learned Lord Justice goes on to deal further with those matters and comes to the conclusion, with which the other members of the court agree, that the question of suitable alternative accommodation is not satisfied by the offer of a house with the additional offer of a single room

in another house but contemplates similar accommodation to that which he originally had."

The other case, in which *Sheehan v. Cutler* (1) was followed and applied, was *Selwyn v. Hamill* (2). As it seems to me, when a landlord is seeking possession from a tenant who has been accommodated with his family in a single house, the question whether alternative accommodation which requires one member of the family to use a room in a separate house is reasonably suitable is different from that which we have to decide on this part of the present case, and I do not think that what is said in those cases on the construction of those sub-sections, regard being paid to the context which excludes the application of the Interpretation Act, 1889, providing that the singular includes the plural, affects in any way the validity of the decision to which I have to come in this case. I think that these premises do come within the definition of "dwelling-house" in s. 16 of the Act of 1939.

The second point arises on certain sections of the Act of 1939. The landlords say that the tenant is not entitled to the protection of that Act because the rateable value of the dwelling-house exceeds the limits within which that Act is applicable. The relevant provision is s. 3 of the Act of 1939 which provides :

"(1) Without prejudice to the operation of the two preceding sections in relation to any dwelling-house to which the principal Acts applied immediately before the commencement of this Act the principal Acts, as amended by the last preceding section, shall, subject to the provisions of this section, apply to every other dwelling-house of which the rateable value on the appropriate day did not exceed (a) in the metropolitan police district or the city of London, £100."

Did the rateable value on the appropriate day exceed £100? To ascertain what was the appropriate day and how the rateable value is defined one has to refer to s. 7 (1) of the Act of 1939 which provides :

"... 'rateable value on the appropriate day,' in relation to any dwelling-house, means (subject to the following provisions of this section) the value shown, with respect to that dwelling-house, on that day in the valuation list then in force, as the rateable value or, where the net annual value differs from the rateable value, as the net annual value; and 'the appropriate day' means, as respects the administrative county of London, Apr. 6, 1939, or, as respects the remainder of England, Apr. 1, 1939. . ."

Counsel for the tenant relied on sub-s. (2) of this section which provides :

"In relation to any dwelling-house of which the rateable value on the appropriate day was not on that day separately assessed, any reference in the preceding provisions of this Act to the rateable value on the appropriate day shall be construed as a reference to such proportion of the rateable value on that day of the property in which the dwelling-house is comprised as may be apportioned to the dwelling-house by the county court in accordance with the provisions of sub-s. (3) of s. 12 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920."

That sub-section, in my opinion, does not assist in this appeal, because it is dealing with a case, which I shall show is not this case, namely, where the dwelling-house is part of a larger rateable or rated unit. Sub-section (3) provides :

"In relation to any dwelling-house first assessed after the appropriate day, any reference in the preceding provisions of this Act to the rateable value on the appropriate day shall be construed as a reference to the rateable value on the day on which the dwelling-house was first assessed."

The two flats on the appropriate day within the definition which I have read being separately let at that time appear in the valuation list, one at £98, and the other at £92. There was a retrospective reduction at a later date, but the effect of that still left the sum of the two assessments in excess of £100. I will leave aside the garage for the moment because a separate argument was based on that. The first question, as it seems to me in view of the terms of s. 7 of the Act of 1939, is: Was a value shown with respect to this dwelling-house on the appropriate day in April, 1939, in the valuation list then in force? As was pointed out in the course of the argument by the MASTER OF THE ROLLS, the Rent Restrictions Acts deal with premises which constitute in ordinary language the home of the tenant, whereas Rating Acts deal with hereditaments. The two often coincide. A man's home is a separately rateable and rated hereditament, and no particular problem arises, but there are many cases, and the Act makes special provision for them, in which the premises taken by the tenant as his home, as a dwelling-house within the meaning of the Act, is only part of the hereditament which the authorities have rated, and in those circumstances there is provision for an apportionment. If, however, I am right in the earlier part of this judgment, the dwelling-house which has to be considered may consist of two rateable hereditaments, as happened here, there having been separate assessments of No. 13 and No. 15. Counsel for the tenant submitted that when the tenant entered into his first tenancy agreement in respect of Nos. 13 and 15, a new rateable hereditament came into existence. That hereditament, he said, has never been assessed, and he relied on s. 7 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938, which provides:

"If any question arises in any proceedings whether the principal Acts apply to a dwelling-house, it shall be deemed to be a dwelling-house to which those Acts apply unless the contrary is shown."

He said that the contrary cannot be shown because there never has been a first assessment of this dwelling-house within s. 7 (3) of the Act of 1939, and, therefore, the landlords have failed to discharge the onus of proof which the section places on them of showing that the dwelling-house is outside the Act. I am unable to accept this contention. As it seems to me, if a man takes two flats, as here, or two adjoining houses, that fact has no relevance from the point of view of the rating valuation. If the tenant, having taken the two houses under one document, proceeds to sub-let one of them, counsel for the tenant did not suggest that that could have any effect on the rating valuation. As I followed his argument, if the tenant, having taken the two houses, puts, say, his parents in one of them without charging a rent, but the parents have their own establishment there, eat there and sleep there and have their living rooms there, then again he would not say that a new rateable unit had come into existence, but he submits that the position is different if, as here, the two separately rated premises (as to which I should, perhaps, have stated there was no structural alteration of any kind made when they were taken by the tenant) are used as what I may call a combined establishment, and that in such a case a new rateable hereditament comes into existence to which the entries in the valuation list as at April, 1939, have no application. I could not appreciate any real reason for that submission which counsel for the tenant advanced. The view which I have formed is that it is incorrect to say that, if a man takes two flats, the rateable value is affected by that fact, even though he uses them in the way described here, namely, all the meals being taken in one flat, and the other being used for sleeping and living purposes. It seems to me, therefore, that, although this dwelling-house consisting of the two flats combined was first let as a dwelling-house in 1941, that does not alter the fact that in the valuation list in force in April, 1939, a value was shown with respect

to that dwelling-house, that value being the sum of the rateable values of flat No. 13 and flat No. 15.

Counsel for the landlords, in submitting that the conclusion to which I have come was right, referred us to two cases. It is only necessary to refer to one of them, namely, *A.-G. v. Mutual Tontine Westminster Chambers Association, Ltd.* (3). In that case, which dealt with some rather complicated provisions, there were blocks of flats, each block containing suites, like chambers in the Inns of Court, and those suites had, for certain statutory purposes, all been separately rated. The question was whether for other statutory purposes, for which it was held that the defendants had to be rated as occupiers of the whole of the blocks, that value could be arrived at by aggregating the rateable values placed on the separate suites. SIR GEORGE JESSEL, M.R., after referring to certain words in the statute, said (L.R. I Exch. D. 481) :

"Now it is said that, under those words, inasmuch as you have to value the house, and the house as such has not been separately valued in any valuation list, though each tenement composing the house has been so valued, it is necessary to make a separate valuation of one hereditament, namely, the house. One answer to that might be that the words 'separately valued' mean when you cannot ascertain its separate value; and that in the present case you can ascertain its separate value from the valuation list by adding up the value of all the tenements; in fact, that it is for this purpose separately valued, because you can ascertain without going beyond the list the total separate valuation of the hereditaments. It may be in two parts or in ten parts, but the total of the two or the ten parts does give you the separate valuation."

The statutory provisions there were different, but it seems to me that the principle which has led me to the conclusion at which I have arrived in the present case on the construction of the statutes with which we have here to deal is in accordance with the principle which was applied in that case. I should also refer to a case which was relied on by counsel for the tenant, namely, *Vaughan v. Shaw* (4) which dealt with a dwelling-house which :

"... was let on Sept. 1, 1939, to two tenants occupying distinct, but not structurally separated, tenements at rents of 17s. and 15s. 6d. a week respectively. In January, 1941, the house was let as a whole to a tenant at 25s. a week."

The question there was : What was the standard rent of the house let as a whole ?, and the Court of Appeal (McKINNON, LAWRENCE and MORTON, L.JJ.) held

"... that the standard rent of the house was 25s. a week, being the rent at which it was first let as a whole, and not 32s. 6d. the aggregate of the rents of the two parts."

I do not propose to go through that case in detail, but there seems to me to be no inconsistency in holding in the present case that, although these two flats were first let as a dwelling-house in 1941, that does not prevent its rateable value as defined in the Act of 1939, being ascertained by reference to entries in the valuation list in force in April, 1939.

Counsel for the tenant raised a separate point with regard to the garage. The garage was one of a number of garages which were assessed as a block, and a figure of some £6 was said to be the proportion of the total assessment of the block which should be allocated to this garage. Counsel submitted that there is no assessment on what was let here, namely, the two flats and the garage; there had been no legal apportionment by a court of the total rateable value of the block of garages. There was merely an estimate put forward, and, therefore, he said, the dwelling-house, which included the garage, has

never been assessed, and the rateable value of the dwelling-house, which includes the garage, cannot be found by looking at the valuation list. I do not think that that argument succeeds, for the reason that what one has to consider here is whether or not the rateable value on the appropriate day exceeded £100. If you find, when looking at the valuation list, that, as here, the rateable value of the dwelling-house, apart from the garage, exceeds £100, that seems to me sufficient proof by the landlord that what he has let is outside the Act. You may, of course, get borderline cases. If the rateable value of the premises, apart from the garage, was, say, £99, and the landlord sought to show that when there was added the rateable value of a garage which had never been separately assessed that brought the value over £100, he might have to take steps which have not been taken here, the nature of which it is not necessary to consider because that is not this case. In this case the landlords can show that the value of that part of what was let which, in fact, comprised the whole of the premises in which the tenant was to dwell exceeded £100, and that, it seems to me, is sufficient for them. As was pointed out by the MASTER OF THE ROLLS when this point was under discussion, one might have a case where a man agreed to take a house the rateable value of which was say, £150, on condition that the landlord put up a garage. The landlord did so, the house was taken, and, if the argument of counsel for the tenant is right, the tenant could say: "This dwelling-house, which now includes the garage, has never been assessed, and, therefore, you have failed to show that it was outside the Act." That would be a remarkable conclusion, and I do not find any words in the Act which would lead one to it. On this point the learned judge decided in favour of the landlords, for the reasons which I have tried to express, and I agree with his conclusion on that point. A
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Another issue was argued below. It was sought to be said that, even if the Acts did not in law apply, the landlords were estopped from so maintaining. I think there is no doubt that at a certain stage in the negotiations, or, possibly, throughout most of them, the landlords thought that these premises were within the Acts, and there were various discussions about what was the standard rent and so on. So far as the point of estoppel was concerned, counsel for the tenant, I think, admitted—in any event we all clearly hold—that what was pleaded in the statement of claim could not constitute an estoppel. He also conceded that there was no evidence that the tenant had acted on any representation of fact which might have been alleged as an estoppel if it had been pleaded in the defence. For those reasons we ruled against counsel for the tenant on this point. When those points emerged we decided that the plea of estoppel could not be raised in this court, and so we did not ask counsel for the landlords to deal with it. For these reasons, I think that this appeal fails and must be dismissed. E
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SINGLETON, L.J. : I agree. G

LORD GREENE, M.R. : I agree.

Appeal dismissed with costs.

Solicitors: *Franks, Charlesly & Leighton* (for the tenant); *Stikeman & Co.* (for the landlords).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

ACTON CORPORATION v. WEST MIDDLESEX ASSESSMENT COMMITTEE AND ANOTHER.

[KING's BENCH DIVISION (Lord Goddard, C.J., Humphreys and Finmore, JJ.), January 26, 1949.]

Rating—Derating—Industrial hereditament—Premises used for testing aeroplane propellers and correcting minor faults—Factory and Workshop Act, 1901 (c. 22), s. 149 (1)—Rating and Valuation (Apportionment) Act, 1928 (c. 44), s. 3 (1).

The Rating and Valuation (Apportionment) Act, 1928, s. 3 (1), provides :
 “. . . the expression ‘industrial hereditament’ does not include a hereditament occupied and used as a factory or workshop if it is primarily occupied and used for . . . (f) any . . . purposes . . . which are not those of a factory or workshop.” The Factory and Workshop Act, 1901, s. 149 (1), provides : “The expression ‘non-textile factory’ means . . . (c) any premises wherein or within the close or curtilage or precincts of which any manual labour is exercised by way of trade or for purposes of gain in or incidental to any of the following purposes, namely—(i) the making of any article or of part of any article ; or (ii) the altering, repairing, ornamenting or finishing of any article ; or (iii) the adapting for sale of any article, and wherein or within the close or curtilage or precincts of which steam, water or other mechanical power is used in aid of the manufacturing process carried on there.”

An aeroplane manufacturing company used certain premises for the testing of propellers, including prototype propellers prior to their being put into production, propellers in regular production before delivery to purchasers, and propellers which had showed faults during operational flights. The component parts of the propellers were manufactured elsewhere, but, when sent for testing, they were assembled on the premises in question and were dismantled after testing. Where a propeller showed faults on test, it was corrected either by minor adjustments and modification on the said premises, or, in the case of more serious faults, by sending it to another factory of the company for alteration.

HELD : the work performed on the premises was part of the process of, or was incidental to the process of, the making of an article within s. 149 (1) (c) (i) of the Act of 1901, and the premises were, therefore, an industrial hereditament within s. 3 (1) of the Act of 1928.

Grove v. Lloyds British Testing Co., Ltd. ([1931] A.C. 450 ; 145 L.T. 73), distinguished.

[AS TO DERATING OF INDUSTRIAL HEREDITAMENT, see HALSBURY, Hailsham Edn., Vol. 27, pp. 435-459, paras. 871-887 ; and FOR CASES, see DIGEST Supp.]

Cases referred to :

- (1) *Grove (Dudley Revenue Officer) v. Lloyds British Testing Co., Ltd.*, [1931] A.C. 450 ; 145 L.T. 73 ; 95 J.P. 115 ; Digest Supp.
- (2) *Jobling (James A.) & Co., Ltd. v. Sunderland County Borough Assessment Committee*, [1944] 1 All E.R. 500 ; 2nd Digest Supp.

CASE STATED by consent of the parties under the Quarter Sessions Act, 1849, s. 11.

De Havilland Propellers, Ltd., made a proposal for an amendment of the valuation list with regard to a propeller testing station occupied by them on the ground that the hereditament was an industrial hereditament. The assessment committee amended the list as proposed, and the Divisional Court now dismissed an appeal by the rating authority. The facts appear in the judgment of LORD GODDARD, C.J.

Rowe, K.C., and *Squibb* for Acton Corporation.

Scott Henderson, K.C., and *Ramsay Willis* for the company.

Ramsay Willis and *W. L. Roots* for the assessment committee.

LORD GODDARD, C.J.: This is a Case stated for the opinion of the court under s. 11 of Baines' Act and it raises the question whether a certain hereditament is an industrial hereditament and as such entitled to be derated, or whether it is a hereditament which has no claim to be called an industrial hereditament, in which case it falls to be assessed. When counsel for the rating authority opened this case and read LORD DUNEDIN's speech in *Grove v. Lloyds British Testing Co., Ltd.* (1), I thought the case was covered by it, but the argument of counsel for the company has convinced me that it is not and that this is an industrial hereditament.

The ratepayers in the present case are De Havilland Propellers, Ltd., who are manufacturers of aeroplane propellers which are principally manufactured for the Ministry of Supply. The Ministry have made it a term of the contract that all the propellers should be tested, but I do not base my judgment merely on that ground. The hereditament in question is occupied for the purpose of testing propellers under conditions as like as possible to those of flight. The Case states :

"The testing carried on in the said hereditament falls into three main categories : (i) The testing of prototype propellers intended to be used in connection with a new or modified type of aircraft. These experiments continue until a type of propeller is judged perfect for the particular need and is ready to be put into production. (ii) Testing of propellers already in regular production before their delivery under contract for sale to the Ministry of Supply. (iii) Testing necessitated by failures or faults in propellers occurring during operational flights. The tests described in (i) and (iii) are not directly connected with production, but are in the nature of research. The bulk of the testing, however, is in connection with production tests as described in (ii), and the hereditament is primarily occupied in connection with tests of this category. The component parts of the propellers are manufactured in other premises occupied by the company and are sent to the hereditament to be tested. On arrival, the components are assembled and prepared for test in a part of the hereditament where also are installed the aero-engines to which the propellers have to be attached to drive the propeller during the test. These aero-engines have to be mounted on test beds in test cells, and, in addition to fitting on the propeller, there has to be fitted certain piping and electrical wiring. Manual labour is involved in the whole of the foregoing procedure and in the subsequent dismantling of the propellers, engines, and ancillary equipment after testing. The majority of the propellers manufactured by the respondent company are made to the order of the Ministry of Supply which makes it a condition of their contract that all propellers shall be tested before delivery. Accordingly, while such propellers are manufactured elsewhere, they are brought to the hereditament for testing as described under heading (ii) hereof. Where a propeller shows faults on test it is not scrapped, but is, dependent on the extent of such faults, dealt with either by minor adjustments or modifications which are made on the said hereditament, or, in case of more serious faults, by returning it to premises of the company elsewhere to enable such alterations or modifications to be made as the test has shown to be necessary, after which the propeller is returned to the said hereditament, where it is submitted to a further test."

The material section is s. 3 (1) of the Rating and Valuation (Apportionment) Act, 1928, where it is provided :

"... the expression 'industrial hereditament' does not include a

hereditament occupied and used as a factory or workshop if it is primarily occupied and used for the following purposes or for any combination of such purposes, that is to say . . . (f) any . . . purposes . . . which are not those of a factory or workshop."

Section 3 (2) throws us back to the Factory and Workshop Act, 1901, for the definition of a factory, and s. 149 (1) of that Act provides :

A " . . . the expression ' non-textile factory ' means . . . (b) any premises or places named in pt. II of [sched. VI to this Act] wherein or within the close or curtilage or precincts of which steam, water or other mechanical power is used in aid of the manufacturing process carried on there ; and (c) any premises wherein or within the close or curtilage or precincts of which any manual labour is exercised by way of trade or for purposes of gain in or

B incidental to any of the following purposes, namely—(i) the making of any article or of part of any article ; or (ii) the altering, repairing, ornamenting or finishing of any article ; or (iii) the adapting for sale of any article, and wherein or within the close or curtilage or precincts of which steam, water or other mechanical power is used in aid of the manufacturing process carried on there."

C No doubt " steam, water or other mechanical power " is used for the processes employed in the hereditament with which we are now dealing.

Reliance has been placed on *Grove v. Lloyds British Testing Co., Ltd.* (1), to which I have already referred, in which a testing station was held not to be an industrial hereditament, but there seems to me to be a distinction between that case and this. In that case cable manufacturers, having made their cables,

D had to send them to another company, Lloyds British Testing Co., Ltd., to get a certificate that the cable had a certain strength, and, to use the words of LORD HEWART, C.J., when the case was in the Divisional Court : " Their task [that is the testing company's task] is not to adapt the cables for sale, but to see that they have been so adapted." In the present case I think (not without some hesitation because, as I say, it is a difficult case) the testing which is

E carried out on this hereditament is all part of the process of manufacture or is incidental to the process of manufacture. It seems to me that if a manufacturer has to make an article to answer a certain specification, it is essential that he should, in the course of his manufacture, take steps to see that the particular parts of the article and the article itself when finished answer that specification, and to ensure that, if they do not, they do not go out from the factory. I

F think that distinguishes this case from one where the manufacturer, having, presumably, satisfied himself, sends the article to somebody else who has merely then to say whether or not the article answers a particular requirement, or to place a hall mark to it, and not to do any work on it himself if it does not. Therefore, I think that the case is distinguishable from *Grove v. Lloyds British Testing Co., Ltd.* (1). I agree, therefore, with the decision of the assessment

G committee and I think the Case should be answered in favour of the respondents.

FINNEMORE, J. : I have come to the same conclusion. The question, which, I agree, is one of great difficulty, depends entirely on the interpretation which is to be given to certain words in the Rating and Valuation (Apportionment) Act, 1928, which was passed to provide machinery for the derating of

H industrial hereditaments. In s. 3 (1) it laid down what those industrial hereditaments are. That sub-section adopts the meaning given to the expression " factory and workshop " in the Factory and Workshop Acts, 1901 to 1920, and provides :

" In this Act the expression ' industrial hereditament ' means a hereditament . . . occupied and used . . . subject as hereinafter provided, as a factory or workshop. Provided that the expression ' industrial hereditament ' does not include a hereditament occupied and used as a factory

or workshop if it is primarily occupied and used for . . . (f) any . . . purposes . . . which are not those of a factory or workshop."

In other words, if a factory or workshop within the meaning of the Factory and Workshop Acts is primarily occupied and used for purposes which are not those of a factory or workshop, it is excluded from the phrase "industrial hereditament." Turning to the Factory and Workshop Act, 1901, s. 149 (1), one finds the definition of the phrase "non-textile factory," which this must be, A

" . . . any premises wherein or within the close or curtilage or precincts of which any manual labour is exercised by way of trade or for purposes of gain in or incidental to any of the following purposes, namely—(i) the making of any article or of part of any article ; or (ii) the altering, repairing, ornamenting or finishing of any article ; or (iii) the adapting for sale of any article, and wherein or within the close or curtilage or precincts of which steam, water or other mechanical power is used in aid of the manufacturing process carried on there." B

This hereditament was used for the purpose of testing aeroplane propellers made by the company—in the main for the testing of propellers already in regular production before their delivery under a contract of sale to the Ministry of Supply. C

Counsel for the rating authority takes two points. He says, first, that there is nothing which makes this a factory or workshop, and, secondly, that, even if it be a factory or workshop, it is primarily used for a purpose which is not that of a factory or workshop. I think his two points really come to one because his case is that this hereditament is used solely for testing, and not for manufacturing or for the adapting for sale of any article. It is right to remember, as was decided in *Jobling v. Sunderland County Borough Assessment Committee* (2), in the words of LORD GREENE, M.R. ([1944] 1 All E.R. 501): D

"The unit for rating is not the business but the hereditament, and you have to find out what is being done in the hereditament with which the rating authorities are dealing." E

What this company may do elsewhere is, therefore, irrelevant. The question on which the decision of this case depends is what was being done at this particular hereditament. Counsel says all that was being done there was testing the propellers and that is not one of the purposes specified in s. 149 (1) (c) of the Act of 1901 or incidental thereto. Counsel for the company, however, points out that the component parts of the propellers come unassembled to this hereditament where they are assembled, and the modifications, if they are not serious modifications, are made at this hereditament. Although, of course, the purpose for which the hereditament was used was that of testing, it was not merely for passing or rejecting work which had been done. It was an essential part of the manufacture which any prudent manufacturer would employ before saying: "This article is now manufactured and is ready for sale." F

The great difficulty in the way of the finding of the assessment committee is *Grove v. Lloyds British Testing Co., Ltd.* (1) to which my Lord has referred. There a cable was sent to a cable testing company to be tested and to have a certificate of fitness given to it without which it could not have been sold. G It was argued in that case that that testing was the adapting for sale of the cable. LORD DUNEDIN, in his speech, in which all the members of the House of Lords concurred, said that all that the cable testing company did in that case was to test. Assuming they found any defect they did nothing to put it right. All they did was to say, aye or no, that a cable made by somebody else was fit for a certificate or it was not. In the present case we are dealing with people who manufacture certain articles, namely, aeroplane propellers. In H

the course of making those articles they test them, and one imagines every prudent manufacturer who has to make important articles would test them from time to time. They have a special hereditament for the purpose of testing. If they find things are wrong, they are put right, if possible, in this hereditament. If they are too big to be put right there, they go to one of the other of the company's factories for it to be done. That seems to me to be quite different from what happened in *Grove's* case (1), where Lloyds were concerned with nothing other than testing. Here, at this hereditament the company were concerned with testing and putting right defects which they might find.

I think this case can be put on two grounds. It could be said this was incidental to the adapting for sale of an article. I should have thought it was clearly incidental to adapting for sale for the people who are manufacturing an article to make sure that any defect in it is put right. I think it is also right here to say that this testing was incidental to the making of the article. It was a normal process which the manufacturers would apply to the manufacture of this article. The testing process was not carried out just to see whether it was ready to be sold. It was part of the manufacture to ensure that the articles were being made properly in accordance with the contract and in accordance with the obligations which the Sale of Goods Act places on manufacturers. For these reasons I think that this hereditament was rightly found to be an industrial hereditament.

HUMPHREYS, J. : I asked FINNEMORE, J., to give his judgment before I expressed any views of my own because I have felt and still feel the most profound difficulty in deciding this question. The distinction is very fine and might well be decided the other way, but, having heard the judgments of my Lord and FINNEMORE, J., I feel that I cannot differ from them.

Appeal dismissed with costs.

Solicitors : *H. C. Lockyer*, town clerk, Acton (for the rating authority); *Blundell, Baker & Co.* (for the company); *H. G. Greenwood*, Ealing (for the assessment committee).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

MACKLEY AND ANOTHER v. NUTTING.

[COURT OF APPEAL (Bucknill, Cohen and Asquith, L.JJ.), January 12, 13, 31, 1949.]

Landlord and Tenant—Tenancy by estoppel—Passing of tenant's right to enforce estoppel to tenant's personal representative—Conversion of right into tenancy.

N., a tenant of a dwelling-house, died intestate in 1935, and his tenancy vested in the President of the Probate, Divorce and Admiralty Division in accordance with s. 9 of the Administration of Estates Act, 1925. No letters of administration were at any time taken out. His widow continued to reside in the house and paid rent to the landlords until her death intestate in 1946. Her daughter, who had at all times lived with her parents or the surviving widow, remained in possession of the premises, and in March, 1947, took out letters of administration to her mother's estate. In May, 1947, the President of the Probate, Divorce and Admiralty Division was served by the landlords with notice purporting to determine the tenancy which had become vested in him on the death of N. On a claim for possession by the landlords against the daughter it was found as a fact that on the death of N. the intention of the landlords and the widow was to create a tenancy on the same terms as that under which N. had held.

HELD : as possession had been given by the landlords to the widow under the tenancy so created the landlords were estopped from repudiating

the tenancy; on the death of the widow her right to rely on that estoppel as against the landlords passed to the daughter as her legal personal representative; that right became a tenancy when the interest of the President was determined by the notice to quit of May, 1947; and, therefore, the landlords were not entitled to possession.

[AS TO ESTOPPEL BETWEEN LANDLORD AND TENANT, see HALSBURY, Hailsham Edn., Vol. 13, pp. 504-509, paras. 572-577; and FOR CASES, see A DIGEST, Vol. 30, pp. 347-366, Nos. 63-292.]

Cases referred to :

- (1) *Thynne v. Salmon*, [1948] 1 All E.R. 49; [1948] 1 K.B. 482.
- (2) *Smith v. Mather*, [1948] 1 All E.R. 704; [1948] 2 K.B. 212.
- (3) *Smith v. Baker & Sons*, [1891] A.C. 325; 65 L.T. 467; 55 J.P. 660; 13 Digest 527, 789.
- (4) *Rhodes v. Liverpool Commercial Investment Co.*, (1879), 4 C.P.D. 425; 13 Digest 538, 901.
- (5) *Seymour v. Coulson*, (1880), 5 Q.B.D. 359; 13 Digest 538, 902.
- (6) *Clarkson v. Musgrave*, (1882), 9 Q.B.D. 386; 13 Digest 527, 788.
- (7) *Webb v. Austin*, (1844), 7 Man. & G. 701; 8 Scott, N.R. 419; 3 L.T.O.S. 282; 21 Digest 284, 998.

APPEAL by the tenant from an order of His Honour JUDGE FIELD, K.C., made at Leicester County Court on July 29, 1947, granting possession of a dwelling-house to the landlords. The court now allowed the appeal. The facts appear in the judgment of COHEN, L.J.

Stimson for the landlords.

Mrs. Y. Frazer for the tenant.

Victor Russell as *amicus curiae*.

Cur. adv. vult.

Jan. 31. COHEN, L.J., read the following judgment. This is an appeal from a judgment dated July 29, 1947, of His Honour JUDGE FIELD, K.C., sitting in the Leicester County Court, whereby he ordered that the tenant do deliver up possession of a dwelling-house, No. 274, Harrison Road, Leicester, to the landlords.

The facts which gave rise to the appeal are peculiar. The premises were originally let by the landlords' predecessors in title, a Mr. Wood, and subsequently, a company named Wood & Martin, Ltd., of which Mr. Wood was a director, to the tenant's father, Mr. Nutting, on a weekly tenancy at a rent of 12s. 6d. a week. Mr. Nutting died at a date which is alleged in the particulars of claim to be Feb. 29, 1935, but is stated by the learned county court judge to have been after 1935 but before 1942. It is clear that he was still a contractual tenant at the time of his death, that he does not appear to have made a will, that no letters of administration to his estate were granted, and that, therefore, the benefit of his tenancy for what it was worth vested, and remained vested, in the President of the Probate, Divorce and Admiralty Division under s. 9 of the Administration of Estates Act, 1925. His widow remained in possession of the premises and continued to pay the weekly rent until her death on Sept. 11, 1946. On the widow's death the tenant, who had lived throughout with her parents or the survivor of them, remained in possession of the premises. On Mar. 27, 1947, letters of administration of her mother's estate were granted to the tenant. Down to that date no notice to determine a tenancy had been given to anyone, but on May 5, 1947, the landlords, who had acquired the freehold reversion in the premises, gave notice to the President of the Probate, Divorce and Admiralty Division purporting to determine the tenancy which became vested in him on the death of Mr. Nutting. On receipt of this notice the Treasury solicitor replied as follows :

"I have been instructed by the President of the Probate, Divorce and

Admiralty Division to reply to your letter of May 5, and I return the copy of the notice to quit duly endorsed. That may be sufficient for your purposes, but I think I should point out that, in my opinion, the nature of the vesting in the President of the property of an intestate, by virtue of s. 9 of the Administration of Estates Act, 1925, is not such as to impose on him any liability in respect of the property, and, in those circumstances, the notice to quit appears to me to be misconceived so far as the President is concerned."

It being clear that the interest, if any, of the President in the premises, had determined, the landlords then demanded possession of the premises from the tenant. On her refusing to deliver up the premises the landlords issued their plaint herein on June 13, 1947. The tenant put in her defence, and the matter came on for hearing before the learned county court judge on July 29, 1947. He made the order for which the landlords asked, the *ratio decidendi* of his judgment being that the widow was a statutory, not a contractual, tenant, and that her daughter could have no rights under the statute since the effect of s. 12 (1) (g) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, on the right of a tenant to remain in possession after notice to quit had been served, was exhausted by the widow's statutory tenancy. From that decision the tenant has appealed.

When the learned county court judge gave his judgment, he had not the advantage of the guidance given by the decisions of this court in *Thynne v. Salmon* (1) and *Smith v. Mather* (2). The first of these decisions lays it down that para. (g) of s. 12 (1) of the Act of 1920 does not apply where the tenancy which was vested in a contractual tenant at his death passed by his will or on his intestacy to some person other than his widow or a member of his family residing with him at the time of his death. The second decision showed that there is no logical distinction between the position of the President and that of any other person in whom the tenancy is vested, and it follows, therefore, that para. (g) cannot apply where the tenancy is vested in the President on the intestacy of the deceased, at any rate, unless on that intestacy the widow is absolutely entitled under s. 46 (1) (v) of the Administration of Estates Act, 1925. This being the position, counsel for the landlords properly admitted that he could not support the decision of the learned county court judge on the basis of his reasoning. He contended, however, that some observations of SOMERVELL, L.J., in *Smith v. Mather* (2) concluded the present case in his favour. The passage on which he relied is ([1948] 1 All E.R. 706) :

"TUCKER, L.J., in his judgment [in *Thynne v. Salmon* (1)], pointed out that, if there is a relative who comes within the words of the definition in para. (g), assuming 'tenant' to cover a contractual tenant, and there is also someone in whom the contractual tenancy has vested under a grant of letters of administration or under a will, there are two tenants, both, presumably, liable to pay the rent and entitled to possession of the house, and so on. That is an impossible position and one which the legislature cannot have contemplated."

If, said counsel for the landlords, this court were to take the view that Mrs. Nutting was a contractual tenant, we should be assuming the co-existence of two tenants, one Mrs. Nutting and the other the President, both presumably, entitled to possession of the house, and that, he says, is the position which SOMERVELL, L.J., regarded as impossible. This argument seems to me, however, to ignore the context in which the observations of SOMERVELL, L.J., were made. What the court was there considering was the construction of s. 12, and the court held that, if there are two alternative constructions, it is reasonable to adopt that which will avoid the inconveniences to which SOMERVELL, L.J., referred. There the court was not considering the question which we have

to consider, which is in part one of fact and in part one of law. The question of fact is : What was the bargain (if any) between the landlords and Mrs. Nutting ? The question of law is, assuming the intention of the parties to that bargain was to create a tenancy : What was the effect of the bargain having regard to the outstanding interest vested in the President ?

On the question of fact the only possible conclusion from the evidence is that the intention of the parties was to create a tenancy on the same terms as that under which Mr. Nutting had held. Counsel for the landlords, however, says that effect cannot be given to that tenancy because of the interest of the President. Counsel for the tenant sought to meet this argument by saying that the landlords, claiming as they did through Messrs. Wood & Martin, Ltd., were estopped from denying the tenancy. Counsel for the landlords then took the objection that this point had not been raised before the learned county court judge, and was not, therefore, open before us. He relied on the well known observations of LORD HALSBURY, L.C., in *Smith v. Baker & Sons* (3) [1891] A.C. 333 :

“My Lords, this was an action originally tried in the county court, and it is very important to bear in mind that only a limited appeal is allowed by law in actions so tried. There is no power to review the decision of fact arrived at in the county court by any other tribunal than the county court itself. A matter of law can be made the subject of appeal, but then only when the point has been raised at the trial before the learned judge. That question was decided in *Rhodes v. Liverpool Commercial Investment Co.* (4). In *Seymour v. Coulson* (5) the principle was affirmed that the point of law must be taken ; and finally in *Clarkson v. Musgrave* (6), where all the cases were reviewed, it was established (and I think has been accepted ever since) that the raising of the point of law at the trial is a condition precedent to any appeal from the decision of the county court. My Lords, I think there are good reasons for the enactment which has so limited an appeal, and in truth even where written pleadings render such precautions as the statute has enforced in the county court less necessary, the same precaution has been constantly enforced where applications for a new trial have been made in the Superior Courts. It is obvious that it would be unjust to one of the parties if the other could lie by and afterwards, having failed on the contention that he in fact set up, be permitted to rely on some other point not suggested at the trial, but which if it had been suggested might have been answered by evidence.”

Now it is true that the point of estoppel was not dealt with in the court below, but that was because of the erroneous view that the learned county court judge took of the law, which resulted in his not considering what the intention of the parties was. In these circumstances the question of estoppel never arose. Accordingly, it seems to me that a grave injustice would be done to the tenant if she were now to be debarred from raising the question of estoppel. On the other hand, I cannot see that any injustice would be done to the landlords if she were allowed to raise it. It was clear on the pleadings that the tenant was alleging a contract of tenancy between the then landlords and her mother, and counsel for the landlords was quite unable to suggest any further evidence which he might have been able to adduce if the point had been expressly pleaded or raised in argument before the learned county court judge.

The legal position, on the assumption that Messrs. Wood & Martin, Ltd., purported to grant a tenancy to Mrs. Nutting is, in my opinion, correctly stated in HALSBURY'S LAWS OF ENGLAND, Hailsham Ed., Vol. 13, p. 504. Paragraph 572 is in these terms :

“Generally, a tenant is estopped from disputing the title at the time of the demise of the landlord by whom he has been let into possession ;

but this estoppel has no application even while the tenancy exists when the question of title arises between the parties, not in the relationship of landlord and tenant, but of vendor and purchaser. The doctrine of estoppel which operates between landlord and tenant is not confined to leases by deed, and applies to tenancies from year to year, at will, or on sufferance, as well as to leases for years; and anyone holding under a tenant, or defending as landlord in an action of ejectment, is bound by it. Similarly, the lessor is estopped from repudiating a lease under which possession has been given or a tenancy which he has acknowledged, and the assignee of the lessor's interest is estopped from denying anything which the lessor is estopped from denying."

Note (r), on p. 505, is in these words: "This is an example of the *dictum* that estoppels must be mutual and reciprocal." Mrs. Nutting, had she been alive, could, therefore, clearly have relied on estoppel as against the landlords. Does that right pass to the tenant as her legal personal representative? In my opinion, it does: see SPENCER BOWER ON ESTOPPEL BY REPRESENTATION, p. 151. I will read the first two sentences of para. 176:

"Speaking generally, on the death or disability of the representee the persons who in right of him or his estate would be entitled to enforce any contract made with him are the persons who can take advantage of any rule of evidence, and, therefore, of any estoppel, which would be available to the representee if alive, or free from disability. Thus, the executor, administrator, heir, or devisee (as the case may be) of a deceased representee succeeds, in this as in any other respects, to the rights which that representee had at the moment of his death."

I would add that, the right having passed to the tenant, her interest in the premises, which on her mother's death was only a right to enforce the estoppel, became a tenancy when the interest of the President was determined as the result of the notice to quit dated May 5, 1947: see *Webb v. Austin* (7), where TINDAL, C.J., delivering the judgment of the court, said (7. Man. & G. 724):

"The doctrine on this subject, as it has been generally understood by the profession, may be collected from Mr. PRESTON'S TREATISE ON ABSTRACTS, vol. ii, p. 210, and the authorities there cited. That general understanding appears to be, that 'An indenture of lease, or a fine *sur concessit*, for years, will be an estoppel only during the term. It first operates by way of estoppel, and finally, when the grantor obtains an ownership, it attaches on the seisin and creates an interest, or produces the relation of landlord and tenant; and there is a term *commencing* by estoppel, but *for all purposes* it becomes an estate or interest. It binds the estate of the lessor, etc., and therefore continues in force against the lessor, his heirs, etc. It also binds the assigns of the lessor and of the lessee'."

For these reasons, I would allow the appeal. The tenant is entitled to costs in the court below on the appropriate scale and such costs of the appeal as she is entitled to as a poor person.

BUCKNILL, L.J.: I agree that the appeal should be allowed for the reasons set out in the judgment of COHEN, L.J.

ASQUITH, L.J.: I also agree.

Appeal allowed with costs.

Solicitors: *Wright & Bull*, agents for *Wright & Freeman*, Leicester (for the landlords); *Wilberforce Allen & Bryant*, agents for *A. H. Headley*, Leicester (for the tenant); *Treasury Solicitor* (instructing counsel as *amicus curiae*).

[Reported by C. N. BEATTIE, Esq., Barrister-at-Law.]

LAWRENCE v. SINCLAIR.

[COURT OF APPEAL (Bucknill and Asquith, L.JJ., and Hodson, J.), January 27, 28, 1949.]

Landlord and Tenant—Business premises—Compensation for goodwill—Carrying on business for five years—Continuous period covering two contracts of tenancy—Landlord and Tenant Act, 1927 (c. 36), s. 4 (1).

On May 5, 1936, the tenant acquired the unexpired term of a 21-years under-lease of certain business premises, and, as a result of business carried on there, goodwill became attached to the premises. On June 21, 1946, the under-lease expired, and the tenant, who had not made any claim for compensation, held over as a tenant from year to year. On Mar. 1, 1947, the landlord served the tenant with notice to quit on June 1, 1948, and within one month of the service of that notice the tenant served a notice on the landlord claiming a new lease under s. 5 (1) of the Landlord and Tenant Act, 1927, or compensation as provided by s. 4 (1) of the Act. The claim for a new lease failed, because the landlord required the premises for his own occupation. As regards the claim for compensation, the question for the court was whether the tenant, by carrying on business at the premises under two successive contracts of tenancy—the under-lease and the yearly tenancy—had complied with the condition contained in s. 4 (1) that he should have carried on business “for a period of not less than five years.”

HELD: a tenant complies with the condition if he carries on business for a continuous period of five years, whether under a single contract of tenancy or under two or more such contracts.

[AS TO COMPENSATION FOR GOODWILL, see HALSBURY, Hailsham Edn., Vol. 20, pp. 294-297, paras. 333-339; and FOR CASES, see DIGEST, Supp.]

Cases referred to:

(1) *Clift v. Taylor*, [1948] 2 All E.R. 113; [1948] 2 K.B. 394.

(2) *Barrell v. Fordree*, [1932] A.C. 676; 96 J.P. 278; *sub nom.*, *Fordree v. Barrell*, 147 L.T. 206; Digest Supp.

(3) *Donegal Tweed Co., Ltd. v. Stephenson*, (1929), 141 L.T. 262; Digest Supp.

APPEAL by the landlord from a decision of His Honour JUDGE GRANVILLE SMITH, sitting at Barnet County Court, on June 29, 1948, whereby he awarded the tenant £465 as compensation for loss of goodwill. The learned referee, to whom the matter had been referred, reported, first, that the tribunal had no jurisdiction to entertain the claim by reason of the tenant having carried on business under two separate tenancies, but that, if a tribunal had jurisdiction, the tenant was entitled to £465 compensation. The county court judge ruled that the tribunal had jurisdiction and awarded compensation. From that decision the landlord appealed. The Court of Appeal now dismissed the appeal. The facts appear in the judgment of BUCKNILL, L.J.

Heathcote-Williams and *Plume* for the landlord.

J. W. Russell for the tenant.

BUCKNILL, L.J.: This is an appeal from a decision of His Honour JUDGE GRANVILLE SMITH, sitting at Barnet County Court on June 29, 1948, whereby he awarded to Mr. Lawrence, a tenant of certain premises, the sum of £465 for compensation for loss of goodwill under s. 4 (1) of the Landlord and Tenant Act, 1927. The premises consisted of a half shop with two flats above in Ballard Lane, North Finchley. On July 11, 1935, the premises were let, by an under-lease, to S. Cliff & Co., for a term of 21 years less three days. The under-lease began on June 24, 1925, so that it expired on June 21, 1946. On May 5, 1936, S. Cliff & Co., with the then landlord's consent, assigned the unexpired term of that under-lease to the tenant, Lawrence. On Nov. 4, 1946, Sinclair, who

is the present landlord, acquired the lease-hold interest in the property and became the immediate landlord of Lawrence. After the lease had expired on June 21, 1946, the tenant held over as tenant from year to year. On Mar. 1, 1947, the landlord served notice to quit on the tenant to terminate his tenancy on June 1, 1948. On Mar. 28, 1947, the tenant served a notice under the Landlord and Tenant Act, 1927, s. 5 (1), claiming a new lease or compensation in respect of the business carried on by him since May, 1936. On June 6, 1947, Mr. Horton-Smith was appointed referee, under s. 21 (2) of the Act of 1927, to make a report. He held his reference in January and February, 1948, and he took a preliminary point that the tribunal had no jurisdiction to entertain the claim either for a new lease or for compensation, but as it was merely his duty to report, he did so after hearing argument on the matter. On Mar. 12, 1948, he reported, first, that, in his view, the tribunal had no jurisdiction to entertain the claim; secondly, that, if there was jurisdiction, he found that goodwill had attached to the premises; thirdly, that the claim for a new lease was defeated by the defence that the landlord required the premises for his own occupation; and, finally, he recommended an award of £465, by way of compensation. In due course that report was considered by the learned judge, and counsel for the landlord contended, as he had before the referee, that the tribunal had no jurisdiction. The learned judge refused a new lease and awarded the tenant £465 compensation.

The material section is s. 4 of the Landlord and Tenant Act, 1927, which provides:

“(1) The tenant of a holding to which this Part of this Act applies shall, if a claim for the purpose is made in the prescribed manner—(i) in the case of a tenancy terminated by notice, within one month after the service of the notice on the tenant; and (ii) in any other case, not more than 36 nor less than 12 months before the termination of the tenancy; be entitled, at the termination of the tenancy on quitting the holding, to be paid by his landlord compensation for goodwill if he proves to the satisfaction of the tribunal that by reason of the carrying on by him or his predecessors in title at the premises of a trade or business for a period of not less than five years’ goodwill has become attached to the premises by reason whereof the premises could be let at a higher rent than they would have realised had no such goodwill attached thereto: Provided that . . . (b) the tenant shall not be entitled to compensation in respect of such goodwill if within two months after the making of the claim the landlord serves on the tenant notice that he is willing and able to grant to the tenant, or obtain the grant to him of a renewal of, the tenancy of the premises at which the trade or business is carried on at such rent and for such term not exceeding fourteen years as, failing agreement, the tribunal may consider reasonable; and if the tenant does not within one month from the service of the notice send to the landlord an acceptance in writing of the offer the tenant shall be deemed to have declined the offer.”

By sub-s. (3):

“Where an offer of the renewal of a tenancy by the landlord under this section is accepted by the tenant, the rent fixed by the tribunal shall be the rent which in the opinion of the tribunal a willing lessee other than the tenant would agree to give and a willing lessor would agree to accept for the premises having regard to the terms of the lease, but irrespective of the value of any goodwill which may have become attached to the premises by reason of the tenant or his predecessors in title having carried on thereat a particular trade or business.”

Section 25, the interpretation section, provides:

“The expression ‘tenant’ means any person entitled in possession to the

holding under any contract of tenancy, whether the interest of such tenant was acquired by original contract, assignment, operation of law or otherwise."

The preamble to the Act is :

"An Act to provide for the payment of compensation for improvements and goodwill to tenants of premises used for business purposes, or the grant of a new lease in lieu thereof ; and to amend the law of landlord and tenant."

The argument put forward on behalf of the landlord is, shortly, that the claim for compensation must be in respect of one tenancy only, and in the present case the compensation is claimed partly in respect of the tenancy for 21 years and partly in respect of the tenancy from year to year. Section 4 (1) (ii) of the Act of 1927 clearly lays down that in the case of a tenancy which is not terminated by notice, notice of the claim for compensation must be made not less than 12 months before the termination of the tenancy. No such notice was given in the present case in respect of the tenancy which came to an end in 1946, and, therefore, it is argued, the tenant has got no right to compensation under that lease, that he has not been a tenant for 5 years under the tenancy from year to year, and in those circumstances he is debarred from making a claim for compensation in respect of this admitted goodwill, which has been valued at £465. It is said that it is impossible for a tenant to aggregate two separate tenancies as has been done in the present case, and that there was clearly a new tenancy when, the original lease, having expired, the tenant held over from year to year. It is argued that after the words "for a period of not less than five years" there must be read into the section the words "under one and the same title." Finally, reference was made to a judgment of SCOTT, L.J., in *Clift v. Taylor* (1). SCOTT, L.J., speaking of this Act, said (1948] 2 All E.R. 116) :

"(i) The Act interferes with freedom of contract and thus modifies an important right of the individual. Any real ambiguity of language in any particular provision, still apparent even when construed in the light of the whole Act, ought to be resolved in favour of maintaining common law rights. (ii) For the same reason, its plain meaning should not be strained in favour of any presupposed intention to enlarge the tenant's or to cut down the landlord's contractual rights."

The question is whether there is any real ambiguity in the words of the section which I have read. In *Clift v. Taylor* (1) the point which has now been argued, was not raised, and, although this Act was passed in 1927 the point has never been raised in any legal proceedings, so far as I know, until it was raised before the learned official referee in the present case.

Counsel for the tenant, on the other hand, went back to first principles when he referred to MAXWELL ON THE INTERPRETATION OF STATUTES, 9th ed., p. 3, where the author thus deals with how a section of this kind is to be read :

"Section 2—Literal Construction : The first and most elementary rule of construction is that it is to be assumed that the words and phrases of technical legislation are used in their technical meaning if they have acquired one, and, otherwise, in their ordinary meaning ; and, secondly, that the phrases and sentences are to be construed according to the rules of grammar. From these presumptions it is not allowable to depart where the language admits of no other meaning. Nor should there be any departure from them where the language under consideration is susceptible of another meaning, unless adequate grounds are found, either in the history or cause of the enactment or in the context or in the consequences which would result from the literal interpretation, for concluding that that interpretation does not give the real intention of the legislature."

There follows a quotation from the judgment of WARRINGTON, L.J., in *Barrell v. Fordree* (2) :

“ ‘The safer and more correct course of dealing with the question of construction is to take the words themselves and arrive, if possible, at their meaning without, in the first place, a reference to cases’ .”

There being no cases which deal in any way directly with this point, we can look at the words themselves.

A Is this a case where a tenancy has been terminated by notice ? There is no doubt that it is. Proper notice has been given. Was the claim made within one month after the service of the notice ? It was. Has the tenant
B quitted the holding ? He has. Has he proved to the satisfaction of the tribunal that, by reason of the carrying on by him at the premises of a trade or business for a period of not less than five years, goodwill has become attached to the premises ? He has proved that. Why, then, should he not get compensation ? The only reason put forward is that one must read into this section words which are not there, namely, that he must have held the premises under one and the same title. In my view, to read those words into the section would be wrong according to the principles of construction to which I have referred and would also defeat the object of the Act set out in the preamble. So far
C I think that s. 4 (1) (f) helps the tenant in this matter. Paragraph (f) is in the following terms :

D “ . . . compensation under this section shall not be payable if the tenant has determined the tenancy or failed to exercise an option for a further term contained in the lease or in a collateral agreement, unless, in the case of an option, the terms of the option are such that the tenant could not reasonably be expected to exercise it.”

My comment on that paragraph is that a tenant who exercises an option is very much in the same position as a tenant under a new tenancy. No authority has been given for that proposition, but it was admitted by counsel for the landlord. If that proposition is correct it would seem to me to indicate
E that the tenant, having exercised the option, would be entitled to claim compensation in respect of his tenancy under that option. It might very well be that the option might be, say, for a tenancy for three years. What is the position of the tenant in that case ? If he has, for instance, been in occupation of the premises for two years under the original lease and then continues under the option for another three years, he would, if
F the learned judge is right, be entitled to claim compensation because he had been in occupation for five years, but, if the landlord is right, it would seem that unless the tenant, a year before the original lease expired, had given notice that he was going to claim compensation, he would be debarred from claiming any compensation in respect of the total of five years. That seems to me to put the tenant in a very unreasonable position. He is faced with the option
G and with a section in the Act of Parliament which says that compensation shall not be payable unless he exercises the option. He does not make any claim for compensation, and then at the end of three years he finds that he is not entitled to any compensation. He is forced to construe the section in such a way as to say : “ It is true I have to wish on, but I cannot get compensation unless I file a claim for compensation a year before the original lease has expired.” I do not think that Parliament intended to place the tenant in such
H a position. For those reasons, in my view, this appeal should be dismissed.

ASQUITH, L.J.: I agree. The question is whether the tenant has fulfilled the conditions precedent to his right to compensation provided for in the Landlord and Tenant Act, 1927, s. 4 (1). The terms of that section are, in my view, quite unambiguous, and there is nothing to qualify their plain, grammatical meaning.

To entitle a tenant to compensation under the sub-section, his application

must show a number of things—first, that he was the tenant of a holding within the definition of the Act. It is conceded that the tenant in the present case has shown that. Secondly, he must show that he has given notice of his claim in the prescribed manner, which (when, as in this case, his own lease was determined by notice to quit) is by giving notice to the landlord within a month after receiving that notice to quit. This also he has done. Then he must show to the satisfaction of the tribunal three things—(i) that he or his predecessors in title have carried on at the premises a trade or business for a period of not less than five years; (ii) that goodwill has, in consequence, attached to the premises; and (iii) that, by reason thereof, the premises could have been let at a higher rent than they would have realised otherwise. The second and third of these last requirements are not in dispute, but the landlord maintains that the first condition is not satisfied, and he bases his contention on the ground that the five years referred to must be five years during which the tenant is holding under a single tenancy or title, and must not be spread over two tenancies, even if they are immediately consecutive the one on the other. It is conceded that the five years must be continuous. So much is clearly implied in the expression “period of five years.” There seems, however, to be no warrant for the second qualification which counsel for the landlord attempts to embroider on the simple terms of the sub-section. The latter nowhere says that the five years must be under a single tenancy, and there seems to be no room and no need for any such implication. Incidentally, the evil struck at by the Act, which is the appropriation by the landlord of the fruits of the tenant's industry and labour, would be just the same in quantity and quality whether the five years were spread over one tenancy, two tenancies, or a dozen. It is said by counsel for the landlord that the construction of the section contended for by the tenant should be avoided because it places the tenant in as strong a position as if he had given notice of his claim 12 months before the 21 years' lease expired whereas, in fact, he failed to do so, and that his failure ought to preclude him for good from claiming in respect of any goodwill acquired during the period of that early lease. It is true that if, on the termination of the 21 years' lease, he had quitted instead of getting a renewal, he could not have made a claim because he would not have been, within the express terms of the opening words of s. 4 (1), a tenant of a holding who had made a claim in the prescribed manner, which, in the events assumed, would be a claim made 12 months, at least, before the termination of that 21 years' lease. In the actual events of this case he held over at the end of the 21 years, and by such holding over he became a tenant who had to give, and has given, one month's notice, and he qualifies under the opening words of the section. The effect of this is to entitle him to compensation if he can further show that he carried on at the premises a trade or business for a period of not less than five years. This he has shown. If it is said that this puts him in as strong a position as if he had given a proper notice of a claim 12 months before the 21 years' lease expired, I can only say that, in my view, the plain, unambiguous language of the section leads to that result, and if the legislature wished to avoid it they should have said so.

There are two other points with which I will deal shortly. Counsel for the landlord laid some stress on the fact that the word “tenancy” in s. 4 (1) is in the singular number, but I do not think that that fact helps him because the tenancy which the section is discussing is the tenancy on whose termination the tenant quits, not a tenancy—such as the 21 years' tenancy—on whose termination he did not quit. The other point is that the assistance which counsel for the landlord sought to derive from s. 4 (1) (f) is, I think, not his to claim. I have nothing to add to what my Lord has said under that heading. I agree that the appeal should be dismissed.

HODSON, J. : I agree. The application before the court was for a new lease under s. 5 (1) of the Landlord and Tenant Act, 1927, but the tenant had

first to qualify under s. 4. The argument for the landlord is that the tenant has not qualified under that section because he has irrevocably lost the rights which he had under the lease which expired in 1946, not having made an application in time, because part of the five years must necessarily have passed during the currency of that lease. The proposition which counsel for the landlord put is stated shortly in FOA's GENERAL LAW OF LANDLORD AND TENANT, 7th ed., p. 756 :

"Compensation for goodwill is not payable—unless the tenant has made a claim within the time prescribed."

He relied on *Donegal Tweed Co. v. Stevenson* (2), for the proposition that the time cannot be extended by the court, and said that since no application had been made in due time under the long lease the tenant had lost his right forever and that it could not be resuscitated. That is the argument which he put forward. It has certain attractions, but I agree that, faced with the plain language of the statute, the tenancy which has to be considered is that which exists at the quitting of the holding. Although the tenant's claim for compensation under the original lease was barred, that bar only applied if he quitted the holding at the time of the expiration of the lease. On the simple construction of s. 4 the tenant qualifies for compensation if he is a tenant at the time of quitting the holding, notwithstanding the fact that the tenancy which then came to an end has not subsisted during the whole five years. For those reasons, and those which have already been given, I agree that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors : *E. E. Pugh & Co.* (for the landlord) ; *Merton Jones, Lewsey & Jefferies* (for the tenant).

[*Reported by C. N. BEATTIE, Esq., Barrister-at-Law.*]

HALL v. BECKENHAM CORPORATION.

[KING'S BENCH DIVISION (Finnemore, J.), February 2, 1949].

Nuisance—Recreation ground—Liability of local authority—Park dedicated to public—Noise from model aircraft flown in park—No contravention of bye-laws—Public Health Act, 1875 (c. 55), s. 164.

A local authority owned, controlled and managed a public park acquired by them under the Public Health Act, 1875, s. 164, and made bye-laws for its regulation under the powers conferred by that section. The bye-laws contained no provision regulating the flying of model aircraft in the park, and such aircraft, fitted with internal combustion engines which made a considerable noise, were frequently flown therein. The noise was alleged to be a nuisance by an occupier of an adjoining house who sought an injunction to restrain the local authority from permitting the commission of the nuisance and damages.

HELD : the park was dedicated to the public use and was not in the beneficial occupation of the local authority, and, although the authority had the management and control of the park, their power to regulate the conduct of members of the public using the park was limited to the enforcement of the bye-laws ; the flying of model aeroplanes was not contrary either to those bye-laws or to the general law ; and, therefore, the local authority had no power to prevent the use of the park in that manner and were not liable in respect of the noise complained of.

Lambeth Overseers v. London County Council ([1897] A.C. 625 ; 76 L.T. 795), *applied*.

North Riding of Yorkshire¹ County Valuation Committee v. Redcar Corpn.
 ([1942] 2 All E.R. 589; [1943] 1 K.B. 114; 168 L.T. 81), distinguished.

[AS TO PERSONS LIABLE TO BE SUED FOR NUISANCE, see HALSBURY, Hailsham Edn., Vol. 24, pp. 83-88, paras. 147-153; and FOR CASES, see DIGEST, Vol. 36, pp. 213-217, Nos. 558-591.]

Cases referred to:

- (1) *A.-G. v. Tod Heatley*, [1897] 1 Ch. 560; 76 L.T. 174; 36 Digest 177, 221. A
- (2) *Sedleigh-Denfield v. O'Callaghan*, [1940] 3 All E.R. 349; [1940] A.C. 880; 164 L.T. 72; 2nd Digest Supp.
- (3) *Lambeth Overseers v. London County Council*, [1897] A.C. 625; 76 L.T. 795; *sub nom., St. Mary, Lambeth (Churchwardens and Overseers) v. London County Council*, 61 J.P. 580; 36 Digest 247, 12.
- (4) *North Riding of Yorkshire County Valuation Committee v. Redcar Corpn.*, [1942] 2 All E.R. 589; [1943] 1 K.B. 114; 168 L.T. 81; 106 J.P. 11; 2nd Digest Supp. B

POINT OF LAW set down for decision in an action for damages for nuisance, for an injunction, and for a declaration that the defendant local authority were not entitled to cause or permit the commission of a nuisance by noise. C

The plaintiff was the owner and occupier of a house adjoining a public park provided by the local authority under the Public Health Act, 1875, s. 164. He sought to restrain the local authority from permitting users of the park to cause noise by flying model aircraft, which, he alleged, constituted a nuisance. The defendants claimed that the park was dedicated to the public and that they had no power to prevent the use of the park for any particular purpose except by means of bye-laws which they had made under the Act, none of which was applicable. By consent this point of law was set down for hearing before the trial. FINNEMORE, J., dismissed the action. D

Hackforth-Jones for the plaintiff.

Squibb for the local authority.

FINNEMORE, J.: The plaintiff, Mr. Hall, lives near a park called the Blake Recreation Ground, which is under the control of the defendants, Beckenham Corporation. In recent times there has grown up the pastime of flying model aircraft, which, instead of being comparatively harmless, quiet, instruments driven by elastic, or something of that sort, as formerly was the case, have been fitted with internal combustion engines which have no silencers and, in consequence, make a considerable noise. The plaintiff is asking for damages to compensate him for having to endure the nuisance of this excessive noise occurring in the recreation ground, and an injunction to prevent its recurrence in the future. I am not trying those issues, because a preliminary point has been argued in front of me, and that is, that, however true the plaintiff's complaint may be, he has no right against the defendant corporation. He may have a right against the actual perpetrators of the nuisance, but the defendants say that that is nothing to do with them. Counsel for the plaintiff says: "Here is a nuisance. You are the occupier of the land, the recreation ground. Although the nuisance is caused by other people, you must so manage and control your property that there is no nuisance committed on it. If that nuisance is created by other people, even by trespassers, and you allow it to continue and take no reasonable steps to stop it, you are at common law responsible in damages." Those observations, addressed to a private individual, would be correct under *A.-G. v. Tod Heatley* (1) and *Sedleigh-Denfield v. O'Callaghan* (2) which are authorities for that proposition. The reason is plain. An owner of private property, if he likes to take the necessary measures, can prevent people coming on his land and committing a nuisance, because he can shut everyone out if he so wishes. Counsel's point for the plaintiff is that Beckenham Corporation are in exactly the same position. They are the owners. E
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and the occupiers, and they certainly have the management and control of the recreation ground. If other people, licensees he would call them, come into that park and create a nuisance, and the corporation do nothing about it, they, as occupiers, and, in any event, as managers and controllers, are responsible, unless they take reasonable steps to stop it.

This land was established as a recreation ground under the Public Health Act, 1875, s. 164, which provides :

- A "Any urban authority may purchase or take on lease, lay out, plant, improve, and maintain lands for the purpose of being used as public walks or pleasure-grounds, and may support or contribute to the support of public walks or pleasure-grounds provided by any person whomsoever. Any urban authority may make byelaws for the regulation of any such public walk or pleasure ground, and may by such byelaws provide for the removal from such public walk or pleasure-ground of any person infringing any such byelaw by any officer of the urban authority or constable."

- B Two points are taken by counsel for the defendants. The first is that in the strict sense the corporation are not the occupiers of this park, certainly not within the meaning of "occupiers for rating purposes," and in support of that he has cited *Lambeth Overseers v. London County Council* (3). That was a case where the London County Council, under the London County Council (General Powers) Act, 1890, acquired a place called Brockwell Park for the perpetual use of the public for exercise and recreation, and the question arose whether that park was liable to the poor-rate. LORD HALSBURY, L.C., made it quite plain that it was not, and he stated the grounds on which he arrived at that conclusion. He said ([1897] A.C. 630) :

- E "The fact that the park is vested in the county council does not make them the occupiers. It would be absurd to contend that wherever the legal estate is there is occupation. A road is vested in someone, but, if a public road, there is no occupation of it any more than of a milestone or a direction-post. I have hitherto dealt only with the question of occupation, and, as I have said, I think there is no occupation at all, the county council being merely custodians and trustees for the public . . . Once it has been found, as in this case, that the occupation cannot as a matter of law be a beneficial occupation, there is an end of the question. I say as matter of law, because that it does not give a beneficial occupation as matter of fact is nothing to the purpose. Here there is no possibility of beneficial occupation to the county council ; they are incapable by law of using it for any profitable purpose ; they must allow the public the free and unrestricted use of it."

- G Counsel for the plaintiff answers that, by the Local Government Act, 1933, s. 163, any land belonging to a local authority and not occupied for the purpose for which it was acquired may be appropriated for any other purpose approved by the Minister of Health for which the local authority are authorised to acquire land. He also quoted the Town and Country Planning Act, 1947, s. 42, and argued that as now with the permission of the Minister of Town and Country Planning, the Blake Recreation Ground might, in certain circumstances, be used by the corporation for some other purpose, which might be a profitable purpose, the *ratio decidendi* of *Lambeth Overseers v. London County Council* (3) no longer applies. I think on that point one ought to refer also to the much later case of *North Riding of Yorkshire County Valuation Committee v. Redcar Corpn.* (4). In that case the corporation purchased the foreshore of certain lands to be used as public walks and pleasure-grounds, and on a part of that property they set up baths, a bathing pool, a boating lake, a putting golf course, a car park, and a pavilion or concert hall, and they also let the foreshore in the summer for roundabouts and swings and other amusements which people frequent at the seaside. For these they charged admission. It was held that these buildings were in the

occupation of the Redcar Corporation and were not merely ancillary to the use by the public of the walks and pleasure-grounds in which they were situated, and to that degree the court distinguished *Lambeth Overseers v. London County Council* (3). I think, if the point made by counsel for the plaintiff on this is right, it must follow that the principle in *Lambeth Overseers v. London County Council* (3) would now have to be re-considered in view of the Acts of 1933 and 1947. That was not, as far as I know, suggested in any form before the Divisional Court which decided the *Redcar* case (4). Indeed, *Lambeth Overseers v. London County Council* (3) was referred to, and the principle was, I think, accepted without question. TUCKER, J., in his judgment, makes this, to my mind, quite clear, because he says ([1942] 2 All E.R. 594), after agreeing with the other learned judges :

" . . . the inference I draw (and I think the inference is almost irresistible) is that there never was any intention to dedicate these lands exclusively to the public, that such dedication never in fact took place, and that the user of these buildings is not ancillary to the use of the hereditament as a whole as a pleasure park."

I think that must mean two things. It must mean, first, that you may still have a pleasure-ground which is dedicated to the public use. If so, it is not considered to be in beneficial occupation for rating purposes. Secondly, the reason why those particular hereditaments were rateable was because they could not be considered as just ancillary to the use of the pleasure-park. In the latter part of his judgment, CASSELS, J., said (*ibid.*, 600) :

" Beneficial occupation does not mean that pecuniary profit has to be established. It merely means that there must be an occupation which is of value to the occupier. There is nothing about any one of these seven hereditaments which entitles the Redcar Corporation to say that it is not capable of occupation or that its occupation is of no value, or that it is occupied by the public who cannot be occupiers for the purpose of rateability. I hold that the Redcar Corporation are in rateable occupation of these seven hereditaments . . . "

The general conclusion that I draw from all these matters is that the Acts of 1933 and 1947 do not alter the position of a local authority in regard to land which it has acquired under the Public Health Act, 1875, s. 164, for the purpose of public walks or pleasure-grounds. It is not for the local authority to decide to turn this land to some other use. That could only be done, as I read the Acts, with the consent of the Minister. As far as the local authority is concerned, if the land is purchased under their statutory powers, it is dedicated to the use of the public for the purpose of a park. Counsel for the plaintiff points out that on certain days and at night this park is closed, and, therefore, the public do not have unrestricted access to it. I think those points have been referred to in the cases with which I have dealt. To my mind, it would not affect what I believe is true—that this recreation ground was bought under statutory powers and was dedicated to the use of the public as a park.

That does not, however, end the matter, because, whether the corporation are occupiers in the normal sense of the word or not, they are certainly invested with the management and control of this park. If further evidence were needed of that, the bye-laws have been produced, which they themselves have drawn up to regulate, as far as they can, the use of the park. I think the legal position would be the same as if they were occupiers. Whether you are an occupier of land in the strict sense or whether you have management and control of it, you must occupy it, or manage and control it, so that it is not a nuisance. It is true that in some circumstances an Act of Parliament may authorise a nuisance, but, as is shown by cases which counsel for the plaintiff cited to me—and, indeed, it is well-known law—the fact that you do something by statutory

authority does not entitle you to disregard other people's rights or to create a nuisance to other people unless the Act authorises you to do things which cannot be done without creating a nuisance. In some cases we have to accept the position that Parliament has legislated, knowing it was affecting other people's rights and intending so to do. So long, however, as there is a way of carrying out a statutory obligation, especially a statutory permission, without affecting other people's rights, you must, of course, adopt that way. Therefore, if

- A Beckenham Corporation used, or permitted to be used, the Blake Recreation Ground so that it became a nuisance, they would be liable, subject to the consideration which, to my mind, is decisive of the point which I have to decide, namely, whether the powers of the corporation over this recreation ground are sufficiently extensive. The corporation have the right to make bye-laws for its proper conduct, and they have express powers to eject people who infringe those bye-laws. If they go beyond those powers, it seems to me quite plain that their officer, and, therefore, the corporation themselves, would be liable to an action for assault or false imprisonment should they lay hands on someone and forcibly put him outside the park. What they can do with regard to the park is to make bye-laws, and enforce them. If they refuse to enforce their own bye-laws, and a nuisance is created, it might well be that they would be
- C liable, but what can they do beyond that? They have certain rights if people are committing offences against the law, but if a person in the park, near an adjoining dwelling-house, is flying one of these model aeroplanes, making a great noise, under what authority could the park-keeper stop him? There is no bye-law prohibiting the flying of aeroplanes, and he is committing no criminal offence. If someone outside the park says he is committing a nuisance, it is
- D for him to take proceedings and prove his case, if he can, against the person committing the nuisance. It has nothing to do with the park-keeper or the local authority.

- I confess that it is this problem which has posed itself to me as being really the crux of this case. When we find our way through all the other sides of this problem which have been fully explored, I have come to the conclusion that
- E the argument of counsel for the corporation on this point is right. I think that the Beckenham Corporation are the trustees and the guardians of this park, and I think they are bound to admit to that park any citizen who wants to enter within the times that it is open. I do not think they can interfere with any person in the park, unless that person breaks the general law or one of their
- F bye-laws. I do not think the corporation can put themselves in the position of a judge (as it were) of whether a person may be causing a nuisance to someone outside the park. I think their proper attitude is that a person who is complaining of nuisance must take action against the person who is committing the nuisance of which he complains. If something is becoming a nuisance, they may then propose a new bye-law, but that is a matter with which I have
- G no concern. It seems to me that, as things are, a person who so wishes can go into this park and can fly his aeroplane, subject to being proceeded against by the person aggrieved if he commits a nuisance. I do not think that the Beckenham Corporation can be sued for such a nuisance, and, therefore, I think this action is wrongly founded. I decide this preliminary point in favour of the corporation.

- H *Judgment for the defendant. Costs were not asked for.*
Solicitors: *Elands, Nettleship & Butt* (for the plaintiff); *C. E. Staddon*, town clerk, Beckenham (for the local authority).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

ECCLES v. KIRKE.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Finnemore, JJ.), January 27, 1949.]

Hackney Carriage—Sign indicating vehicle is a hackney carriage—Vehicle carrying sign “M. Mosley Wakefield 19” in compliance with bye-law—Roads Act, 1920 (c. 72), s. 11 (1)—Road Vehicles (Registration and Licensing) Regulations, 1941 (S.R. & O., 1941, No. 1149), reg. 31, sched. V. A

In compliance with the requirements of a local bye-law, the proprietor of a hackney carriage affixed to it a plate bearing the sign “M. Mosley Wakefield 19,” indicating the proprietor's name, the town where he carried on business, and the number of the licence granted him by the local authority. B

HELD: this did not comply, or absolve the proprietor from complying, with the requirements in the Roads Act, 1920, s. 11 (1), and the Road Vehicles (Registration and Licensing) Regulations, 1941, reg. 31 and sched. V, that there shall be exhibited on every hackney carriage a distinctive sign indicating that the vehicle is a hackney carriage and the number of persons which it seats. C

[FOR THE ROADS ACT, 1920, s. 11, see HALSBURY'S STATUTES, Vol. 19, pp. 94, 95.]

CASE STATED by the Recorder of Bradford.

At a court of summary jurisdiction sitting at Bradford on June 1, 1948, on an information preferred by the prosecutor, a police sergeant in the Bradford City Constabulary, the defendant was adjudged proved to have used unlawfully on Mar. 20, 1948, a motor vehicle chargeable with duty as a hackney carriage on a road without having fixed to it a distinctive sign indicating that it was a hackney carriage and the number of persons that it seated, contrary to the Roads Act, 1920, s. 11 (1). The court dismissed the information under the Probation of Offenders Act, 1907, s. 1 (1). The defendant appealed to Bradford Quarter Sessions, who on Aug. 4, 1948, allowed the appeal. The prosecutor now appealed against that decision. It was contended on his behalf that a plate bearing the letters and figures “M. Mosley Wakefield 19” affixed to the vehicle in compliance with bye-laws of the Wakefield Corporation was not a distinctive sign indicating that the vehicle was a hackney carriage and the number of persons which it seated as required by the Roads Act, 1920, s. 11 (1), or in accordance with the mark prescribed by the Minister of Transport by virtue of the Road Vehicles (Registration and Licensing) Regulations, 1941, reg. 31 and sched. V. The Divisional Court held that the plate did not exhibit the necessary distinctive sign or mark, and allowed the appeal. D E F

Snowden for the prosecutor. G

H. R. B. Shepherd for the defendant.

LORD GODDARD, C.J.: This is a Case stated by the Recorder of Bradford and it raises a very short and somewhat unusual point under the Roads Act, 1920, and the regulations made thereunder. Section 11 (1) of that Act provides: H

“There shall, subject to the prescribed exceptions, be exhibited on every vehicle which is chargeable with duty as a hackney carriage, in conjunction with the mark required under this Act to be fixed on the vehicle indicating the registered number of the vehicle, a distinctive sign indicating that the vehicle is a hackney carriage and the number of persons which the vehicle seats, and regulations made by the Minister [of Transport] under this Act shall provide for the sign to be so exhibited . . .”

Therefore, the Minister has to make regulations providing for this sign subject to any prescribed exceptions. The Minister made the Road Vehicles (Registration and Licensing) Regulations, 1941, which provides by reg. 31 :

- A " Any vehicle (other than a tramcar) licensed under the provisions of para. 3 of sched. II to the Finance Act, 1920, in respect of which the rate of duty paid is less than the rate of duty which would have been payable had the vehicle been licensed under para. 6 of the said schedule, shall display in addition to the index mark and registration number of the vehicle a mark of the dimensions and form set out in sched. V hereto in the position prescribed in that schedule unless such vehicle is licensed to ply for hire and carries in a conspicuous position on the outside of the vehicle a mark in the form prescribed by the authority by whom it is licensed to ply for hire
- B indicating clearly that the vehicle is a hackney vehicle so licensed . . . "

The form in the schedule is the well-known form showing " hackney carriage " and so many seats with registered number below. The corporation of Wakefield have made a bye-law which provides :

- C " (18) Every proprietor of a hackney carriage shall cause the number of the licence granted to him in respect of such carriage to be painted or marked on each of two plates in figures not less than two inches in height, of proportionate breadth, and of such a colour, or in such a manner as to be clearly distinguishable from the colour or nature of the ground whereon such figures are painted or marked."
- D That is a requirement of the local authority, but by it the local authority have not absolved the proprietor from indicating clearly that the vehicle is a hackney carriage so licensed. If they had purported to do so, it would have been *ultra vires* because the exception in reg. 31 requires a clear indication that the vehicle is a hackney vehicle. I do not think it can possibly be argued that merely to paint on it " M. Mosley Wakefield 19 " indicates that it is a hackney vehicle
- E licensed to ply for hire. " Wakefield 19 " is entirely ambiguous, and when I first read the Case I thought it meant the telephone number of Mr. Mosley so that anybody who saw his car would know where to ring him up. For these reasons I think the learned recorder was wrong in allowing the appeal. The justices from whose decision the appeal was brought were right in finding the offence proved although they dealt with it under the Probation of Offenders
- F Act, which I should think in the circumstances, as the proceedings were intended to be a test case, was the proper thing to do. The judgment of the learned recorder must be set aside and the decision of the justices restored.

HUMPHREYS, J. : I agree.

FINNEMORE, J. : I agree.

G

Appeal allowed with costs.

Solicitors : *Torr & Co.*, agents for *W. H. Leathem*, town clerk, Bradford (for the appellant) ; *Maude & Tunnickiffe*, agents for *Green, Williamson & Way*, Wakefield (for the respondent).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

**Re HARARI'S SETTLEMENT TRUSTS.
WORDSWORTH v. FANSHAWE.**

[CHANCERY DIVISION (Jenkins, J.), February 3, 1949.]

Settlement—Investment—Power to trustees to invest “in or upon such investments as to them may seem fit”—Whether power limited to trustee securities.

By a settlement dated June 16, 1938, a settlor recited the transfer of certain securities, none of them a trustee investment, to trustees and directed: “The trustees shall hold the said investments so transferred to them as aforesaid upon trust that they may either allow the same to remain in their present state of investment so long as the trustees may think fit or may at any time or times with the consent of the daughter realise the said investments or any of them or any part thereof respectively and shall with the like consent invest the moneys produced thereby and also all capital moneys which may be or become subject to the trusts of this settlement in the names or under the control of the trustees in or upon such investments as to them may seem fit . . .”

HELD: on the true construction of the settlement, there was no justification for implying any restriction of the words “in or upon such investments as to them may seem fit,” and the trustees had power, under the plain meaning of those words, to invest in any investments which they honestly thought to be desirable, whether or not they were investments authorised by law for the investment of trust funds.

Re Braithwaite ((1882) 21 Ch.D. 121; 48 L.T. 857), and *Bethell v. Abraham* (1873) (L.R. 17 Eq. 24; 29 L.T. 715), explained.

Re Smith ([1896] 1 Ch. 71; 73 L.T. 604), and *Re McEacharn's Settlement Trusts* ([1939] Ch. 858; 161 L.T. 263), applied.

[AS TO INVESTMENT AT DISCRETION, see HALSBURY, Hailsham Edn., Vol. 33, pp. 234-236, para. 418; and FOR CASES, see DIGEST, Vol. 43, pp. 927-930, Nos. 3648-3682.]

Cases referred to:

- (1) *Re Maryon-Wilson's Estate*, [1912] 1 Ch. 55; 105 L.T. 692; 43 Digest 935, 3729.
- (2) *Re Braithwaite*, (1882), 21 Ch.D. 121; 48 L.T. 857; 43 Digest 837, 2834.
- (3) *Bethell v. Abraham*, (1873), L.R. 17 Eq. 24; 29 L.T. 715; 43 Digest 930, 3675.
- (4) *Re Smith*, [1896] 1 Ch. 71; 73 L.T. 604; 43 Digest 936, 3749.
- (5) *Re McEacharn's Settlement Trusts*, [1939] Ch. 858; 161 L.T. 263; ✓ Digest Supp.
- (6) *Re Wragg*, [1919] 2 Ch. 58; 121 L.T. 78; 43 Digest 928, 3662. ✓

ADJOURNED SUMMONS to determine whether the power given by a settlement to trustees to invest trust moneys “in or upon such investments as to them may seem fit” enabled them to invest money in any investment which seemed fit to them, whether or not it was an investment authorised by law for the investment of trust funds, or whether the discretion was limited in its operation to trustee investments. JENKINS, J., held that, on the natural and proper meaning of the words used in their context, there was no justification for implying any restriction.

E. I. Goulding for the plaintiff, a trustee of the settlement.

H. F. MacMaster for the first and second defendants, the settlor's daughter and her husband.

R. O. Wilberforce for the third defendant, contingently interested in the capital of the trust fund and one of the settlement trustees and also representing all persons (other than the first and second defendants), including unborn persons, beneficially interested under the settlement.

JENKINS, J. : This case raises a short question of construction on a settlement dated June 16, 1938, made by Sir Victor Harari, Pasha, as settlor for the benefit of his daughter, Marie, for life, with various remainders over, subject, in her lifetime, to certain protective trusts for her benefit. I have to decide whether, on the true construction of the few words in the settlement referring to investment, the trustees have an unrestricted discretion to invest in such investments as they think fit, whether they are or are not of a kind authorised by law for the investment of trust funds, or whether such discretion as they have should be construed as limited in its operation to the trustee range of investments.

The settlement is made between Sir Victor, the settlor, of the first part, Marie Fanshawe, his daughter, of the second part, and the trustees therein named, of the third part. It recites that the settlor is desirous of making provision for the benefit of his daughter, Marie, and the transfer into the names of the trustees at the National Bank of Egypt at Cairo in an account called "The Marie Trust Fund" of the investments mentioned in the schedule to the settlement, "to the intent that the same may be held upon the trusts hereinafter expressed." The investments in the schedule to the settlement comprise holdings of certain Egyptian Government fixed interest stocks, a holding of Credit Foncier bonds in a nominal amount expressed in Egyptian pounds, 300 ordinary shares in a concern called Kom Ombo, and 100 5 per cent. Sucreries bonds. So that one observes in passing that none of the investments comprised in the trust fund as originally constituted was a trustee investment.

Paragraph 1 of the settlement is in these terms :

"The trustees shall hold the said investments so transferred to them as aforesaid upon trust that they may either allow the same to remain in their present state of investment so long as the trustees may think fit or may at any time or times with the consent of the daughter realise the said investments or any of them or any part thereof respectively and shall with the like consent invest the moneys produced thereby and also all capital moneys which may be or become subject to the trusts of this settlement in the names or under the control of the trustees in or upon such investments as to them may seem fit with power with such consent to vary or transpose any investments for or into others and such investments shall be placed in the names of the trustees in the said account called 'The Marie Trust Fund,' which shall remain at the National Bank of Egypt of Cairo or at such bank or institution in Egypt or out of Egypt as the trustees in their absolute discretion may see fit."

By para. 2 :

"The said investments so transferred to the trustees as aforesaid and the investments money or property representing the same or which may be or become subject to the trusts hereby declared are herein called 'The Marie Trust Fund' (sometimes referred to herein as 'the trust fund'), which expression is intended to mean the constituents for the time being of the said fund."

Then follows a beneficial trust. There are protective trusts for the benefit of the daughter during her life, the discretionary trust, in the event of it arising, being in favour of the daughter and her husband, if any, and her children or more remote issue, and, if there is no husband or issue, to the daughter and the persons who would, if she were actually dead, be entitled to the trust fund or the income thereof. After the death of the daughter, there is power to her to appoint a life interest or a less interest than a full life interest to any husband of hers who survives her, and, subject to any exercise of that power of appointment, the fund is to be held in trust for a class of persons consisting of the children or remoter issue of the daughter by any husband, or their respec-

tive husbands or wives, or any one or more exclusively of the other or others of the beneficiaries under four other settlements to which the settlor here refers, being settlements on his other children, each of them in identical form, for the benefit of that child. In default of and subject to any such appointment there is a trust for all or any of the children or child of the daughter at 21, or, if female, marriage under that age, and, if more than one, in equal shares, and, in default of any child of the daughter attaining a vested interest, there is an ultimate trust for the trustees of the other four settlements. The daughter, Mrs. Fanshawe, has a husband, but up to the present no children.

The question turns primarily on the meaning to be attached to the words "in or upon such investments as to them may seem fit." *Prima facie* those words mean what they say—that the trustees are not to be limited in any way by any statutory range of investments, but can invest in any investment which they may select as seeming to them a fit one for the moneys subject to the trusts of the settlement. There is, however, a good deal of authority, which must be borne in mind, to the effect that investment clauses should be strictly construed and should not be construed as authorising investments outside the trustee range unless they clearly and unambiguously indicate an intention to that effect. I was first of all referred to *Re Maryon-Wilson's Estate* (1), which was cited for the proposition, sufficiently, I think, stated in the headnote in these terms :

"Per COZENS-HARDY, M.R., and FARWELL, L.J. : Clauses in trust instruments enlarging the power of investment beyond what the general law sanctions ought to be construed strictly."

In *Re Braithwaite* (2) there was a trust under which the sum of £5,000 free of duty was given to the testator's daughter "for her sole and separate use and to be invested by trustees to be nominated by her so that she shall have the income for her life without power of anticipation," and after her death the principal sum was to fall into the testator's residuary estate. The testator authorised the trustees to invest on such securities as they might think fit. The action was brought for the execution of the trusts of the testator's will so far as they related to the legacy of £5,000, and it was claimed that the legacy ought to be brought into court and duly invested. HALL, V.-C., said (21 Ch.D. 122) :

"I do not think that the rule [as to the bringing of funds into court] is as absolute as the counsel for the plaintiff have contended, although the fund would, no doubt, be brought into court in any case where there was reasonable ground for the application. But there is here no pretence for the court taking the fund into its own hands and administering it. The testator did not think fit himself to appoint trustees, but considered it more satisfactory to leave the legatee for life herself to appoint her own trustees, who were to select their own investments, which must however, of course, be such as the law permits."

The learned VICE-CHANCELLOR, stating the proper course to be taken, said (*ibid.*) :

"Certainly in this case the proper course is, according to the terms of the will, to pay over this £5,000 to the trustees appointed by the legatee, and there must be an order for the purpose. It must be invested by them in their names in some or one of the investments upon which trustees can, by law, properly invest trust funds, and they must give notice of every change of investment. A proper declaration of trust must be executed . . ."

That is some authority for the proposition that a power to trustees to invest in such securities as they may think fit means "such securities authorised by law for the investment of trust funds as they may think fit." It is not, however, a very satisfactory authority. The learned VICE-CHANCELLOR gives no reason

for his decision, and the matter is confused by the fact that the question really before him was whether an order ought to be made for the £5,000 settled legacy to be brought into court or whether it ought to be allowed to remain in the hands of the trustees, and, if so, on what terms. I think the essence of the learned judge's decision was that there was not a sufficient case made out to render it necessary to require the fund to be brought into court provided that the court was satisfied that it was properly invested in trustee investments, as it would have been if it had been brought into court. So that case leaves it in some obscurity whether the learned judge's view was anything more than that, if the fund were to remain out of court, the trustees ought to be put on terms to confine themselves to investments of that nature.

In *Bethell v. Abraham* (3) the investment clause under consideration was in these terms (L.R. 17 Eq. 24):

"All the residue of the income of my estate shall be accumulated and invested at the discretion of my trustees during such five years, and the money also receivable on my policies shall be invested at their discretion. My trustees shall not be obliged to alter any investment, or to convert perishable into permanent securities, but may continue or change securities from time to time as [*sic.*] the majority shall seem meet."

The testator must have meant, "as to the majority shall seem meet." The question arose whether there was an absolute discretion as to the investments to be made or whether they had to be authorised trustee investments. SIR GEORGE JESSEL, M.R., in the course of the argument, said (*ibid.*, 26):

"Is it quite clear that you have the discretion you claim? The testator says, the trustees 'may continue or change securities from time to time, as to the majority may seem meet'; these words would be satisfied if the discretion were confined to determining the time at which a change of securities is to be made; there are no words shewing that if a change is made the trustees may invest in the way the majority of them think fit; must not then the mode of investment be left to the operation of law?"

At the beginning of his judgment the MASTER OF THE ROLLS said (*ibid.*, 27):

"I am not satisfied that the trustees have the power they claim. It is not necessary for me at the present moment to say more than that."

It must be borne in mind that the observations of the MASTER OF THE ROLLS (*ibid.*, 26) indicate pretty clearly that, in his view, if there were power to invest in such investments as the trustees thought fit, as opposed to discretionary words which could be satisfied by reference to the time of investment or the question whether an investment should be changed or not, then he would have been of opinion that the words did give the trustees discretion to invest in an unrestricted range of investments. It is only because the discretionary words in the clause he was considering could be satisfied in one or other of the ways I have mentioned that he was not satisfied, as he said, that the trustees had the power they claimed.

In *Re Smith* (4) the trustees of a will had power to invest "in such stocks funds and securities as they should think fit." The trustees invested a proportion of the trust funds in some debentures of a limited company, and the question arose whether that was an authorised investment. KEKEWICH, J., was clearly of opinion that these words authorised the trustees to invest in an investment such as the debentures in question, provided they decided to do so *bona fide*. He said ([1896] 1 Ch. 76):

"I should say the words clearly authorised them to invest money on mortgage if they, having a sufficient knowledge of the property, thought that the investment was desirable. The question is, what is the meaning of the

words 'shall think fit'? I have formed a very strong opinion that they mean 'shall honestly think fit.'"

He proceeded to deal with the matter on that footing, and so he clearly held that, if the trustees honestly thought fit to invest in debentures of a limited company, they would not be travelling outside their powers of investment. Attention was called in the course of the argument to the fact that, in some of the cases, there is an enumeration of the types of investment—as in *Re Smith*, "stocks funds and securities"—but I do not think that that really makes any difference unless, indeed, the enumeration includes a reference to some type of investment which, on the face of it, could not be an investment in the trustee range. "Stocks funds and securities" is an enumeration which is quite consistent with a range confined to trustee investment only.

In *Re McEacharn's Settlement Trusts* (5) the settlement contained a provision enabling the trustees to invest the trust funds in such stocks, funds and securities as they should think fit. The question raised and argued in the case was whether those words were wide enough to authorise an investment in fully paid shares of a limited company. BENNETT, J., held that they were wide enough. There was no express decision as to the width of the investment powers conferred by the words "such stocks funds and securities as they shall think fit," but it was assumed by everybody, including the learned judge, that those words gave power to invest in an unrestricted range of investments. It must have been so assumed, as otherwise the question whether fully paid shares in a limited company were included must have been *in limine* answered in the negative. As the matter proceeded entirely on that assumption, the learned judge's judgment was confined to his reasons for saying that the word "stocks" was sufficient to include fully paid shares.

Lastly, I was referred to *Re Wragg* (6), which I do not think really touches the question with which I am now dealing. The clause there was, on the face of it and most explicitly, of the widest possible nature, and the question before P. O. LAWRENCE, J., was whether the clause included investment by way of purchase of land and he held that it did. That is rather a different question from that to which I am addressing myself at the moment.

That, I think, is a representative collection of the authorities bearing on this topic, and, having given them the best consideration I can, it seems to me that I am left free to construe this settlement according to what I consider to be the natural and proper meaning of the words used in their context, and, so construing the words "in or upon such investments as to them may seem fit," I see no justification for implying any restriction. I think the trustees have power, under the plain meaning of those words, to invest in any investments which, to adopt KEKEWICH, J.'s observation, they "honestly think" are desirable investments for the investment of moneys subject to the trusts of the settlement. To hold otherwise would really be to read words into the settlement which are not there. The wide construction which the words themselves are, in my view, sufficient to bear, is, I think, to some extent, supported by the fact that the investments brought in, in the first place, are non-trustee investments, and also to some small extent by the reference in para. 2 to "investments money or property representing" the trust fund. There is nothing in those words that one can say is really inconsistent with a limitation on the range of investment to trustee investments, but there is, perhaps, more likelihood of something which in common parlance would be described as "property" rather than an "investment" coming into the hands of the trustees in the course of exercising their powers of investment if the range is the unrestricted one rather than the narrow one. The real ground, however, for my decision is the plain and ordinary meaning of the words "in or upon such investments as to them may seem fit." Having found nothing in the authorities to constrain me to construe

those words otherwise than in accordance with their plain meaning, that is the meaning I propose to place on them.

For these reasons, I will declare that the power given by the settlement in question to the trustees to invest trust moneys, with the consent therein mentioned, in or upon such investments as to them may seem fit, with power to vary or transpose any investments for or into others, enables investments to be made in any investments which seem fit to the trustees, whether or not they are investments authorised by law for the investment of trust funds.

Order accordingly. Costs of all parties as between solicitor and client to be taxed and paid out of the trust fund.

Solicitors : *Wordsworth & Co.* (for all parties).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

DEMBY HAMILTON & CO., LTD. v. BARDEN (ENDEAVOUR WINES, LTD. (Third Party)).

[KING'S BENCH DIVISION (Sellers, J.), January 19, 20, 24, 28, 1949.]

Sale of Goods—Transfer of risk—Delivery delayed through fault of buyer—Buyer's liability for loss—Sale of Goods Act, 1893 (c. 71), s. 20.

A manufacturer contracted to supply 30 tons of apple juice in accordance with sample to a wine merchant, to be delivered in weekly truckloads. He crushed the apples, put the juice in casks, and kept it pending delivery. It was found as a fact that it would have been difficult to supply juice complying with the sample unless all the apples had been crushed at one time and that the juice was rightly and reasonably kept for the fulfilment of the contract, but that the property in it had not passed to the buyer. After 20½ tons had been delivered no further deliveries were made through the delay of the buyer in breach of the contract between the parties and notwithstanding requests for delivery instructions from the seller, and in due course the undelivered juice went putrid and had to be thrown away. It was found that delivery had been delayed through the fault of the buyer within the Sale of Goods Act, 1893, s. 20. In an action by the seller for damages for breach of contract or the price of the goods sold,

HELD : (i) "goods" within the meaning of the first proviso to s. 20 meant the contractual goods which had been assembled by the seller for the purpose of fulfilling the contract and making delivery and were ready to be delivered.

(ii) after the delay, therefore, the apple juice was at the risk of the buyer who was liable in respect of its loss.

Per SELLERS, J. : If the seller had been in a position to sell the goods elsewhere and acquire other goods for the postponed time of delivery and he had not done so and there was some loss in the meantime, the responsibility for the loss would have fallen on him, but in the present case the seller had to keep the goods ready for delivery as and when the buyer proposed to take them.

[AS TO DAMAGES FOR NON-ACCEPTANCE OF GOODS, see HALSBURY, Hailsham Edn., Vol. 29, pp. 189, 190, para. 255.

FOR THE SALE OF GOODS ACT, 1893, s. 20, see HALSBURY'S STATUTES, Vol. 17, p. 623.]

Cases referred to :

- (1) *Martineau v. Kitching*, (1872), L.R. 7 Q.B. 436 ; 26 L.T. 836 ; 39 Digest 528, 1417.
- (2) *Comptoir D'Achat et de Vente du Boerenbond Belge S.A. v. Luis de Ridder, Limitada*, [1949] 1 All E.R. 269.

(3) *Inglis v. Stock*, (1885), 10 App. Cas. 263 ; 52 L.T. 821 ; 39 Digest 530, 1433.

(4) *Sterns, Ltd. v. Vickers, Ltd.*, [1923] 1 K.B. 78 ; 128 L.T. 402 ; 39 Digest 529, 1421.

ACTION for damages for breach of contract or for the price of goods sold.

The plaintiffs (the sellers) were suppliers of apple juice, and on Nov. 8, 1945, they contracted with the defendant (the buyer), a wine merchant, to supply "approximately 30 tons of 'Cyas' apple juice as per sample at £58 per ton" to the third parties, also wine merchants, on the buyer's behalf, "the first truck to be despatched in about three weeks' time, the remainder by sending one truck per week, in casks of 6 or 12 cwts." The sellers crushed 30 tons of cider apples, the last apples which they had that season for crushing, put the liquid into casks, and kept it for the fulfilment of the contract. Deliveries were begun in accordance with the contract, and, if they had continued to be made punctually, they would have been completed in February, 1946, but on Dec. 11, 1945, following a communication from the third parties, the buyer requested the sellers to stop delivery until further notice. Further deliveries took place on Jan. 28, and Apr. 4, 1946, but thereafter, although the sellers were able and willing to make delivery and notwithstanding requests for delivery instructions made by them, no further deliveries were accepted. On Nov. 7, 1946, the buyer was informed that the contents of the casks which had been kept ready for delivery had become putrid and been thrown away. It appeared from the evidence that it would have been very difficult to comply with the sample unless all the apples had been crushed at one time and that the apple juice was rightly kept for the fulfilment of the contract. There was nothing in the contract inconsistent with the view that the parties recognised throughout that the 30 tons were going to be crushed and the casks containing the apple juice kept until delivery, but there was no specific statement in the correspondence that they were ready for delivery. It was found on these facts that the property in the apple juice had not passed to the buyer, but that the loss had arisen from the fault of the buyer in delaying taking delivery in breach of contract, and that the buyer and also the third parties were liable for the loss under the Sale of Goods Act, 1893, s. 20.

T. J. F. Hobley for the sellers.

Leonard Lewis for the buyer.

Mocatta for the third parties.

SELLERS, J. : [His LORDSHIP stated the facts and continued :] The first question which arises is whether the sellers are entitled to recover on the basis on which they framed their case by reason of the provisions of s. 20 of the Sale of Goods Act, 1893, which provides :

" Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not. Provided that where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault . . . "

It would appear that this proviso to s. 20 has not so far called for consideration in the courts—at least, no case has been produced in the course of this hearing in which that proviso has been considered or applied. It appears, however, from the footnote in CHALMERS' SALE OF GOODS, 12th ed., p. 78, that it is probably based on some observations of the court in *Martineau v. Kitching* (1). In the course of his judgment in that case BLACKBURN, J., said (L.R. 7 Q.B. 453) :

" As a general rule, *res perit domino*, the old civil law maxim, is a maxim

of our law ; and when you can show that the property passed the risk of the loss, *prima facie*, is in the person in whom the property is. If, on the other hand, you go beyond that, and show that the risk attached to the one person or the other, it is a very strong argument for showing that the property was meant to be in him. But the two are not inseparable. It may be very well that the property shall be in the one and the risk in the other."

A The learned judge continued (*ibid.*, 456) :

" Now by the civil law it always was considered that, if there was any weighing, or anything of the sort which prevented the contract being *perfecta emptio*, whenever that was occasioned by one of the parties being *in mora*, and it was his default, though the *emptio* is not *perfecta*, yet if it is clearly shown that the party was *in mora*, he shall have the risk just as if the *emptio* was *perfecta*. That is perfectly good sense and justice, though it is not necessary to the decision of the present case, that, when the weighing is delayed in consequence of the interference of the buyer, so that the property did not pass, even if there were no express stipulation about risk, yet because the non-completion of the bargain and sale, which would absolutely transfer the property, was owing to the delay of the purchaser, the purchaser should bear the risk just as much as if the property had passed."

In BENJAMIN ON SALE OF PERSONAL PROPERTY, 7th ed., p. 426, it states :

" It should be observed that the second clause of s. 20 of the Act . . . is not identical with BLACKBURN, J.'s proposition. He speaks of *mora* delaying the transfer of the *property* whereas the Act refers to a delay in delivery, *i.e.*, in the transfer of *possession*, and, though in many instances the same acts operate to transfer both, yet this is not always the case. It would therefore seem that the law, as laid down by him, has been extended by the Act. Moreover, the risk to be borne by the party in fault is the risk of any loss which ' might ' not otherwise have occurred ; and this provision seems to throw on the party in fault the onus of showing positively that the loss would have occurred independently of his fault. The case is of course stronger where the loss would not have happened had there been no delay."

I am not going so far in this case as to say that I place the onus on the buyer to show that the loss did not occur or might not have occurred. I think that all the facts and circumstances have to be looked at in very much the same way as a jury would look at them in order to see whether the loss can properly be attributed to the failure of the buyer to take delivery of the goods at the proper time. That, I think, is essentially a matter for the jury—a question of fact—having regard to all the circumstances. The first requirement of the proviso in question is that delivery has been delayed through the fault of the buyer. I am satisfied on the facts in the present case that a good delivery, which would have avoided all loss, was delayed through the fault of the buyer, and that of the third parties. The next requirement of the proviso is that, where delivery has been delayed through the fault of the buyer, the goods are at the risk of the party in fault "as regards any loss which might not have occurred but for such fault." The goods referred to there must be the contractual goods which have been assembled by the seller for the purpose of fulfilling his contract and making delivery. The goods may have been defined goods, goods manufactured for the purposes of delivery, or goods which had been acquired by the seller from somebody else for the purpose of fulfilling his contract. It does not seem to me that the Act requires to be construed in any narrow sense. The real question is whether the loss which has accrued was brought about by the delay in delivery, and that must have regard to the goods which were there

to be delivered. Different circumstances may arise in different cases. It may be that the seller was in a position to sell the goods elsewhere and acquire other goods for the postponed time of delivery, and if he does not do that and there is some loss in the meantime the responsibility for the loss would be held to fall upon him. Again, there may be cases (and I think this is one of them) where the seller has his goods ready for delivery and has to keep them ready for delivery as and when the buyer proposes to take them. In the present case the position is clear. The casks of apple juice which were not accepted were manufactured at the time of the contract, and the contract required that delivery should be in accordance with sample. It would have been very difficult to have obtained goods which complied with the sample unless the apples had all been crushed at the same time. They would have had to be apples from the same district and the juice from them, when obtained, would have had to be of the same maturity. The condition of apples changes. They may be unripe at one time and too ripe at another. The 30 tons of juice were goods which the sellers rightly and reasonably kept for the fulfilment of their contract. These were the last apples which the sellers had that season for crushing, and, therefore, the goods in question were goods which the sellers had awaiting delivery in fulfilment of their contract with the buyer.

I have to ask myself whether this loss might not have occurred but for the fault of the buyer. I am satisfied that it would not have occurred but for his fault. There is, of course, an obligation on a seller to act reasonably, and, if possible, to avoid any loss. As to that, one or two questions arise for consideration. Was there anything the sellers could reasonably do to dispose of these goods when they still had an outstanding obligation to keep them at the disposal of the buyer and when they had to be ready and willing to deliver them when requested? If delivery had been asked for at a later date and they had let these goods go elsewhere they could not have fulfilled their contract. I do not hesitate to find (although to construe this proviso is not easy) that in a practical and business sense this loss has fallen on the sellers by reason of the fact that the buyer refused to take delivery at the proper time and postponed the date of delivery until the goods had deteriorated, and I come to the conclusion that the liability for that loss falls on the buyer.

There is no authority which has dealt with this proviso, but I was referred to a recent case in the House of Lords, *Comptoir D'Achat et de Vente du Boerenbond Belge S.A. v. Luis de Ridder, Limitada* (2), and reliance has been placed on what LORD PORTER there said (*ante*, p. 276) :

" . . . it is difficult to see how a parcel is at the buyer's risk when he has neither property nor possession, except in such cases as *Inglis v. Stock* (3), and *Sterns, Ltd. v. Vickers, Ltd.* (4), where the purchaser had an interest in an undivided part of a bulk parcel on board a ship, or elsewhere, obtained by attornment of the bailee to him."

Other passages also in the speeches of the noble Lords in that case were relied on, but I do not think that that case assists the court in the present matter except in a very general way, because the House was not considering the effect of the proviso to s. 20 of the Act. In my opinion, the sellers have justified their claim of £412 6s. 0d., and I give judgment for them for that amount against the buyer. [HIS LORDSHIP then held the third parties liable to the buyer for the sum the buyer had to pay to the sellers, for the buyer's loss of profit, and for his costs in defending the action.]

Judgment for the plaintiff against the defendant with costs : judgment for the defendant against the third parties with costs (costs as between solicitor and client in defending the plaintiffs' claim).

Solicitors : *Ernest W. Long & Co.* (for the sellers) ; *Goodman, Monroe & Co.* (for the buyer) ; *Cosmo Cran & Co.* (for the third parties).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

Re DE BEAUJEU.

[CHANCERY DIVISION (Wynn-Parry, J.), December 10, 1948, February 4, 1949.]
Contempt of Court—Chambers proceedings—Ward of court—Report of order made in chambers.

At the hearing of summonses by a judge in chambers an applicant challenged the jurisdiction of the judge. The challenge was not pressed, but the judge was of the opinion that the proper forum for dealing with the matter, which concerned the custody and maintenance of infants who were wards of the court, was the competent court in the province of Quebec and he gave permission for the removal of the infants to Canada. In reporting subsequent proceedings in Quebec, a London newspaper stated: "An earlier attempt . . . to obtain possession of the children failed when it was ruled that the Chancery Division of the High Court in England lacked jurisdiction." In a motion for leave to issue a writ of attachment against the editor of the newspaper on the ground that the report was a contempt of court because it referred to proceedings in chambers:

HELD: the judge had not directed that the order made on the chambers proceedings or a summary thereof should not be published, and, therefore, the report was not a contempt of court.

Dictum of NORTH, J., in Re Martindale ([1894] 3 Ch. 201, 202; 71 L.T. 471), *applied*.

Per WYNN-PARRY, J.: In proceedings involving wards of court the judge has a complete discretion to allow or forbid publication of the proceedings or any order made therein. In the absence of any special direction, I am of opinion that *prima facie* it would be a contempt of court to publish an account of proceedings relating to an infant conducted in chambers without the express permission of the judge who heard the case. I use the words "*prima facie*" because I do not intend to attempt to state any exhaustive rule. There may well be cases in which the permission of the judge is not required, because, for example, of the lapse of time between the hearing and the date of the publication. Such cases must be dealt with as and when they arise and cannot conveniently be made the subject of any hard and fast or exhaustive rule. On the other hand, I am of opinion that it would not be a contempt of court to publish the order, or an accurate summary of the order, made on such proceedings unless the judge directed that neither the order nor such summary should be published.

[AS TO CONTEMPT OF COURT, see HALSBURY, Hailsham Edn., Vol. 7, pp. 2-12, paras. 1-14; and FOR CASES, see DIGEST, Vol. 16, pp. 30-32, Nos. 292-302.]

Cases referred to:

- (1) *Re Martindale*, [1894] 3 Ch. 193; 71 L.T. 468; 16 Digest 32, 302.
- (2) *Scott v. Scott*, [1913] A.C. 417; 109 L.T. 1; 16 Digest 31, 301.

MOTION for leave to issue a writ of attachment against the editor of a newspaper for the publication of a report referring to an order made in proceedings which had been heard in chambers. Leave was refused. The facts appear in the judgment.

Manningham-Buller, K.C., and *Neil Lawson* for the applicant, the mother of two infant children, plaintiffs in an action.

Sir Valentine Holmes, K.C., and *John Davidson* for the respondent, the editor of the newspaper.

Cur. adv. vult.

Feb. 4. WYNN-PARRY, J., read the following judgment. This is a motion for leave to issue a writ of attachment against the respondent, Percy

Cudlipp, for an alleged contempt of court. The relevant facts may be stated shortly as follows. On Nov. 15, 1948, I made two orders on two summonses in this matter. On the first, a summons by the applicant on this motion, the mother of the two infant plaintiffs, I gave the applicant liberty to take the infant plaintiffs out of the jurisdiction to Montreal on certain terms and subject to certain conditions to which I do not propose to refer. The applicant, by her summons, challenged the jurisdiction of this court over the infant plaintiffs, A but at the hearing this challenge was not pressed and the matter proceeded on the basis that the infant plaintiffs were wards of this court and subject to its jurisdiction. The other summons was a summons by the father of the infant plaintiffs asking for directions as to custody and maintenance. On this summons I made no order.

In accordance with the invariable practice of the court the summonses were heard in chambers as, so far as effective, they were concerned solely with matters relating to the interests of the infant plaintiffs. In view, however, of this motion which was heard and the judgment on which is being delivered in open court, I think it right to say that the reason why I gave leave to the applicant to take the infant plaintiffs to Canada and why I made no order on the father's summons was because I took the view, for reasons which I do not propose to state, that the proper forum for the disposal of the matters raised before me was the competent court in the province of Quebec. Pursuant to my order, the applicant took the infant plaintiffs to Montreal, and the necessary proceedings were started by the father before the competent court in that province. C

The respondent to this motion is the editor of the DAILY HERALD newspaper. In the issue of that newspaper of Nov. 30, 1948, there appeared the following paragraph : D

“ A writ of *habeas corpus* was issued by Quebec Chief Justice Tyndale yesterday ordering the divorced wife of Jacques Debeaujeu, a journalist, of Forge Cottage, Penhurst, Kent, to produce the two children of the marriage in court and justify their retention. An earlier attempt by Mr. Debeaujeu to obtain possession of the children failed when it was ruled that the Chancery Division of the High Court in England lacked jurisdiction. Mr. Debeaujeu married Juliana Becqaert in Antwerp and obtained a divorce from the divorce committee of the Canadian senate.” E

The paragraph is inaccurate in two respects. In the first place, as I have already stated, the jurisdiction of this court over the infant plaintiffs was not challenged. In the second place, the divorce between the applicant and the father of the children was obtained by the applicant against the father and not by him against her. The information contained in the paragraph in question was supplied to the DAILY HERALD by a reputable news-agency. It was passed for publication by the night editor, who at the time was not aware of the proceedings before me. F G

It is alleged that, putting aside the inaccuracies in the report, the publication of the paragraph in question was a contempt of this court because it referred to proceedings which were held in chambers, and reliance was placed on the judgment of NORTH, J., in *Re Martindale* (1). On the other hand, it was argued for the respondent that no contempt had been committed because all that was done was to publish a statement (inaccurate, as it turned out) of the result of the proceedings before me, and that the mere publication of such a statement did not amount to a contempt. H

As I read the judgment of NORTH, J., he does not lay down that publication of an order of this court, or of the effect of such an order, is a contempt merely because the proceedings leading up to the order were held in chambers. It is true that NORTH, J., said ([1894] 3 Ch. 201, 202) :

" . . . I cannot conceive a clearer contempt of court than that a party concerned, or any person, should proceed forthwith to make known to the world the very matter which the court had deliberately, in the exercise of its discretion, decided ought not to be published . . . But, as I have already said, there was no contempt in announcing the fact that the ward had become the wife of Hueffer; the contempt was in purporting to give the public information, though meagre, of what the judge had decided ought not to be disclosed, by determining to hear the case in private and excluding the public."

He does not, however, go so far as to say that the effect of proceedings being held in chambers is to preclude publication of the result.

In *Scott v. Scott* (2), LORD SHAW OF DUNFERMLINE said ([1913] A.C. 482) :

" Upon this head it is true that to the application of the general rule of publicity there are three well recognized exceptions which arise out of the nature of the proceedings themselves. The three exceptions which are acknowledged to the application of the rule prescribing the publicity of courts of justice are, first, in suits affecting wards; secondly, in lunacy proceedings; and, thirdly, in those cases where secrecy, as, for instance, the secrecy of a process of manufacture or discovery or invention—trade secrets—is of the essence of the cause. The first two of these cases, my Lords, depend upon the familiar principle that the jurisdiction over wards and lunatics is exercised by the judges as representing His Majesty as *parens patriae*. The affairs are truly private affairs; the transactions are transactions truly *intra familiam*; and it has long been recognized that an appeal for the protection of the court in the case of such persons does not involve the consequence of placing in the light of publicity their truly domestic affairs. The third case—that of secret processes, inventions, documents, or the like—depends upon this: that the rights of the subject are bound up with the preservation of the secret. To divulge that to the world, under the excuse of a report of proceedings in a court of law, would be to destroy that very protection which the subject seeks at the court's hands. It has long been undoubted that the right to have judicial proceedings in public does not extend to a violation of that secret which the court may judicially determine to be of patrimonial value and to maintain. But I desire to add this further observation with regard to all of these cases, my Lords, that, when respect has thus been paid to the object of the suit, the rule of publicity may be resumed. I know of no principle which would entitle a court to compel a ward to remain silent for life in regard to judicial proceedings which occurred during his tutelage, nor a person who was temporarily insane—after he had fully recovered his sanity and his liberty—to remain perpetually silent with regard to judicial proceedings which occurred during the period of his incapacity. And even in the last case, namely, that of trade secrets, I should be surprised to learn that any proceedings for contempt of court could be taken against a person for divulging what had happened in a litigation after the secrecy or confidentiality had been abandoned and the secrets had become public property."

In my judgment, in proceedings involving wards of court the judge has a complete discretion to allow or forbid publication of the proceedings or any order made therein. In the absence of any special direction, I am of opinion that *prima facie* it would be a contempt of court to publish an account of proceedings relating to an infant conducted in chambers without the express permission of the judge who heard the case. I use the words "*prima facie*" because I do not intend to attempt to state any exhaustive rule. There may well be cases in which the permission of the judge is not required, because,

for example, of the lapse of time between the hearing and the date of the publication. Such cases must be dealt with as and when they arise and, as I see it, cannot conveniently be made the subject of any hard and fast or exhaustive rule. On the other hand, I am of opinion that it would not be a contempt of court to publish the order, or an accurate summary of the order, made on such proceedings unless the judge directed that neither the order nor such summary should be published. No such direction was made by me in this case, and, in my judgment, the act complained of did not constitute a contempt of court.

That would be sufficient to dispose of the motion. I desire to add, however, that, even had my conclusion been otherwise, the contempt involved would have been of the most technical character, and I find it difficult to see how it could be said to have been necessary or desirable in the interests of the infant plaintiffs to launch this motion. I am satisfied as to the good faith of the newspaper in the matter, and it is to be observed that the information supplied to it (inaccurate as it was) did no more, so far as reference to the infant plaintiffs is concerned, than refer to a challenge to the jurisdiction. Had that question been pursued, I should have adjourned the matter into court, at any rate, for the purpose of giving judgment. The night editor, therefore, was not to know from a mere perusal of the information supplied by the news-agency that the proceedings referred to were not proceedings held in open court. In the result, the motion will be dismissed with costs.

Order accordingly.

Solicitors: *Kenneth Brown, Baker, Baker* (for the applicant); *Simmons & Simmons* (for the respondent).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

✓ *Re* NORTHCOTE'S WILL TRUSTS. NORTHCOTE *v.* NORTHCOTE.

[CHANCERY DIVISION (Harman, J.), January 27, 1949.]

Trustee—Profit from trust—Duty to account to estate—Commission allowed to executors under American law.

A testator, domiciled in England, died having assets both in England and in the United States of America. His executors took an English grant, and, in compliance with an undertaking given by them to the Inland Revenue, they obtained a grant in New York State appertaining to the American assets. They got in the American assets, for doing which the law of that State allowed them agency commission. This they deducted and paid the balance to themselves as the English executors. On the question whether they were accountable to the English estate for the commission so received by them,

HELD: the commission was never part of the English assets and it arose out of the executors' obligation to take the American grant; the money had come to them without their volition; and, therefore, they were not under a duty to account for it.

Re Gee ([1948] 1 All E.R. 498; [1948] Ch. 284), *applied*.

[AS TO DUTY OF TRUSTEE NOT TO OBTAIN PERSONAL ADVANTAGE FROM POSITION, see HALSBURY, Hailsham Edn., Vol. 33, pp. 220, 221, para. 402; and FOR CASES, see DIGEST, vol. 43, pp. 863-866, Nos. 3097-3117.]

Cases referred to:

(1) *Re Gee*, [1948] 1 All E.R. 498; [1948] Ch. 284.

(2) *Robinson v. Pett*, (1734), 3 P. Wms. 249; 2 Eq. Cas. Abr. 454; *sub nom.*, *Robinson v. Lorkin*, 2 Barn. K.B. 435; 43 Digest 775, 2151.

ADJOURNED SUMMONS to determine, *inter alia*, whether English executors and trustees who had taken out a grant of probate in the United States of America

to the testator's American assets were bound to account to the English estate in respect of commission allowed them under American law on a percentage basis in connection with the getting in of the American assets. HARMAN, J., held that they were not so bound.

Rawlence for the plaintiff.

R. W. Goff for the first defendant, one of the trustees.

Lightman for the second defendant, personal representative of a deceased trustee.

A *Craufurd, Parbury and Burnett-Hall* for residuary legatees and parties attending the proceedings.

HARMAN, J. : This is a point on which I had hoped to find direct authority, but there does not seem to be any. The testator, who left assets both in this country and in the United States, was domiciled in England, and the principal forum of administration is, therefore, English. The executors took an English grant, and on doing so they were put on terms by the Revenue, because of the requirements of the Revenue for security for the English duty (the English effects being insufficient to pay it), to undertake themselves personally to obtain a grant in New York State in respect of the American assets. In due course they obtained such a grant. As personal representatives of the testator in New York State they got in the American assets, and for so doing the law of that State allowed them agency commission. They deducted this commission, and then paid to themselves as the English executors the net American assets of a million and so many dollars. In the administration touching the English estate it is said : "You, the English executors and trustees, have made a profit out of your trust, to wit, the commission which New York State allowed you to put in your pocket, and for that you are accountable to the English estate." That is based on the old principle which, as I pointed out recently in *Re Gee* (1), goes back at least to the time of Peere Williams. In *Re Gee* decd. (1) I said ([1948] 1 All E.R. 503) :

E "The principle that a trustee, in the absence of a special contract, cannot make a profit out of his trust, nor be paid for his time and trouble, is an old one, and is spoken of as established in *Robinson v. Pett* (2) . . ."

In *Re Gee* (1) I was dealing with moneys received by a trustee from a company, which, therefore, were moneys paid from outside. I conceive that the present case is exactly *in pari materia* with that case and the other cases where trustees have received remuneration from an outside source in the course of administering an estate or executing a trust, for the remuneration received by these trustees was never part of the English assets which alone are being administered in this country. It seems to me the question whether or no trustees are accountable for moneys received by them depends on whether it resided within their own power to procure the moneys for themselves or whether the moneys came to them without their volition. Here these trustees were under an obligation to take out this American grant, and everything flows from that. The same remuneration would have been payable to any other person to whom they had given a power of attorney. The only question is whether there is an equity against these trustees to disgorge that which they have put in their pockets from an outside source, on the ground that their interest in the matter conflicted with their duty. I do not think it did. *Qua* the American executors, they are not accountable for this sum. They have accounted fully in that capacity, and, in my judgment, the English beneficiaries are not entitled to call them to account for a sum which accrued to them by reason of the obligation they undertook in order to obtain the English grant.

Order accordingly.

Solicitors : *Farrer & Co.* (for the plaintiff) ; *Torr & Co.* (for the first and second defendants) ; *Lee & Pembertons, Moon, Gilks & Moon*, and *Behrend, Kendall, Price & Francis* (for English residuary legatees and parties attending the proceedings).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

HAIN STEAMSHIP CO., LTD. v. MINISTER OF FOOD.

[COURT OF APPEAL (Tucker, Singleton and Denning, L.JJ.), January 28, 31, February 1, 1939.]

Charterparty—Freight—Computation—Carriage of contemplated cargo—Option to charterer to ship other lawful merchandise—Freight to be paid at rate agreed for contemplated cargo—Vessel completely loaded partly with contemplated cargo and partly with optional cargo. A

Demurrage—Computation—Lay days—Carriage of contemplated cargo—Option to charterer to ship other lawful merchandise—Vessel completely loaded partly with contemplated cargo and partly with optional cargo—Calculation of demurrage on cargo actually loaded and discharged.

A charterparty provided that the chartered vessel should load a full and complete cargo of wheat and/or maize and/or rye in bags and/or bulk and deliver the cargo on being paid freight at the rate of 83s. 6d. per ton for wheat and/or maize and/or rye. The charterparty contained the following clause : “ (6) Charterer has the option of shipping other lawful merchandise . . . in which case freight to be paid on steamer’s dead-weight capacity for wheat in bags on this voyage at the rate above agreed on for heavy grain, but steamer not to earn more freight than she would if loaded with a full cargo of wheat in bags . . . All extra expenses in loading and discharging such merchandise over heavy grain to be paid by charterer.” The steamer was to be loaded at the rate of 500 tons per running day and, at the destination, cargo was to be received at an average of not less than 1,000 tons per weather working day for bulk cargo and not less than 750 tons for bagged cargo, otherwise demurrage was to be paid at the rate of 8d. per G.R.T. per day or pro rata for part of a day. Exercising his option under cl. 6 the charterer loaded the ship to capacity with contemplated cargo of maize in bulk, and optional cargo of linseed in bags and pollards, a total of 8,858 tons, or 579 tons short of the vessel’s dead-weight capacity for wheat in bags of 9,437 tons. B C D

HELD : (i) cl. 6 of the charterparty did not entitle the charterer to deduct from the freight which he had to pay the shipowners, a sum which represented the saving of money which had enured to the benefit of the shipowners by reason of the exercise by the charterer of his option under this clause, and, accordingly, the freight should be calculated on the dead-weight capacity of the ship. E

Per TUCKER, L.J. : Freight is the remuneration to which the shipowners are entitled on performance of their obligations under the charterparty, and it is a sum which has no relation to the profits which they may make or the expense which they have to incur in order to earn that freight. F

(ii) with regard to demurrage, the lay days were dependent on the loading and unloading of the actual cargo which was shipped and unloaded.

Decision of SELLERS, J. ([1948] 2 All E.R. 523), *varied*. G

[AS TO RATE OF PAYMENT OF FREIGHT, see HALSBURY, Hailsham Edn., Vol. 30, pp. 583-588, paras. 741-745 ; and FOR CASES, see DIGEST, Vol. 41, pp. 654-658, Nos. 4867-4892.]

AS TO COMPUTATION OF DEMURRAGE, see HALSBURY, Hailsham Edn., Vol. 30, pp. 344-349, paras. 524-528 ; and FOR CASES, see DIGEST, Vol. 41, pp. 566-576, Nos. 3910-3998.] H

Cases referred to :

(1) *Red “ R ” S.S. Co. v. Allatini Brothers*, (1910), 103 L.T. 86 ; 15 Com. Cazar. 290 ; 41 Digest 656, 4882.

(2) *Mazarakis (A. & C.) v. Bunge Y. Born, Ltd.*, (1926), 24 Lloyd L.R. 244, C.A. ; 26 Lloyd L.R. 169, H.L.

APPEAL by the shipowners and cross appeal by charterer from a decision

of SELLERS, J., dated July 5, 1948, on a Special Case stated by an arbitrator in respect of freight and demurrage payable by the charterer. The arbitrator accepted the shipowners' computation for both claims, but the learned judge reversed the arbitrator's finding in respect of freight, affirming his finding in respect of demurrage. The Court of Appeal now allowed the appeal, dismissing the cross-appeal by the charterer. The facts appear in the judgment of TUCKER, L.J.

Sir Robert Aske, K.C., and *Mocatta* for the shipowners.

Sir William McNair, K.C., and *H. L. Parker* for the charterer.

TUCKER, L.J.: This is an appeal by the Hain Steamship Co., Ltd. by way of Special Case in arbitration proceedings in which they were claimants and the Minister of Food was respondent. Those proceedings arose in connection with a charterparty—the Chamber of Shipping River Plate Charterparty, 1914 (homewards)—known under the code name of “Centrocon.” The dispute primarily concerns the proper interpretation of cl. 6 of that charterparty, and it arose in connection with a claim by the shipowners for freight.

The cargo which was loaded on the ship, a motor-vessel named the *Trevoise*, consisted of 8,858 tons, made up of four parcels, namely, maize in bulk, linseed in bags (two parcels), and pollards in bags. Under cl. 2 of the charterparty wheat and/or maize and/or rye in bags and/or bulk was what has been called the contemplated cargo—that is, the cargo which would normally be carried by the ship. The quantity of cargo loaded on the ship was 579 tons short of the vessel's dead-weight capacity for wheat in bags, the contemplated cargo, and she was not, in fact, down to her marks, though fully loaded. The maize was shipped under cl. 2 and the linseed and pollards were shipped under cl. 6, the optional clause. The cargo, therefore, consisted partly of contemplated cargo and partly of optional cargo. When the cargo was unshipped in this country the pollards and linseed, which were unshipped at Avonmouth and were not weighed on discharge, amounted to 3,155 tons odd, allowing for a shrinkage of .75 per cent., and the balance of the cargo, which was unshipped at Liverpool and was weighed on discharge, amounted to 2,213 tons odd of maize and 3,427 tons odd of linseed. That made a total, allowing for shrinkage, of 8,795 tons odd as against the 8,858 tons which had been shipped.

Clause 6 of the charterparty provides :

“Charterer has the option of shipping other lawful merchandise, cotton, sugar, quebracho wood, quebracho extract and distillery residue excluded, in which case freight to be paid on steamer's dead-weight capacity for wheat in bags on this voyage at the rate above agreed on for heavy grain, but steamer not to earn more freight than she would if loaded with a full cargo of wheat in bags. This option can only be used if the quantity of other lawful merchandise as above shall amount to not less than 200 tons.

All extra expenses in loading and discharging such merchandise over heavy grain to be paid by charterer. The charterer is to have the full reach and burthen of the steamer, including 'tween and shelter decks, bridges, poop, etc. (provided same are not occupied by bunker coals and/or stores).”

It is agreed that the rate of freight in this case is 83s. 6d. per ton, which in the circumstances which existed would have been the rate payable in respect of wheat in bags.

The shipowners say that they are entitled to be paid freight arrived at by a simple arithmetical calculation. The cargo loaded did not take the ship down to her marks, and there was a deficiency between the full capacity of the ship and the load which she in fact carried of 579 tons. That means that the full dead-weight capacity of the ship, calculated in terms of wheat in bags, was 9,437 tons. The shipowners say : “All you have to do is to take 9,437 tons, allow for a normal shrinkage of 0.75 per cent., and multiply the resulting

figure by 83s. 6d. per ton." That works out at 9,366 odd tons, which, multiplied by 83s. 6d. per ton, gives a total figure of £39,103 19s. 7d. On the other hand, the charterer says that the proper method of calculation is: "You take the actual out-turn weight of the cargo which was weighed on arrival, and, as to the cargo which was not weighed on arrival, you allow the agreed estimated shrinkage of 0.75 per cent., and you add those two figures together, but you have also to add something further in respect of the 579 tons representing the balance of the available dead-weight capacity of the ship." The charterer says that the proper way of making the calculation is to allow 83s. 6d. per ton on the 579 tons, which amounts to £2,417 6s. 6d., and he says that he is entitled to deduct from that sum the sum of £81 11s. 4d., representing a saving in the expenses of discharging the cargo, of which the shipowners had the benefit by reason of the fact that they did not have to discharge 579 tons of cargo.

On the figures, I think that the issue between the parties can be disposed of without expressing a view as to the two rival methods of calculating the freight which is properly payable. It happens in this case that, putting on one side the saving in the expenses of discharging and the question whether they were properly deductible, the amount payable on the charterer's calculation would have worked out at £39,144 odd, but he would have then said: "As cl. 6 expressly provides that the steamer is not to earn more freight than she would if loaded with a full cargo of wheat in bags, and, as on the shipowners' own calculations on that basis, she would have only earned £39,103 19s. 7d., I must reduce my figure of £39,144 odd to £39,103 19s. 7d." Therefore, but for this question of the claim to deduct these expenses, the result would have been identical whichever party is right as to the proper method of calculation. It seems to me, therefore, that this part of the case turns entirely on the question whether or not the charterer would be entitled, even assuming that his method of calculation is correct, to deduct the sum saved in respect of discharging expenses.

Before going on to consider that matter further, I may state in passing that a clause similar to cl. 6 has been the subject of discussion in two cases which have gone to the House of Lords. In *Red "R" S.S. Co. v. Allatini* (1) the whole of the cargo was optional cargo. The ship was not loaded to her marks; she was only partially laden. It was decided that the effect of the clause was to entitle the shipowners to recover a sum calculated in the same way as that in which the shipowners make their calculation in the present case. That has been referred to as the "lump sum" method of calculation. In *Mazarakis (A. & C.) v. Bunge Y Born* (2) there was partly contemplated cargo and partly optional cargo, and the vessel was loaded to her marks. It was held that the application of a clause similar to cl. 6 did not on the facts result in freight calculated in the way it had resulted in the *Allatini* case (1), that is to say, you did not simply have to make a calculation based on the dead-weight capacity of the ship multiplied by the rate payable. LORD SUMNER stated the matter shortly as follows (26 Lloyd L.R. 171):

"I have come to the conclusion that, when the option given by cl. 6 is exercised and the provisions of that clause have to be reconciled with the other clauses which govern the chartered voyage, the right construction of the words, and the only feasible construction in business, is that the freight payable is payable on delivered weights and on right delivery, and upon such a total weight as may earn freight by right delivery, provided always that the weight of a full and complete cargo of wheat in bags has been shipped."

Then he says (*ibid.*, 172):

"The preferable construction of cl. 6 is, that in the event of a due exercise of the option given by that clause, freight, earned by right delivery

and calculated on the delivered weights of the several sorts of cargo delivered, is to be paid at the rate agreed above for heavy grain, but so that, either the steamer shall have been loaded to her marks, or, if not, the total freight paid shall not be less than the agreed rate for wheat in bags on a full and complete cargo, duly delivered. The expression 'lump sum charter,' so much relied on in argument, is, I think, for present purposes misleading. It may well be that the freight payable under cl. 6 is such as to preclude any claim for dead freight if the ship had not been loaded to her marks at her final port of loading. Such a case arose in *Red "R" S.S. Co. v. Allatini* (1), but it is not the case here, and I therefore think that the expressions there used about a 'lump sum' do not apply now. In no other respect does this term fit the present charter. Nothing that was said in *Allatini's* case (1) is a binding authority to determine how the calculation of the charterparty freight is to be made when a full cargo has been both shipped and delivered but has lost weight by evaporation during the voyage."

In the *Mazarakis* case (2), both in the Court of Appeal and the House of Lords, the courts had envisaged a case like the present, namely, cargo partly optional and the vessel not loaded to her marks, and I think it is clear that the view taken both in the Court of Appeal and the House of Lords was that neither the judgment in the *Allatini* case (1) nor the judgments which they delivered in the *Mazarakis* case (2) were conclusive of the point which arises in the present case. This is what BANKES, L.J., said about that in the *Mazarakis* case (2) (24 Lloyd L.R. 246) :

"Having regard to the facts of this case it is not material to consider what the position would have been had the cargo shipped consisted partly of contemplated cargo and partly of optional cargo, and if the two together had not completely filled the ship so that the dead-weight capacity of the ship was represented by the cargo shipped. In such a case as that, of course, the effect of cl. 6 is to require the charterer to pay in respect of the optional cargo a sum which will make up the full freight upon the steamer's dead-weight capacity; and in a sense, therefore, the effect of the clause is in a case such as that to bring about something which is not exactly but very similar to a payment of lump sum freight, because there would be no question of paying dead freight, but the sum which would have to be paid would be a sum representing a rate of freight upon the full dead-weight capacity of the steamer. However, that particular point does not arise in this case, because in fact a full cargo was shipped."

WARRINGTON, L.J., and ATKIN, L.J., referred to that possibility, but both refrained from expressing a view on the matter. In the House of Lords, in the passage to which I have already referred, LORD SUMNER envisaged it and dealt with it quite shortly, when he used the words (22 Lloyd L.R. 172) :

"... but so that, either the steamer shall have been loaded to her marks, or, if not, the total freight paid shall not be less than the agreed rate for wheat in bags on a full and complete cargo, duly delivered."

I think, however, that the last part of that statement of LORD SUMNER's and the statement that I have read from the judgment of BANKES, L.J., were both *obiter*.

The learned umpire took the view that the case which governed the present matter was the *Allatini* case (1) and that the *Mazarakis* case (2) did not apply. He did not express an opinion with regard to the *dicta* of BANKES, L.J., and LORD SUMNER in the *Mazarakis* case (2), but he held that the *Allatini* case (1) applied, and, therefore, the shipowners were right in their method of calculation, merely multiplying the dead-weight capacity of the ship, after allowing for normal shrinkage, by the agreed rate of 83s. 6d. per ton. In that view of

the case it did not become necessary for him to consider whether or not the claim by the charterer to deduct the saving in expenses of discharging was maintainable or not. *SELLERS, J.*, came to a different conclusion. He held that the charterer was entitled to deduct those expenses, and he arrived at his conclusion in these words ([1948] 2 All E.R. 526) :

"Before the arbitrator the claim seems to have been based on a liability for dead freight or damages. If that were correct, I think the estimated discharging expenses would be deductible from the freight attributable to the shortage, but the two cases cited establish clearly that the liability arising under cl. 6 is not for dead freight but is for freight due under the contract—not for breach of it. The argument was not so put or restricted before me."

The learned judge had considered the *Allatini* case (1) and the *Mazarakis* case (2) and had said (*ibid.*) :

"The learned arbitrator has accepted the shipowner's contention and held that their calculation of freight is correct. The conclusion so reached does not, as I see it, fully deal with or exhaust the charterer's submissions before this court. Neither of the two cases cited deals with the position which arises here where part of the cargo consists of specified and part of optional cargo and the two together do not reach the dead-weight capacity of the ship of wheat in bags, but, as *Mazarakis* (2) is the later case and as it deals with parcels of specified and optional cargo, I am of opinion that it should be applied to the present case and that the charterer is right in making his calculation of freight on the several sorts of cargo delivered. Whichever view is taken, however, the argument on behalf of the charterer still subsists that, in assessing the freight, whether on a notional cargo of wheat in bags to cover the shortage in dead-weight or to cover freight on the entire cargo, an allowance must be made to the charterer for the discharging expenses saved by the shipowners. This argument was not advanced in either of the cases to which I have just referred."

I think that there *SELLERS, J.*, was taking the view that the *Mazarakis* case (2) governed the present matter to the extent that the charterer was right in his contention that the calculation had to be made on the several sorts of cargo delivered and allowing for something with regard to the notional cargo which had not been shipped, which was, I think, the method of calculation indicated by *LORD SUMNER*. The learned judge went on to say that, although this deduction in respect of the saving in discharge expenses could not be justified on a basis of dead freight because on the authorities there had been no breach of contract on the part of the charterer, none the less the same result could be arrived at by a different process, and this is how he arrives at it ([1948] 2 All E.R. 526) :

"I think the charterparty should be looked at as a whole, especially as cl. 6 has been described more than once as ambiguous and puzzling. The charterparty is essentially one for the carriage of grain, and where the option is given to ship any other lawful merchandise, except a few specified commodities, the freight on such merchandise is based on the carriage of wheat in bags at the rate for heavy grain fixed by the charterparty—*i.e.*, it keeps the ship, as far as earnings are concerned, on the same basis as for one of the specified grain cargoes. There is nothing to indicate that the ship should gain by this. The indications are that she should be in the same position, neither better nor worse, whether grain is loaded or not. All extra expenses are for the charterer. The steamer is not to earn more freight. If wheat in bags only were shipped and the cargo failed to reach the dead-weight then dead freight or damages would be

recoverable from the charterer and any saving to the ship would be taken into consideration. If a full cargo were shipped, then the ship would recover freight on the out-turn weights and would have the expense of discharging the full cargo in order to earn the freight. In my opinion, the charterparty (and cl. 6 in particular) should be so interpreted that the shipowner is placed in no better position than if he, in fact, carried wheat in bags instead of the optional cargo and that the charterer's contention is right."

I have arrived at a different conclusion with regard to the construction to be put on cl. 6. I cannot find in that clause any justification for deducting these discharging expenses. The clause, in my view, is designed to provide a method of calculation in respect of freight payable when the option conferred by the clause is exercised—and it provides in that case :

" . . . freight to be paid on steamer's dead-weight capacity for wheat in bags on this voyage at the rate above agreed on for heavy grain, but steamer not to earn more freight than she would if loaded with a full cargo of wheat in bags. This option can only be used if the quantity of other lawful merchandise as above shall amount to not less than 200 tons. All extra expenses in loading and discharging such merchandise over heavy grain to be paid by charterer."

If that clause had not contained an express provision that the charterer was to pay extra expenses in loading and discharging as compared with heavy grain the shipowners would have been liable under the other provisions of the charterparty for the extra expenses of loading and discharging, and, therefore, it was necessary to put in that provision in order that they might escape that liability, but that is a liability quite apart from the freight which is payable. The freight which is earned, in my opinion, has nothing whatever to do with the payment of the expenses of loading and/or discharging. If, furthermore, it had been intended that, where optional cargo is shipped but the ship is not down to her marks, and, therefore, there is a saving in expense in the unloading of the cargo by the shipowners, in that event there should be a reduction in the freight payable, it would have been easy to say so. The argument is that there is a contrast between the words "freight to be paid" and the words "steamer not to earn more freight," but I do not think that such a distinction can properly be drawn. The argument of the charterer really amounts to contending that this language means that in such an event the shipowners are not to make any greater profit out of the venture than they would if contemplated cargo had been shipped. Freight is the remuneration to which the shipowners are entitled on performance of their obligations under the charterparty, and it is a sum which has no relation to the profits which they may make or the expenses which they have to incur in order to earn that freight. Clause 6, on its proper construction, does not entitle the charterer to deduct from the freight which he has to pay the shipowners, a sum which represents the saving of money which has enured to the benefit of the shipowners by reason of the exercise by the charterer of his option under this clause.

It was said by counsel for the charterer that, if the words "steamer not to earn more freight than she would if loaded with a full cargo of wheat in bags" have not the meaning for which he contends, there can be no good reason for their inclusion in the clause. I do not think that that argument should prevail. I think there are other reasons which would, or might, necessitate such language as this—for instance, differences might arise as a result of shrinkage of the cargo on the voyage. However that may be, I cannot interpret "freight earned" as meaning or equivalent to "profit made on the voyage." For these reasons, even assuming that the charterer's method of calculating freight is the correct one, he is not entitled to make this

deduction, and, that being so, the result in the present instance is the same in figures as that contended for by the shipowners.

Taking that view of the matter, it becomes necessary to deal with the claim in respect of demurrage. On this point *SELLERS, J.*, said ([1948] 2 All E.R. 527) :

"The second issue between the parties is in respect of demurrage. The shipowners contend 'that the lay days must be calculated on the actual quantities, *viz.*, 8,858 tons and 8,796½ tons, loaded and discharged, respectively.' The charterer contends 'that at the loading port the calculation must be based on the dead-weight capacity of the vessel for wheat in bags, *viz.*, 9,437 tons, and, at the discharging ports, on the aggregate out-turn weight at Liverpool, the bill of lading weights (with no allowance for shrinkage) of the cargo discharged at Avonmouth and the weight on which . . . dead freight is payable, which aggregate amounts to 9,399½ tons'."

He then sets out the demurrage clauses and proceeds :

"The learned arbitrator has found as follows : 'Clauses 13 and 25 (which provide for the lay days at ports of loading and discharge respectively) are wholly independent of the clauses which provide for the calculation and payment of freight, and, on their true construction, provide that the lay days shall be calculated on the weights of cargo actually loaded and discharged respectively. Accordingly, I hold that the shipowners' calculation of demurrage are also correct'."

SELLERS, J., having referred to the clauses in question, continues (*ibid.*) :

"On this issue I agree with the learned arbitrator. The charterer has loaded cargo to the full capacity of the ship and if he had loaded and discharged at the agreed rate the shipowners would have been free to employ their vessel elsewhere during the time for which they now claim demurrage. The clauses provide for demurrage on a tonnage rate and draw no distinction between specified and optional cargo which may vary very considerably in the rate of loading or discharging."

With regard to that, I find myself in agreement both with the learned umpire and the learned judge. It would require a lot to be read into cl. 13 if it was to have the meaning attributed to it by counsel for the charterer. It would certainly have to read : "The steamer shall be loaded at the rate of 500 tons per running day, calculated on the dead-weight capacity of the ship." I think that the learned umpire was right when he said that cl. 13 and 25 are wholly independent of the clauses with regard to freight. I do not understand him as meaning that, in construing cl. 13 and 25, it is not proper to take into consideration all the other relevant clauses of the charterparty. What he says is that he cannot see anything in the other clauses of the charterparty which has any bearing on the question of demurrage. The view that he and the learned judge took was that the lay days were to be dependent on the loading and unloading of the actual cargo which was shipped and unloaded, and it seems to me that that is clearly the right view with regard to the claim in respect of demurrage, whatever may be the proper construction to be put upon cl. 6 of the charterparty. For these reasons, I think that the appeal of the shipowners succeeds and that the cross-appeal of the charterer fails.

SINGLETON, L.J. : I agree. Under cl. 2 of the charterparty the obligation of the charterer, *prima facie*, was to provide, and of the shipowners to receive from the charterer, "a full and complete cargo of wheat and/or maize and/or rye in bags and/or bulk." Under cl. 6 of the charterparty the charterer had an option (which he exercised) of shipping "other lawful

merchandise" (with certain exceptions), and, if he did exercise that option, freight was to be paid "on steamer's dead-weight capacity for wheat in bags on this voyage at the rate above agreed on for heavy grain, but the steamer not to earn more freight than she would if loaded with a full cargo of wheat in bags." The exercise of that option resulted in only 2,213 tons of maize being carried in the ship. The remainder of the cargo (linseed and pollards) took up the rest of the space in the ship, and the total cargo loaded filled the carrying space of the ship. The total weight carried was 579 tons short of the ship's total dead-weight capacity for wheat in bags. The charterer thereupon claimed to deduct from the freight payable the discharging expenses which the shipowners had saved by not having to load or to discharge the full amount of cargo. The amount in dispute between the parties in respect of this matter is comparatively small. It is a little surprising to me that in all the years that this charterparty has been used this specific question has, apparently, never been the subject of litigation, although there has been a good deal of litigation on other clauses of this charterparty.

The first thing that has to be remembered is that one is not dealing with a claim for damages in any sense of the word. The rights of the parties depend on the contract made between them, and the terms of that contract are to be found in cl. 6 of the charterparty. That clause, after specifying "freight to be paid on steamer's dead-weight capacity for wheat in bags" and "steamer not to earn more freight than she would if loaded with a full cargo of wheat in bags," says: "All extra expenses in loading and discharging such merchandise over heavy grain to be paid by charterer." When the shipowners were asked to give the charterer an option at the time the agreement expressed in this charterparty was entered into, or when some amendment of it was made, the shipowners obviously said that they would do so on certain terms, one of which was the method of payment already mentioned, and the other was that all extra expenses in loading and discharging were to be paid by the charterer and the shipowners should not be put to any expense on that basis. If the charterer was to have the benefit of any saving because of less expenses it would have been quite easy to add to the words of cl. 6 some such words as these: "... and any saving of expenses in loading or discharging to be credited to, or for the benefit of, the charterer." No such words appear here. The argument of counsel for the charterer is that the words "but steamer not to earn more freight than she would if loaded with a full cargo of wheat in bags" means "net freight," or something of that kind. I agree with what counsel for the shipowners said in regard to that matter. I do not know (for this purpose) what is the meaning of "net freight." "Freight" means "freight." It does not mean "freight less expense of earning that freight." "Freight earned" means "freight due under the contract," and the word "freight" is used in that sense in cl. 6 of the charterparty. In the absence of any such words as I have indicated I do not see that the charterer can succeed in his argument, and I agree that this appeal must be allowed. I do not desire to say anything with regard to the cross-appeal. I am in complete agreement with the judgment of *SELLERS, J.*, as to that.

DENNING, L.J.: I agree. When the option given by cl. 6 of the charterparty is exercised the charterer is absolved from the responsibility of loading a full and complete cargo of the contemplated kind. He is given the option of loading "other lawful merchandise," which may be as much as the ship can carry or as little as 200 tons. When that option is exercised the ship need not load a full and complete cargo. The freight at so much per ton of cargo "delivered" is, therefore, inapplicable. So the parties have substituted a sum fixed by the dead-weight capacity of the ship. If the charterer does not choose to utilise the whole of that capacity, that is his affair. So much I take to be clear, but the option clause contains a stipulated maximum

whereby the steamer is not to earn more freight than she would have earned if loaded with a full cargo of wheat in bags. The shipowners say that that maximum operates to reduce the freight calculated on dead-weight capacity because such a cargo would shrink in the course of transit and also to reduce the freight in cases where the ship would not be down to her marks when loaded with a cargo of wheat in bags. The charterer says that a further meaning is to be given to it so as to reduce the freight in cases when the optional cargo costs less to load or unload than wheat in bags. In my opinion, the short answer to this argument, as a matter of construction, is that the clause requires this question to be asked: What freight would the ship earn if loaded with a full cargo of wheat in bags? That question is answered by taking the gross weight delivered in tons and multiplying by the stipulated rate of freight per ton. To ascertain the freight earned, you do not deduct the expenses incurred in earning that freight.

Counsel for the charterer contends that the shipowners should be no better off by reason of the loading of optional cargo, but I see no room for inserting words to that effect in the clause. The clause requires that the shipowners shall be no worse off, but does not say that they shall not be better off. Counsel has disclaimed any intention to treat any part of the freight payable under cl. 6 as dead freight, *i.e.*, as damages, but I think that that is just what he is doing. He is really saying that the shipowners are only to be allowed the damages which they have suffered by reason of the contemplated cargo not being shipped. If this had been a claim for damages, it would mean that the shipowners would have had to give credit for the expenses saved by not having to load and unload the non-existing cargo and for the time saved in loading and unloading. The claim, however, is not a claim for damages and the contract does not provide for any credit of that kind. It provides for a simple calculation of freight. The contention of counsel for the charterer would involve a complicated assessment of the amount the shipowners would save by reason of the optional cargo being shipped. It would open the door to many disputes and arbitrations. It is quite reasonable to suppose that the business men who framed this charter intended to avoid complications of that sort. I agree that the demurrage clauses are quite clear, and that they refer only to the cargo shipped, and I agree with the order proposed by my Lord.

Appeal allowed and cross-appeal dismissed.

Solicitors: *Holman, Fenwick & Willan* (for the shipowners); *Treasury Solicitor* (for the charterer).

[*Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.*]

FINCH v. TELEGRAPH CONSTRUCTION AND MAINTENANCE CO., LTD.

[KING'S BENCH DIVISION (Devlin, J.), January 20, 21, 1949.]

Factory—Protection of eyes—Grinding machine—Obligation to provide goggles—Goggles in foreman's office 30ft. from machine—Safe system of work—Contributory negligence—Factories Act, 1937 (c. 67), s. 49.

Costs—Tort—High Court action—Damages of £10—"Sufficient reason" for awarding costs on High Court scale—Expectation based on medical evidence of recovering more than £50—County Courts Act, 1934 (c. 53), s. 47 (3) (a).

A factory workman, while operating a double grinding machine and wearing no goggles, suffered an injury from a piece of material thrown up by the machine which entered his eye. It was not disputed that the Factories Act, 1937, s. 49, applied to the process, and that, in conformity with that section, suitable goggles or effective screens should be provided to protect the eyes of the persons employed in the process. Goggles had

at one time hung beside the machine for the use of the operator, but it was not the practice to use goggles for grinding in that workshop, and, as the goggles hanging there had been mishandled, the foreman removed them and hung them on a nail inside his office 30ft. away from the machine. The workman did not know where the goggles were.

HELD : (i) the goggles had not been "provided" within the meaning of s. 49, and the company were, therefore, in breach of their statutory duty.

(ii) drawing the attention of the workmen to the need to use goggles and not informing them where they were kept, but leaving the men to ask for goggles if they wanted them, the employer had failed to provide a safe system of work.

(iii) the workman was not guilty of contributory negligence in not asking for the goggles, for it was the duty of the employers to provide them.

Two months after the removal of the grinding, the workman's eye became inflamed and painful, and his vision became misty, so that he was unable to work and sustained loss of wages. The medical report indicated that the eye condition was serious. The workman brought his action in the High Court, but withdrew the contention that the serious eye condition which he contracted was due to the original eye injury. He was awarded £10 damages.

HELD : the workman's mistaken belief in the early stages of the action that there was a claim of substance was not a "sufficient reason" within the County Courts Act, 1934, s. 47 (3) (a), for awarding costs on the High Court scale.

[FOR THE FACTORIES ACT, 1937, s. 49, see HALSBURY'S STATUTES, Vol. 30, p. 239.]

ACTION for damages for negligence and/or breach of statutory duty.

The plaintiff was a workman who suffered injury to an eye while operating without wearing goggles a double grinding machine in the defendants' factory.

He contended that the defendants had not complied with their statutory duty to provide goggles, and that in their absence there was not a safe system of working. The goggles had been kept in the foreman's office without the workman's knowledge. The workman denied contributory negligence in not asking for the goggles. **DEVLIN, J.**, found for the workman on all three issues and awarded £10 damages with costs on the county court scale, holding that belief,

founded on medical evidence, that there was a substantial claim, which was later abandoned, was not a sufficient reason for ordering costs on the High Court scale.

Edgedale, K.C., and *Monier-Williams* for the workman.

Marven Everett for the defendant company.

DEVLIN, J. : The plaintiff is a plater who was at all material times employed by the defendants at their factory. On Dec. 20, while he was engaged in the process of dry grinding a metal cylinder (he says on a double machine grinder), he got a foreign body into his eye, either a piece of the bobbin which he was grinding or a piece of the grinding itself, and it is in respect of that accident that he brings this action. It is pleaded in two ways. In the first place, he claims that there was a breach of statutory duty under the Factories Act, 1937, s. 49, which provides :

"In the case of any such process as may be specified by regulations of the Secretary of State, being a process which involves a special risk of injury to the eyes from particles or fragments thrown off in the course of the process, suitable goggles or effective screens shall, in accordance with any directions given by the regulations, be provided to protect the eyes of the persons employed in the process."

By the schedule to the Protection of Eyes Regulations, 1938 (S.R. & O., 1938, No. 654), the processes to which s. 49 applies include

“Dry grinding of metals or articles of metal applied by hand to a revolving wheel or disc driven by mechanical power.”

[HIS LORDSHIP reviewed the evidence as to the machine on which the plaintiff had been working at the time of the accident, found that it was a double grinding machine, and proceeded:] It is not disputed by counsel for the defendants that the Act and regulations apply, and, accordingly, what I have to consider is whether, on the facts in the present case, suitable goggles were provided to protect the eyes of the workman. On that point there has been a conflict of evidence. The workman's case is that goggles for grinding (that is, with plain glass only) were not provided in the shop in which he worked, and were not, in fact, used. On that he has called, to support his evidence, four fellow workmen, who testify the same thing. The defendants' case rests on the evidence of their foreman, Mr. Stanley, who agreed that it was not generally the practice to use goggles for grinding in the workshop, but, he said, they were used by some men and on long jobs. He agreed that he rarely, if ever, used them himself, but he says that they were available. Originally a pair of goggles had been hanging up beside the double grinding machine, but, owing to the fact that they were carelessly handled while in that position, he hung them inside his office which was about 30ft. from the machine. He did not take any steps at the time he removed the goggles from their place to make it known to the workmen generally that he had moved them to the office, but he says that the men generally knew where the goggles were and could get them if they so desired. I do not think he said that the plaintiff, in particular, knew where the goggles were. I am not prepared to reject Mr. Stanley's evidence that a pair of grinding goggles was hanging up on a nail inside his office, but I think that it is very probable that they were not in a very conspicuous place. I am satisfied by the evidence of the workman and the witnesses who were called for him that neither he nor the majority of the men knew where the goggles were and that they were actually rarely used.

In those circumstances I have to consider whether that was a “providing of goggles” within the meaning of s. 49 of the Act of 1937. I have listened to the careful argument of counsel for the defendants, but I have come to the conclusion that it was not a “providing.” Of course, goggles would be “provided” if they were given to each man individually. I do not think that is the only way in which they could be “provided,” but, in my view, in order to “provide” them within the meaning of the Act it would be necessary either that they should be put in a place where they come easily and obviously to the hand of the workman who is about to grind, or, at the very least, that he should be given clear directions where he is to get them. Accordingly, I think there has been a breach of s. 49.

It is unnecessary to say very much about the alternative provision, about the “safe system of work,” but it might be convenient if I expressed my view about that. I find there was no safe system of work in this workshop with regard to the provision of goggles. I accept the evidence, which was not contradicted, of Mr. Thomas, a consulting engineer who was called by the workman that the process of grinding, whether done on the double grinder or by portable grinder, is a dangerous process. Mr. Stanley, the foreman, admitted that he did not consider it any part of his duty to see that goggles were used. There was not at the time, although there is now, a notice on the machine directing the attention of the men to the fact that the goggles should be used. According to Mr. Stanley, it was simply left to each man to ask for goggles if he wanted them. In my judgment, that is not providing a safe system of working, or any system of working at all, and I shall find for the workman on that issue also.

A There is a plea of contributory negligence in the defence, the contributory negligence pleaded being that the workman failed to make use of the goggles provided for his use, which he well knew were kept hanging on a hook inside the door of the foreman's office. I have found that the workman did not have that knowledge, and, accordingly, all that can be left of the allegation is that he failed to make use of goggles which were hanging on a hook inside the door of the foreman's office. In substance the suggestion must be that he, being a man of experience, should know that it was or might be dangerous to work without goggles and ought to have asked for them, and that it was his failure to ask for them that was the cause of the accident. I cannot accept that as being contributory negligence, since it is the duty of the defendants to provide the goggles. The contributory negligence as alleged merely consists in the workman's failure to ask the defendants to do their duty. I do not think that that failure amounts to contributory negligence. Accordingly, the workman succeeds on the issue of liability. On the whole I am satisfied that an award of the sum of £10 would be sufficient to cover the irritation and inconvenience which was caused to him. Accordingly, there will be judgment for the plaintiff for £10.

B
C *Edgedale* : I have to ask for an order that the costs should be on the High Court scale. There was sufficient reason for bringing the action in the High Court. My instructing solicitors had before them the report of Dr. Preston, in which it was said that this was obviously a very serious matter.

D *DEVLIN, J.* : Could you help me on the meaning of "sufficient reason" in the County Courts Act, 1934, s. 47 (3) (a). There may be a sufficient reason for bringing an action in the High Court, although very small damages are awarded. Is "sufficient reason" confined to that sort of thing, or is it sufficient reason to bring an action in the High Court that it looks to the plaintiff's advisers as if he might well recover more than £200 damages, although later it turns out that that is a mistaken view?

E *Edgedale* : I do not think there is any authority about it. It is a matter of the construction of the County Courts Act, 1934, s. 47 (3). The question is whether there is "sufficient reason for bringing the action in the High Court," and that, in my submission, means any sound reason for doing so. There is nothing in the section to limit the word "reason" to a reason based on the number of persons affected or the importance of the matter. If the reason is purely frivolous—supposing that it is obvious the plaintiff cannot recover more than £50—the action ought not to be brought in the High Court, but no one would say, in the present case, on the evidence of Dr. Preston, that this action ought not to have been brought in the High Court. The purpose of the section is to prevent vexatious litigation. I should submit that this was eminently a case which it was proper to bring in the High Court.

F
G *Everett* : It is submitted that an action cannot be brought in the High Court merely because, on information which the plaintiff has, it appears to be a matter of substance. "Sufficient reason" in s. 47 (3) (a), means something out of the ordinary, a point of law of general importance, or a case which, plainly on the face of it, is a matter of very great moment.

H *DEVLIN, J.* : It is not a very easy point, but on the whole I find that there is no evidence here on which I am justified in departing from the normal consequence arising from my judgment. I give judgment for the workman for £10 and costs.

Judgment for the workman for £10, and costs on the county court scale.

Solicitors : *Shaen, Roscoe & Co.* (for the plaintiff); *Barlow, Lyde & Gilbert* (for the defendants).

[Reported by F. A. AMLES, ESQ., Barrister-at-Law.]

LINDOP AND OTHERS v. QUAIFE.

[COURT OF APPEAL (Bucknill and Asquith, L.JJ., and Hodson, J.), January 25, 26, 1949.]

Rent Restriction—Standard rent—Apportionment—House converted into flats—Whole house outside Rent Acts—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 12 (3).

By s. 12 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, "Where, for the purpose of determining the standard rent or rateable value of any dwelling-house to which this Act applies, it is necessary to apportion the rent at the date in relation to which the standard rent is to be fixed, or the rateable value of the property in which that dwelling-house is comprised, the county court may, on application by either party, make such apportionment as seems just, and the decision of the court as to the amount to be apportioned to the dwelling-house shall be final and conclusive."

In 1941, the landlord took a lease of a house, the rateable value of which was outside the limits of the Rent Restrictions Acts, for 21 years at a rent of £140 a year. He altered and adapted the house, converting it into ten flats, keeping one for his own occupation and letting the others to tenants. On an application by three of the tenants for an apportionment of the rateable value so as to ascertain the rents of their flats, it was contended that there was no jurisdiction since the house as a whole was not subject to the Rent Acts.

HELD: the county court judge had jurisdiction to apportion the value.

Upsons, Ltd. v. Herne ([1946] 2 All E.R. 309; [1946] K.B. 591; 175 L.T. 350), *followed*.

Cole v. Harris ([1945] 2 All E.R. 146; [1945] K.B. 474; 173 L.T. 50), *distinguished*.

[AS TO STANDARD RENT, see HALSBURY, Hailsham Edn., Vol. 20, pp. 312-314, para. 369 and 1948 Supp.; and FOR CASES, see DIGEST, Vol. 31, pp. 564-566, Nos. 7117-7132.]

Cases referred to:

- (1) *Upsons, Ltd. v. Herne*, [1946] 2 All E.R. 309; [1946] K.B. 591; 175 L.T. 350; 2nd Digest Supp.
- (2) *Gover v. Field*, [1944] 1 All E.R. 151, 417, *n.*; 170 L.T. 73; *sub nom. Field v. Gover*, [1944] K.B. 200; 2nd Digest Supp.
- (3) *Barrett v. Hardy Brothers (Alnwick), Ltd.*, [1925] 2 K.B. 220; 133 L.T. 249; 31 Digest 561, 7090.
- (4) *Woodhead v. Putnam*, [1923] 1 K.B. 252; 128 L.T. 281; 31 Digest 572, 7196.
- (5) *Cole v. Harris*, [1945] 2 All E.R. 146; [1945] K.B. 474; 173 L.T. 50; 2nd Digest Supp.

APPEAL by the landlord from a decision of His Honour JUDGE PRATT at Torquay County Court, dated July 30, 1948, whereby, to ascertain the rents of certain flats forming part of a house known as "Western House," Torquay, he apportioned the rateable value of the whole of the house. The Court of Appeal held that the learned county court judge had jurisdiction to make the apportionment and dismissed the appeal.

E. R. Mills for the landlord.

Raymond Stock for the tenants.

BUCKNILL, L.J.: I will ask ASQUITH, L.J., to deliver the first judgment.

ASQUITH, L.J.: This is an appeal from a decision of His Honour JUDGE PRATT at Torquay County Court fixing by apportionment the rents

of certain flats forming part of a house called "Western House," Torquay. In 1941, the landlord, Mr. Quaife, took a lease of 21 years of that house. Its rateable value was £76, and, therefore, it was outside the limits of the Rent Restrictions Acts for provincial houses. The rent was £140 a year. He altered and adapted the house, turning it into 10 flats of which he kept one and let the others. Three of the persons to whom he sub-let these flats applied for their rents to be fixed by an apportionment of the rateable value of the whole house, and the learned county court judge held that he had jurisdiction to make an apportionment.

There is no dispute about the figures if the apportionment was competent and the sole point in this appeal is whether the judge had jurisdiction to make an apportionment. The provisions of the Acts are two-fold. Section 5 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938, provides that an apportionment may take place in the cases to which that section applies, namely, cases in which both the house as a whole and the parts are within the limits of value set out in the Acts. That section, therefore, has no direct bearing on this case. The other provision dealing with apportionment is s. 12 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and it provides :

"Where, for the purpose of determining the standard rent or rateable value of any dwelling-house to which this Act applies, it is necessary to apportion the rent at the date in relation to which the standard rent is to be fixed . . . the county court may, on application by either party, make such apportionment as seems just, and the decision of the court as to the amount to be apportioned to the dwelling-house shall be final and conclusive."

On the threshold of the case counsel for the landlord was confronted with an adverse decision which appears to be directly in point and binding on this court. That is *Upsons, Ltd. v. Herne* (1). The point taken by counsel for the landlord was that, unless the house as a whole was within the limits of value laid down in the Acts, no application could successfully be made for an apportionment of the rent of the parts sub-let. *Upsons'* case (1) decides (*inter alia*) ([1946] 1 K.B. 591) that : "The dictum of SCOTT, L.J., in *Field v. Gover* (2) suggesting that s. 12 (3) only applies if both the containing building and the contained dwellings were within the Rent Restrictions Acts does not accord with the law as laid down in *Barrett v. Hardy Brothers (Alnwick), Ltd.* (3), which must be treated as binding." Therefore, that appears at first sight to be a decision binding on us, directly in point and completely adverse to the argument addressed to us for the landlord. Counsel for the landlord, however, sought to circumvent that awkward position by praying in aid other decisions of this court which were, in his submission, inconsistent with it, and one of which was not cited to the court when *Upsons, Ltd. v. Herne* (1) was being considered. He relied in part on *Barrett v. Hardy Brothers (Alnwick), Ltd.* (3), to which I have referred, but I do not think that that case assists him. It was a case in which an apportionment was sought of the rateable value of a house the rateable value of which was in excess of the limits covered by the Rent Restrictions Acts, yet it was held that an apportionment was necessary and proper. In his judgment BANKES, L.J., cited a number of decisions and went out of his way to say ([1925] 2 K.B. 223) :

"The result of these decisions undoubtedly is, to use SALTER, J.'s language in *Woodhead v. Putnam* (4), that 'to entitle a tenant to apportionment under s. 12 (3), it is not necessary that the "property" in which the applicant's dwelling-house is "comprised" should itself be a dwelling-house, or should be subject to the Act'."

No comfort can be drawn by the landlord from that decision.

The main decision relied on by counsel for the landlord was *Cole v. Harris* (5), but that was a very different case from the present one. In that case, on Sept. 1, 1939, which the learned judge treated as the material date for the purpose, there were not, as in the present case, a head-lease and sub-leases and sub-rents. The owner in fee simple had let directly to two tenants. The very word "apportionment" necessarily implies that there is a rent for premises as a whole which has to be allocated to smaller units carved out of them and those conditions did not exist in *Cole v. Harris* (5) at what the learned judge held to be the material time. Therefore, there was no rent which was capable of apportionment. The case might further be explained on the basis of the suggestion of counsel for the tenants that it was not necessary to make the apportionment because, at the material time, the owner in fee simple had let direct to Mr. Cole's predecessor on Sept. 1, 1939. The facts of that case are, indeed, remote from this present case, and I do not think there is anything in that decision to qualify the principle laid down in *Upsons'* case (1) which I propose to follow. That principle seems to be fatal to the only contention put forward by the landlord, and for those reasons I think the appeal should be dismissed.

BUCKNILL, L.J. : I agree. I would only add that SOMERVELL, L.J., in *Upsons, Ltd. v. Herne* (1) said in the course of his judgment ([1946] 2 All E.R. 312) :

"I have referred above to *Barrett's* case (3). That case proceeded on the view that s. 12 (3), may apply although the larger property, the rent of which is to be apportioned, is itself outside the Acts and contains premises other than 'dwelling-houses.' Our attention was drawn to a *dictum* by SCOTT, L.J., in *Field v. Gover* (2), in which he was inclined to the view that s. 12 (3) of the 1920 Act only applied if both houses, the containing and the contained, were within the Acts. It does not appear that SCOTT, L.J.'s attention was drawn to *Barrett's* case (3) and the authorities there referred to, and I do not, speaking for myself, think that the *dictum* should be regarded as throwing doubt on the law as laid down in *Barrett's* case (3)."

MORTON, L.J., who had already given his judgment, said (*ibid.*, 313 ; [1946] K.B. 597) :

"I should like to add this, that I agree with the observations made by SOMERVELL, L.J., in regard to the true construction of s. 12 (3) of the Act of 1920, and in regard to the case of *Field v. Gover* (2)."

I draw the conclusion from those remarks of MORTON, L.J., that, if there is, in fact—and I do not think there is—any conflict between his decision in *Cole v. Harris* (5) and his decision in *Upsons, Ltd. v. Herne* (1), his second thoughts were best.

HODSON, J. : I agree.

Appeal dismissed with costs.

Solicitors : *Arnold Carter & Co.*, agents for *Dunn & Baker*, Exeter (for the landlord) ; *Wood, Nash & Co.*, agents for *Kitsons, Hutchings, Easterbrook & Co.*, Torquay, and *Almy & Thomas*, Torquay (for the tenants).

**Re GAITE'S WILL TRUSTS. BANKS AND ANOTHER v.
GAITE AND OTHERS.**

[CHANCERY DIVISION (Roxburgh, J.), February 11, 1949.]

Perpetuities—Gift to the grandchildren of named person living at testatrix's death or born within five years therefrom and attaining 21.

A

By her will a testatrix gave a legacy of £5,000 to trustees on trust to pay the income to H.G. for her life, and directed that "after her death [they] shall stand possessed of both income and capital thereof in trust for such of her grandchildren living at my death or born within five years therefrom who shall attain the age of 21 years or being a female marry under that age in equal shares." She also bequeathed a share of residue

B

on trust "for such of the grandchildren of H.G. as shall be living at my death or born within five years therefrom who shall attain the age of 21 years or being female marry under that age in equal shares."

C

HELD: under the provisions of the Age of Marriage Act, 1929, a child under the age of 16 years could not lawfully be married; therefore, a child of H.G. born after the death of the testatrix could not be lawfully married and have lawful children within five years of the death of the testatrix, and the bequests did not infringe the rule against perpetuities.

[AS TO PRINCIPLES GOVERNING LIMITATION OF CLASS GIFT, see HALSBURY, Hailsham Edn., Vol. 25, pp. 134-141, paras. 229-237; and FOR CASES, see DIGEST, Vol. 37, pp. 98-102, Nos. 342-373.]

D

ADJOURNED SUMMONS to determine whether gifts by will to the grandchildren of a Mrs. Hagar Gaite, living at the date of the testatrix's death or born within five years thereafter and attaining 21 years of age, were void as infringing the rule against perpetuities.

E

The testatrix made her will on Mar. 14, 1947, and died on Nov. 9, 1947. Mrs. Hagar Gaite, who was entitled to a life interest under the will, survived the testatrix and at the date of the summons was aged 67 years and a widow, her husband having predeceased the testatrix. She had two children living at the date of the testatrix's death, and one grandchild, who was born on May 27, 1939. ROXBURGH, J., held that, if Mrs. Gaite had a child after the death of the testatrix, quite apart from any question of physical possibility, it would be impossible for that child to have lawful issue within the five years' limit set by the will because, having regard to the Age of Marriage Act, 1929, s. 1, it could not legally marry within that time, and the rule could not, therefore, be infringed.

F

W. F. Waite for the plaintiffs, the trustees of the will.

Boraston for the first defendant, the grandchild.

G

R. W. Goff for the second and remaining defendants, persons interested under the will or on intestacy.

ROXBURGH, J.: The testatrix gave a legacy of £5,000 to trustees on trust to pay the income to a Mrs. Hagar Gaite for life and directed:

H

"... and after her death [they] shall stand possessed of both the income and capital thereof in trust for such of her grandchildren living at my death or born within five years therefrom who shall attain the age of 21 years or being a female marry under that age in equal shares."

She also bequeathed a share of residue in trust:

"... for such of the grandchildren of Mrs. Hagar Gaite as shall be living at my death or born within five years therefrom who shall attain the age of 21 years or being female marry under that age in equal shares."

The question is whether the reversionary trusts in the case of the legacy and

those immediate trusts of a share of residue infringe the rule against perpetuities.

I must assume that Mrs. Hagar Gaite, who was alive at the date of the death of the testatrix, might have had a child within five years after the death of the testatrix. What is impossible is that that child of Mrs. Hagar Gaite, *ex hypothesi* born after the death of the testatrix, could itself have had a child within that period of five years, and that is essential to qualify for membership of the class. I do not base my judgment on physical impossibility. I leave all questions of that sort open for consideration when they arise because the matter is, in my judgment, concluded—and counsel for the second defendant admitted it was concluded—by the Age of Marriage Act, 1929, s. 1 (1), which provides :

“A marriage between persons either of whom is under the age of sixteen shall be void.”

Ex hypothesi, the child of Mrs. Hagar Gaite born after the death of the testatrix must be under the age of 16 years at the expiration of five years from the death of the testatrix, and, therefore, that child could not lawfully be married and have lawful children. In construing the rule, I must have regard to the statute law of England, and, therefore, I hold that the rule is not infringed.

Bequests declared to be good. Costs to be taxed as between solicitor and client and paid out of the estate in due course of administration.

Solicitors: *Kenneth Brown, Baker, Baker* (for the plaintiff, and the defendants, except the first); *Vizard, Oldham, Crowder & Cash* (for the first defendant).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

Re MULHOLLAND'S WILL TRUSTS. BRYAN AND OTHERS v. WESTMINSTER BANK LTD.

[CHANCERY DIVISION (Wynn-Parry, J.), February 10, 11, 1949.]

Trustee—Profit from trust—Contract entered into before creation of fiduciary relation—Sale to trustee of trust property—Lease to bank with option to purchase—Appointment of bank as lessor's executor and trustee—Option exercised by bank after death of lessor.

By a lease, dated Sept. 1, 1936, the testator demised to a bank certain property for a term of 21 years from Mar. 31, 1936, the lease providing that the bank should have an option to purchase the demised premises subject to the conditions that (1) the option should not be exercisable in the testator's lifetime without his consent, and (2) that, if the testator should die during the term created by the lease, the option should be exercisable by the bank at the price of £2,500 on not less than three calendar months' notice in writing. By his will, dated July 26, 1937, the testator, who died on Mar. 28, 1942, appointed the bank and his widow to be his executors and trustees. By a notice in writing, dated July 11, 1946, the bank exercised the option to purchase granted by the lease, and the property was conveyed to the bank by the bank and the widow on July 31, 1947. Beneficiaries under the will sought to have the conveyance set aside.

HELD: the only contract between the parties was that constituted by the provisions in the lease; the notice exercising the option did not lead to the creation of any fresh contractual relationship between them, nor did it bring into existence any right in addition to that conferred by the option; therefore, the only contractual right was created before the fiduciary relationship arose, and, as the testator could not annul his

contract simply by appointing the bank as executor, the bank was entitled to exercise the option and the conveyance must stand.

Vyse v. Foster (1874) (L.R. 7 H.L. 318) and *dictum* of JESSEL, M.R., in *London and South Western Ry. Co. v. Gomm* (1882) (20 Ch.D. 582; 46 L.T. 452), *applied*.

Aberdeen Ry. Co. v. Blaikie Brothers (1854) (1 Macqueen 461, 23 L.T.O.S. 315) and *Wright v. Morgan* ([1926] A.C. 788; 135 L.T. 713), *distinguished*.

[AS TO SETTING ASIDE A PURCHASE BY A TRUSTEE, see HALSBURY, Hailsham Edn., Vol. 33, pp. 285-287, para. 501; and FOR CASES, see DIGEST, Vol. 43, pp. 778-785, Nos. 2189-2250.]

Cases referred to :

(1) *Aberdeen Ry. Co. v. Blaikie Brothers*, (1854), 1 Macqueen 461; 2 Eq. Rep. 1281; 23 L.T.O.S. 315; 10 Digest 1176, 8339.

(2) *Vyse v. Foster*, (1874), L.R. 7 H.L. 318; *affgm.*, (1872), 8 Ch. App. 309; 27 L.T. 774; 43 Digest 916, 3571.

(3) *Hordern v. Hordern*, [1910] A.C. 465; 102 L.T. 867; 43 Digest 90, 946.

(4) *Re Lewis*, (1910), 103 L.T. 495; 43 Digest 774, 2142.

(5) *Re Macadam*, [1945] 2 All E.R. 664; [1946] Ch. 73; 173 L.T. 395;

2nd Digest Supp.

(6) *Wright v. Morgan*, [1926] A.C. 788; 135 L.T. 713; 43 Digest 781, 2218.

(7) *London and South Western Ry. Co. v. Gomm*, (1882), 20 Ch.D. 562; 46 L.T. 449; 11 Digest 286, 2141.

WITNESS ACTION.

The plaintiffs, beneficiaries under the will of Thomas Ambrose Mulholland, deceased, claimed an order setting aside a conveyance dated July 31, 1947, and made between the defendant bank and the testator's widow (who were together the executors and trustees of the testator's will), of the one part, and the bank, of the other part, whereby certain property, of which the bank was lessee, was conveyed to the bank on the exercise by the bank of an option to purchase contained in the lease. The plaintiffs also claimed delivery of the conveyance for cancellation, and an account of the rents and profits. WYNN-PARRY, J., held that the bank was entitled to exercise its option and that the conveyance must stand. The facts appear in the judgment.

Upjohn, K.C., and *Danckwerts* for the plaintiffs, the widow (an executor and trustee) and the children of the testator.

Milner Holland, K.C., and *Harold Brown* for the bank.

WYNN-PARRY, J.: This is an action brought by the plaintiffs as beneficiaries under the will of the testator, Thomas Ambrose Mulholland, against the defendants, Westminster Bank Ltd., one of the two executors and trustees of the testator, for an order setting aside a conveyance dated July 31, 1947, by which certain freehold property forming part of the estate of the testator was conveyed to the bank.

By a lease, dated Sept. 1, 1936, the testator leased to the bank certain property known as 173, College Road, Great Crosby, Lancashire, for the term of 21 years from Mar. 31, 1936. By the lease it was provided that the bank should have the option to purchase the demised premises as an estate in fee simple in possession free from incumbrances subject to two conditions (i) that the option should not be exercisable during the life of the testator without his consent, and (ii) that, if the testator should die during the term created by the lease, the bank should have the option to purchase at the price of £2,500 by giving not less than three calendar months' notice in writing of such intention at the expiration of the year in which the testator should die or at the expiration of any subsequent year. By his will, dated July 26, 1937, the testator appointed the bank and his widow, the fourth plaintiff, to be the executors and trustees of his will, and declared that the bank should be entitled to remuneration in

addition to the customary share of brokerage in accordance with the bank's scale of fees then in force free from duties, and, further, that the bank should, without being liable to account for any profit made thereby, be entitled to act as banker and transact any banking or allied business on behalf of his estate on the same terms as would be made with a customer in the ordinary course of business. He settled his residuary estate on trust for his widow for life and directed that on her death it should be divided among his children who should survive him and attain 21 years of age. The testator had three children, all daughters, who survived him and attained the age of 21, and they are the first three plaintiffs. The testator died on Mar. 28, 1942, and his will was proved by the bank and his widow on Sept. 25, 1942, in the District Probate Registry at Liverpool. By a notice in writing, dated July 11, 1946, the bank exercised the option to purchase granted by the lease. After considerable correspondence between the bank's solicitors and a firm of solicitors acting on behalf of the trustee department of the bank and the widow, as the executors and trustees, as to the requisitions on title, the content and scope of the property, rights to be conveyed and assured, and other similar matters, the property in question was conveyed to the bank by a conveyance dated July 31, 1947, made between the bank and the widow, of the one part, and the bank, of the other part. The point, taken at one time, that the notice of July 11, 1946, did not comply with the terms of the option was not pressed, and the validity of the notice was not disputed.

It was contended that the plaintiffs, as beneficiaries under the will, were entitled to have the conveyance set aside because at the date when the bank exercised the option they were trustees of the property the subject-matter of the option; that, as trustees, they were not entitled to place themselves in a position where their duty and their interests conflicted; and, therefore, having accepted the executorship and trusteeship, they had effectively precluded themselves from exercising the option. Reliance was placed on the well-known passage of LORD CRANWORTH, L.C., in *Aberdeen Ry. Co. v. Blaikie Brothers* (1), where he said (1 Macqueen 471):

"A corporate body can only act by agents, and it is of course the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their principal. And it is a rule of universal application, that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect. So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into. It obviously is, or may be, impossible to demonstrate how far in any particular case the terms of such a contract have been the best for the interest of the *cestui que trust*, which it was possible to obtain. It may sometimes happen that the terms on which a trustee has dealt or attempted to deal with the estate or interests of those for whom he is a trustee, have been as good as could have been obtained from any other person,—they may even at the time have been better. But still so inflexible is the rule that no inquiry on that subject is permitted. The English authorities on this head are numerous and uniform . . . It is true that the questions have generally arisen on agreements for purchases or leases of land, and not, as here, on a contract of a mercantile character. But this can make no difference in principle. The inability to contract depends not on the subject-matter of the agreement, but on the fiduciary character of the contracting party, and I cannot entertain a doubt of its being applicable to the case of a party who is acting as manager of a mercantile or trading business for the benefit of

others, no less than to that of an agent or trustee employed in selling or letting land."

The principle which emerges from those passages is that the existence of the fiduciary relationship creates an inability in the trustee to contract in regard to the trust property. The case, as I read it, does not touch the position arising where the contract in question has been brought into existence before the fiduciary relationship. That in such a case the trustee is not precluded by the subsequent fiduciary relationship from asserting his rights under the pre-existing contract emerges clearly from such cases as *Vyse v. Foster* (2), *Hordern v. Hordern* (3), *Re Lewis* (4) and *Re Macadam* (5).

In *Vyse v. Foster* (2) the question arose because a deceased partner in a partnership, the partnership agreement governing which contained a provision that the surviving partners should purchase the share of the deceased partner on terms set out in the deed, appointed a surviving partner his executor and trustee. In the course of his opinion LORD CAIRNS, L.C., said (L.R. 7 H.L. 332):

"My Lords, in point of fact the testator appointed as one of his executors one of his partners, Mr. Henry Vyse. I apprehend it to have been perfectly clear that the testator could not, by appointing one of his partners as his executor, annul that partnership contract which he had deliberately entered into. I cannot admit that it was necessary for the person so appointed executor to disclaim the executorship in order to save his contract. In the view, at least, of a Court of Equity, I apprehend that the contract remained in full vigour, even although there might, from the peculiar position of the executor as a surviving partner, be reasons for watching narrowly the course which he would take with regard to the fulfilment of the contract."

To meet this point, counsel for the plaintiffs relied on *Wright v. Morgan* (6) the headnote of which is:

"The owner of two estates in New Zealand, known as Surrey Hills and Windermere, provided by his will that they should be offered at valuations, made as therein directed, to the testator's son H.H.W., who was one of the trustees under the will. After the death of the testator, H.H.W. sold and conveyed his rights under the will, including his right to purchase the estates, to D.W., another son of the testator, also one of the trustees. In 1907 the trustees sold Surrey Hills at a valuation, made as provided, to D.W., as being entitled to exercise the option. In 1908 Windermere, including land known as Chapman's Block, which had been bought by the trustees without authority, was similarly sold to D.W. The farming stock on each estate was separately valued and included in the sale, though not referred to in the will. At the date of sale of Windermere D.W. had ceased to be a trustee, but he had arranged the sale before retiring from the trust. In 1922 an action was brought to set aside the sales to D.W., for an account of profits and payments to the trust:—*Held*, that the sales must be set aside, as the trustees could not sell to one of themselves without a conflict of duty and interest arising."

That case appears to me, on its facts, to be materially different from the present case. In the first place, the right given by the will was only a right to have the property in question offered. In the second place, the right in question was not a contractual right, but it arose under the will. In the third place, the person who purported to exercise the right was not the person to whom the right was given, and, in the fourth place, whereas the time at which the right might be exercised might well be a matter of considerable importance, the same cannot be said as regards the option in the present case, because

everything essential was provided in the option at the time of making it, and it could make no difference, so far as the estate of the testator is concerned, when, if at all, the bank should exercise the right. Then it was said that the option here amounted to no more than an offer by the testator which, as consideration had passed, could not be withdrawn; that, if the option should be exercised, the offer would be accepted and a contract to purchase would spring into existence; but that at the date of that contract the fiduciary relationship had come into existence and, therefore, the bank was not entitled effectively to exercise the option.

I do not attempt to state any proposition which will necessarily apply to every type of option. I am dealing in the present case with an option to purchase land, and I confine myself to that type of option. It must be remembered that an option such as this confers an immediate equitable interest in the land which is the subject of the option: see *London and South Western Ry. Co. v. Gomm* (7), and that equitable interest is one which is capable of being registered under the Land Charges Act, 1925, s. 10, class C, sub-para. (iv), which provides that the following class of charge can be registered:

"Any contract by an estate owner or by a person entitled at the date of the contract to have a legal estate conveyed to him to convey or create a legal estate, including a contract conferring either expressly or by statutory implication a valid option of purchase, a right of pre-emption or any other like right (in this Act referred to as 'an estate contract')."

The nature of such an option was considered by SIR GEORGE JESSEL, M.R., in *London and South Western Ry. Co. v. Gomm* (7), where he said (20 Ch.D. 582):

"Now is there any substantial distinction between a contract for purchase, or an option for purchase, and a conditional limitation? Is there any difference in substance between the case of a limitation to A. in fee, with a proviso that whenever a notice in writing is sent and £100 paid by B. or his heirs to A. or his heirs the estate shall vest in B. and his heirs, and a contract that whenever such notice is given and such payment made by B. or his heirs to A. or his heirs, A. shall convey to B. and his heirs? It seems to me that in a court of equity it is impossible to suggest that there is any real distinction between these two cases."

As I understand that passage, it amounts to this, that, as regards this option, there was between the parties only one contract, namely, the contract constituted by the provisions in the lease which I have read creating the option. The notice exercising the option did not lead, in my opinion, to the creation of any fresh contractual relationship between the parties, making them for the first time vendors and purchasers, nor did it bring into existence any right in addition to the right conferred by the option. The notice amounted to no more than the exercise by the bank of a right conferred by the option in 1936. If that be the true position, it must follow that, the only contractual right having been created before the fiduciary relationship arose, the principle underlying *Vyse v. Foster* (2) and the other cases following it must apply. For these reasons the bank was entitled, notwithstanding its acceptance of the executorship and trusteeship of the testator's will, to exercise the option, the conveyance must stand, and the action must be dismissed with costs.

Order accordingly.

Solicitors: *Lightbounds, Jones & Co.*, agents for *Bryan & Co.*, Liverpool (for the plaintiffs); *Potter, Sandford & Co.*, agents for *W. T. Husband & Son*, Liverpool (for the bank).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

BEAMAN v. A.R.T.S., LTD.

[COURT OF APPEAL (Lord Greene, M.R., Somervell and Singleton, L.JJ.), January 12, 13, 14, 17, February 14, 1949].

Limitation of Action—Postponement of limitation period—Conversion—“ Action based on fraud ”—“ Right of action concealed by fraud ”—Bailment of goods—Owner abroad during war—Bailee’s business closing down—Goods given away as worthless—Owner not notified—Limitation Act, 1939 (c. 21), s. 26 (a), (b).

In 1935, before going abroad, the owner of four packages deposited them with a company for storage. Storage charges were paid until 1938, and the owner intimated to the company that the packages were of value to her. She was prevented by the war from returning to England and in January, 1940, she wrote to the company from Turkey asking it to send the packages to her at Athens where she would go to collect them, but, owing to the entry of Italy into the war, this became impossible. The company, being Italian-controlled, wished to close down its business and in August, 1940, without informing the owner, it examined the contents of the packages and, deciding that they were worthless, gave them to the Salvation Army. It made no attempt, then or subsequently, to communicate with the owner and made no full entry in its books regarding what had been done with the goods. In 1946, the owner returned to England and claimed the packages. On Nov. 20, 1946, after being informed of the position, she started an action against the company for damages for conversion. The company pleaded the Limitation Act, 1939, s. 2 (1) (a), but it was contended by the owner under s. 26 of the Act that the period of limitation was postponed because the action was “ based upon the fraud ” of the company or “ the right of action was concealed by [its] fraud,” within the meaning of s. 26 (a) and (b) respectively.

HELD: (i) proof of fraud was not a necessary ingredient in an action for conversion, and, therefore, the present action was not “ based upon fraud ” within the meaning of s. 26 (a) of the Act of 1939.

(ii) the word “ fraud ” in s. 26 (b) was not confined to fraud which was in its nature sufficient to give rise to an independent cause of action, but had the same meaning as in the Real Property Limitation Act, 1833, s. 26, and in equity, and there could be fraudulent concealment of a right of action which was not subsequent to the act which gave rise to the right of action, but acquired its character from the manner in which that act was performed.

(iii) on the facts, the company’s conduct, by the manner in which it converted the owner’s chattels in breach of the confidence reposed in it and in circumstances calculated to keep her in ignorance of the wrong which it had committed, amounted to a fraudulent concealment of the owner’s right of action within the meaning of s. 26 (b), and, therefore, the period of limitation was postponed under that paragraph of the section.

Principles in Bulli Coal Mining Co. v. Osborne ([1899] A.C. 351; 80 L.T. 430) and *Re McCallum* ([1901] 1 Ch. 143; 83 L.T. 717), applied.

Decision of DENNING, J. ([1948] 2 All E.R. 89), reversed.

[FOR THE LIMITATION ACT, 1939, ss. 3 and 26, see HALSBURY’S STATUTES, Vol. 32, pp. 226 and 240.]

Cases referred to:

- (1) *Bulli Coal Mining Co. v. Osborne*, [1899] A.C. 351; 80 L.T. 430; 32 Digest 524, 1798.
- (2) *Re McCallum*, [1901] 1 Ch. 143; 83 L.T. 717; 32 Digest 521, 1777.

APPEAL by the plaintiff from a judgment of DENNING, J., dated May 12,

1948, and reported [1948] 2 All E.R. 89, in an action for damages for conversion.

The action was brought more than six years after the date of the conversion and the defence was that the cause of action accrued at the date of conversion and, accordingly, the action was barred by the Limitation Act, 1939, s. 2 (1). The plaintiff claimed that the action was "based upon the fraud" of the defendants or that the right of action was concealed by their fraud, within the meaning of s. 26 (a) and (b) of the Act, so that the period of limitation did not run until she had discovered the fraud. DENNING, J., held that there was no fraud within the meaning of s. 26, and that the action was barred. The Court of Appeal now held that the plaintiff's right of action was concealed by the fraud of the defendants, within the meaning of s. 26 (b), and allowed the appeal. The facts appear in the judgment.

Patrick O'Connor for the plaintiff.

Aiken Watson, K.C., and *H. J. Baxter* for the defendants.

Cur. adv. vult.

Feb. 14. The following judgments were read.

LORD GREENE, M.R. : The Limitation Act, 1939, is described in its title as "an Act to consolidate with amendments" certain earlier enactments. It must not be construed as though its object was simple consolidation. In many important respects it alters the law. For example, the appropriate period of limitation in the present appeal, which arises out of an action of conversion, is, as before, six years, but s. 3 (2) goes further and extinguishes title to the "converted" chattels. All this, however, is subject to s. 26, which is the section immediately relevant to the present question. It runs as follows :

"Where, in the case of any action for which a period of limitation is prescribed by this Act, either (a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent, or (b) the right of action is concealed by the fraud of any such person as aforesaid, or (c) the action is for relief from the consequences of a mistake, the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it . . ."

There follows a proviso in favour of *bona fide* purchasers for value. The only question raised in the present appeal is whether the plaintiff's cause of action, which arose on Aug. 14 or 15, 1940, became barred at the end of six years or is preserved by para. (a) or by para. (b) of s. 26. It is not suggested that six years have elapsed since the plaintiff discovered the fraud of which she contends the defendants were guilty or since she could with reasonable diligence have discovered it. DENNING, J., held that neither of the two paragraphs applied and dismissed the action.

The defendants were bailees for the plaintiff of four cases containing chattels belonging to her, which with their contents were admittedly converted by the defendants. It was agreed at the trial that if, despite the statute, the plaintiff should establish liability, the question of damages should be referred to an official referee. Accordingly, the value of the contents of the cases was not fully examined at the trial, although the plaintiff stated in evidence that they included jewellery and clothes and were of substantial value. The defendants, on the other hand, led evidence to the effect that the contents of the cases were, in their opinion, of no value and that in the circumstances they were justified in giving them away to the Salvation Army, together with the cases. Admittedly, they took no steps to obtain any independent opinion as to the value of the goods, and made no lists or record of them. Whatever the pecuniary value of the chattels may have been, the defendants were well

aware that the plaintiff herself attached value to them, and, moreover, however trifling or non-existent their pecuniary value may have been, even if they had no more than a sentimental value, the duty of the defendants to keep them in safe custody was not in the least affected, and in the circumstances they had no right whatever to give them away, as they did, without the consent of the plaintiff. There was no shadow of justification for what they did, and the suggestion that they had in mind the interest of the plaintiff herself in saving her the cost of storage is, in my judgment, a disingenuous suggestion, as will presently appear.

It was argued on behalf of the plaintiff that the action was an action based on fraud in that the conversion was (it was claimed) a fraudulent one and that, accordingly, s. 26 (a) of the Act of 1939 applied. DENNING, J., held that for an action to be "based upon the fraud of the defendant" it was not necessary that fraud should be an ingredient essential to the cause of action, but he held that the allegation that the conversion itself was a fraudulent one had not been established. In my opinion, the plaintiff's argument under s. 26 (a) fails on the ground (not accepted by DENNING, J.) that the action is not based on fraud. It must be borne in mind that s. 26 is a section of general

application. It applies to every sort of action which is affected by the Act. Of these many can properly be said to be based on fraud, *e.g.*, an action for damages for deceit and an action claiming rescission of a transaction brought about by fraud. In all such cases fraud is a necessary allegation in order to constitute the cause of action. In other actions covered by the Act fraud is not a necessary allegation at all and the action of conversion is one of them.

Indeed, the word "fraudulent" in connection with conversion, however important it may be in a criminal matter, is, in the civil action of conversion, so far as regards the cause of action, nothing more than an abusive epithet. I am of opinion, therefore, that the language of s. 26, para. (a), means what it says and that the action was not based on fraud.

As I take this view, the observations of DENNING, J., on what conduct will cause an action of conversion to become an action based on fraud for the purposes of para. (a) do not call for consideration, but, on the quite different question whether the right of action was "concealed by the fraud" of the defendants, I must examine closely the facts of the case which bear on the conduct of the defendants. It will be found that I take a different view of the facts from that taken by DENNING, J. When the relevant facts are

considered in their proper perspective, the conduct of the defendants did, in my opinion, amount to a fraudulent concealment of the cause of action. DENNING, J., having found that the actions of the defendants were not fraudulent so as to make the action one "based upon . . . fraud," only found it necessary to consider s. 26 (b) on the assumption that the conversion was in its origin an innocent one, and that, unless there was some subsequent

fraudulent concealment, para. (b) would not apply. I may say at once that no subsequent active concealment of a fraudulent nature is relied on. This, however, does not mean that the defendants' failure to make any attempt to inform the plaintiff of what they had wrongfully done with her property is, in the circumstances, to be disregarded. It must be interpreted in relation to their previous actions.

There may, in my opinion, be fraudulent concealment of a right of action which is not subsequent to the act which gives rise to the right of action. It may acquire its character as such from the very manner in which that act is performed. It is not, I think, a right construction of the statute of 1939 to confine fraudulent concealment to what counsel for the defendants described as "fraud in the ordinary sense." This, as far as I understood him, meant fraud which in its nature is sufficient to give rise to an independent cause of action. This definition would exclude the wide range of conduct which before

the statute was regarded in equity as so dishonest as to prevent the statute of limitations (or its analogous application in equity) from coming into operation. As this is an amending statute, it would, of course, have been open to the legislature to effect so sweeping a change in the law. If it had done so, a striking result would have followed. Provided an action was not based on fraud and provided there was not any subsequent active concealment of a fraudulent nature, the wrongdoer would have obtained the benefit of the statute, however furtively or surreptitiously the act complained of was committed. The manner in which equity treated, for example, a tort surreptitiously committed when the statute of limitations (or its analogous application) was pleaded, is illustrated by the case of the secret abstraction of underground minerals. In *Bulli Coal Mining Co. v. Osborne* (1) the Privy Council had to consider such a case. If the appellant in that case had merely been guilty of trespass, the ordinary six-years period of limitation would have applied, but the very manner in which the trespass was committed was a surreptitious one. LORD JAMES OF HEREFORD, delivering the judgment of the Board, said ([1899] A.C. 363) :

“The contention on behalf of the appellants that the statute is a bar unless the wrongdoer is proved to have taken active measures in order to prevent detection is opposed to common sense as well as to the principles of equity. Two men, acting independently, steal a neighbour's coal. One is so clumsy in his operations, or so incautious, that he has to do something more in order to conceal his fraud. The other chooses his opportunity so wisely, and acts so warily, that he can safely calculate on not being found out for many a long day. Why is the one to go scot-free at the end of a limited period rather than the other? It would be something of a mockery for courts of equity to denounce fraud as ‘a secret thing,’ and to profess to punish it sooner or later, and then to hold out a reward for the cunning that makes detection difficult or remote.”

DENNING, J., in his judgment did not in terms deal with the question of fraudulent concealment as implicit in the technique adopted in committing the tort, and, therefore, contemporaneous with it, but his finding on the question of conversion based on fraud would, I think, have led him to the conclusion that no such fraudulent concealment took place. He absolved the defendants of the dishonesty or moral turpitude which he held to be an essential element, and his reasons appear from the following passage ([1948] 2 All E.R. 94) :

“It is necessary to recapture the atmosphere of 1940. Goods and chattels were then of small concern compared to the lives of men. I think the defendants quite honestly said to themselves : ‘It is useless keeping these things lying in store any longer, with storage charges running up, doing no good to anyone, and in danger of being destroyed by the enemy. The goods do not seem to be of any real value. They have been left here for years. The owner, when we last heard from her was in Turkey, but goodness knows what she is doing now or where we can get hold of her . . . The best thing to do is to give them away to the Salvation Army where they may be of some good to somebody.’ Such conduct is not, to my mind, dishonest. It does not involve any moral turpitude.”

With all respect, I cannot accept this paraphrase as an accurate presentation of the facts. It contains matters which, I am bound to confess, are, to my mind, irrelevant and it omits matters which appear to me to be of crucial importance. For example, I must respectfully suggest that the statement that goods and chattels were then of small concern compared with the lives of men is irrelevant since no question of the lives of men arose. Moreover, during the war vast quantities of chattels were placed in the safe custody of bailees and kept faithfully in places exposed to danger as great as, if not greater than,

these chattels of the plaintiff. The risk that they might be destroyed by the enemy was the plaintiff's risk, not the defendants'. DENNING, J., appears to have underestimated the readiness with which people deceive themselves into thinking their actions are honest, especially when their own interests are involved. He does not refer to the important commercial interest which the defendants had in acting as they did, and that appears to me to have misled him into accepting the protestations of the defendants' witnesses at their face value. The action of the defendants was initiated by a consideration of their own interests. They were anxious to close down their business as rapidly as possible, and the presence of the plaintiff's chattels in store with Thomas Cook & Son, Ltd., on behalf of the defendants was an embarrassment of which they were obviously anxious to rid themselves. If, indeed, they formed the opinion that it would be beneficial to the plaintiff as well as to themselves, that belief was entertained with a recklessness which I can only attribute to self-deception on their part. They would, no doubt, be shocked to hear their conduct described as fraudulent. That is, however, quite immaterial. No amount of self-deception can make a dishonest action other than dishonest, nor does an action which is essentially dishonest become blameless because it is committed with a good motive. It is goodness of motive that the learned judge ascribes to the defendants, and this seems to me to be the best that can be said for them on any view.

I will state the relevant matters as they appear to me. The defendants were bailees, and their duty was faithfully to perform their obligations as bailees wherever at any given moment the bailor happened to be living, and whatever the difficulty of communicating with her might appear to be. They must have known that the bailor was reposing confidence in them and the war was no excuse whatever for them to think otherwise. They must have known that the last thing the bailor would suppose was that they would be unfaithful to the confidence reposed in them. They must have known that by reason of that confidence there would be no reason for her to inquire whether or not they were being unfaithful to it. If on any ground they thought it desirable to deal with the plaintiff's goods in some manner inconsistent with their duties as bailees, she would rightly expect that they would communicate with her before doing so. Yet they made not the slightest effort to do so. [His LORDSHIP reviewed the evidence and continued :—] The defendants' principal purpose, if not their sole real purpose, in getting rid of the plaintiff's goods was to obtain for themselves the commercial advantage of being able to close down their business. In breach of their duty as bailees to communicate with the plaintiff before converting her goods, they recklessly and without making the slightest effort to ascertain the true position assumed that communication was impossible, and it is noticeable that, even after the Mediterranean was opened in 1943 on the surrender of Italy, they made no attempt to let the plaintiff know what they had done. They recklessly and without taking the least trouble to verify the facts assumed (what was false and on a simple examination of the records would have been shown to be false) that the plaintiff had not troubled about her goods, and that large storage charges had mounted up and would continue to mount up which the plaintiff would be unable to pay. They recklessly formed the opinion that the goods were valueless without having any independent valuation and in disregard of the fact (which, as bailees carrying on business as such, they must have known) that the absence of pecuniary value could afford no justification for disregarding their obligations. And all this they did when they must have known that the plaintiff (particularly in the circumstances brought about by the war) would be relying on them to be faithful to their trust, and for that reason would be the less likely to make inquiries as to what had happened to her property. I see no reason why, if she had had any reason to doubt the integrity of the defendants, she should

not have initiated inquiries much earlier than she did, and before she returned to this country. Had she done so, she would have been able to serve her writ before the six years had run. Quite apart from their failure to inform the plaintiff of what they had done, they made no proper entry in their own books of what they had done with the goods. All that their one entry showed was that they had been given away. It did not say to whom. This failure to make a proper record was the cause of delay in tracing what had been done with the goods when the plaintiff came to claim them. A

I am of opinion that the conduct of the defendants, by the very manner in which they converted the plaintiff's chattels in breach of the confidence reposed in them and in circumstances calculated to keep her in ignorance of the wrong that they had committed, amounted to a fraudulent concealment of the cause of action. When she came to claim her goods she expected to find them waiting for her. The fact that she did so expect was due to the manner in which the defendants had chosen to act. This, in the circumstances, can, in my opinion, only be described as furtive and surreptitious. The appeal is allowed. B

SOMERVELL, L.J.: The first question is whether a claim in conversion can come within the words of the Limitation Act, 1939, s. 26 (a). The learned judge thought such a claim might be within the words if, in fact, fraud was involved. I construe the words "the action is based upon the fraud of the defendant" as covering any proceeding in a court of law, including an ecclesiastical court (see s. 31), in which fraud has to be proved for the plaintiff to succeed. There may, perhaps, be equitable claims in which there would be scope for argument whether the claim was based on fraud. In an action at common law for conversion, fraud is not a necessary or relevant allegation and such an action is not, in my opinion, based on fraud. The plaintiff, therefore, must succeed, if at all, by showing that the right of action was concealed by the fraud of the defendants or their agents within the meaning of s. 26 (b). I think "fraud" in s. 26 (b) should have the same meaning as "fraud" in the Real Property Limitation Act, 1833, s. 26, and in the general equitable principles on which this section of the Act is based and which it extends. Where a word has been construed judicially in a certain legal area, it is, I think, right to give it the same meaning if it occurs in a statute dealing with the same general subject-matter, unless the context makes it clear that the word must have a different construction. I find no words pointing to a different construction, and, therefore, the principles laid down in, e.g., *Re McCallum* (2) are applicable. In considering what "concealment" has to be established under para. (b) of s. 26, assistance is, for the same reason, obtainable from a case such as *Bulli Coal Mining Co. v. Osborne* (1), where general equitable principles on this topic were considered by the Privy Council. C D E F

[HIS LORDSHIP stated the facts and continued:—] As I have said, the learned judge regarded s. 26 (a) of the Act of 1939 as covering a case of conversion if the facts established that it was a fraudulent conversion, within, I assume, the criminal law. In dealing with the case on this basis, the learned judge gives his reasons for coming to the conclusion that the defendants through their servants acted honestly. It is necessary to consider these as they are relevant to the question whether there was fraud within the meaning of s. 26 (b). The only possible inference from the evidence, in my opinion, was that the defendants' business was closing down. They wanted, therefore, to get rid of the goods. They did what they did for their own convenience and with complete disregard of the value which the plaintiff, as shown by her letter of seven months before, attached to her property. The learned judge said that there must be some element of moral turpitude for conduct to be held to be fraudulent. On the whole, I prefer to confine myself to seeking to apply the word "fraud" as construed in the cases to which I have referred. If G H

necessary, I would hold that on the evidence as accepted by the learned judge, and having regard to the obligations undertaken and re-affirmed by the defendants, there was moral turpitude. What was done was, in my opinion, a fraud on the plaintiff within the meaning of "fraud" in s. 26 of the Act of 1939, applying the principle laid down in *Re McCallum* (2). I appreciate that servants of the company may have thought that the plaintiff might never come to claim these goods or that after the war they might be of no value to her or of less value than the storage charges. I think that any reasonable person, directing himself to the facts as known, would have realised that the defendants had no right to give away the plaintiff's goods and that it was dishonest to do so.

There remains the question whether the cause of action was concealed by the fraud. If Y. undertakes to store and keep the goods of X., X. is clearly entitled to assume that Y. will not give them away. If Y. does so without communicating with X., he, as it seems to me, brings himself within the principle laid down in *Bulli Coal Mining Co. v. Osborne* (1). That case decided that it was not necessary that the wrongdoer should have taken steps to prevent detection. Regard must be had to the nature and character of the act.

A wrongdoer who "chooses his opportunity so wisely and acts so warily that he can safely calculate on not being found out for many a long day," cannot claim the advantage of the limitation period. This seems to me to apply and to be unaffected by the fact, which I will assume in the defendants' favour, that they believed it was impossible at that time to communicate with the plaintiff. The conclusion is reinforced by the fact that no inquiries were made

as to the possibility of communicating with the plaintiff at her address in Turkey in 1940, nor was any communication sent to that address after Italy surrendered in 1943. I differ from the learned judge not, I think, on any question of whose evidence should be accepted, but rather as to what matters are relevant in considering whether what was done amounted to fraud within the meaning of the section. In the earlier part of his judgment the learned judge gave a brief account of the old forms of action for detinue and trover and the modern causes of action for wrongful detention and conversion. As he stated, he attempted no precise definition, and it is unnecessary to consider what he said in detail. Some of the statements made might, I think, be found to need qualification. I agree that the appeal succeeds.

SINGLETON, L.J. : These facts are not in dispute. (i) The defendants were bailees for reward of certain goods belonging to the plaintiff. (ii) The plaintiff had paid storage charges on them until 1938. She attached value to them and wished them to be sent to her in Greece (see her letter of Jan. 31, 1940). (iii) The parties were in fairly regular correspondence until February, 1940. On Oct. 27, 1938, the defendants had written "during our last inspection of the packages they seemed to be in perfect order." (iv) The plaintiff was unable to return to England owing to the war. (v) On Aug. 14, 1940, the defendants gave instructions for the four packages to be delivered to the Salvation Army. (vi) Three of the packages were delivered to the Salvation Army on Aug. 15, 1940. One trunk was delivered elsewhere for Mr. Ingram, a shipping clerk of the defendants, who dealt with the matter. There is no record of the nature of the goods delivered to the Salvation Army except that they were three packages. (vii) The defendants did not tell the plaintiff what they had done with her goods. They did not make any attempt to communicate with her, either before or after they disposed of the goods. (viii) Towards the middle of 1946 the plaintiff returned to England and tried to find her goods, without success. Thereafter letters on her behalf were written on Aug. 29, Sept. 3, and Oct. 10, 1946. The defendants wrote on Oct. 22, 1946, a letter which was quite inaccurate except that it did state that the goods had been sent to the Salvation Army. (ix) It was not until the trial of the action

(May, 1948) that Mrs. Beaman learnt that one of her trunks had been taken by Mr. Ingram for his own use.

The writ was issued on Nov. 20, 1946. The claim was for damages for conversion. The conversion took place on or about Aug. 15, 1940. The claim is barred by the Limitation Act, 1939, unless it is within the terms of s. 26. I do not think that the case falls under s. 26 (a). Conversion includes fraudulent conversion, but an action for conversion is not "based upon" fraud. It becomes necessary to consider s. 26 (b) and to ascertain whether the right of action was concealed by the fraud of the defendants or their agents. It is clear that the disposal of the plaintiff's goods was for the defendants' purposes entirely. Maybe they wished to avoid, as they thought, further responsibility for the goods, though it must not be overlooked that Mr. Ingram took a trunk for himself. The disposal of the goods in this way was a fraud on the owner. The reason they did not tell her what they had done with the goods was that they did not wish her to know. There was a chance that she might not come back to this country for many years. By concealing from her what they had done, they concealed from her the right of action which arose on the conversion of the goods. The learned judge regarded Mr. Ingram as an honest and reliable witness. Another view might have been taken, having regard to his acts and to the contradictions between him and Mr. Sawyer [another employee of the company], but the fact that Mr. Ingram was regarded in this light by the judge still leaves open the question what is the proper inference to be drawn from the concealment from August, 1940, onwards. I agree with the submission of counsel for the defendants that there must be some conscious wrongdoing. There was ample proof of that. There was wilful disposition of the plaintiff's property for the defendants' own purposes, with knowledge that the property was valued by the plaintiff. It is no answer to say: "We did not think it worth much, and so we disposed of it"; and in this regard I emphasise that, on the evidence of Mr. Ingram, he thought one trunk was of value to him, and he kept it. The disposition of the property was carried out furtively, or, at least, without the knowledge of the owner, and the fact that this had been done was deliberately concealed from her. In my view, the proper inference to be drawn in such circumstances is that the right of action was concealed by the fraud of the defendants' agents within s. 26 (b) of the Act of 1939, and that is the conclusion at which I have arrived. I agree that the appeal should be allowed.

Appeal allowed with costs. Question of amount of damages referred to official referee.

Solicitors: *Murray, Napier & Co.* (for the plaintiff); *Crawley & de Reya* (for the defendants).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

Re BORTHWICK (deceased). BORTHWICK AND ANOTHER v. BEAUVAIS AND OTHERS.

[CHANCERY DIVISION (Harman, J.), February 10, 1949.]

Family Provision—"Reasonable provision for maintenance" of dependant—"Maintenance"—Conduct of dependant—Inheritance (*Family Provision Act, 1938 (c. 45), s. 1 (1), (6).*)

In 1909 the testator married and lived with his wife until 1925, when he became bankrupt. The wife and their children then went to live with the testator's parents, but the testator lived in lodgings and shortly afterwards began to cohabit with another woman. He did not again live with his wife, but continued his association with the other woman until shortly before his death. His financial position greatly improved, and he died

in 1946 leaving a gross estate of £240,000 and a net estate of £130,000. In his lifetime he never provided more than £3 a week for his wife and family. By his will, dated Apr. 21, 1944, the testator bequeathed an annuity of £250 to his wife, and settled £5,000 on his son and his issue and £1,000 on his daughter and her issue. On an application by the widow and the daughter for reasonable provision to be made for them under the Inheritance (Family Provision) Act, 1938,

A HELD: (i) the question what was "reasonable provision" within the meaning of s. 1 (1) of the Act of 1938 depended on the circumstances both of the dependant and of the testator, and "maintenance" for the purpose of the sub-section did not mean mere subsistence.

B (ii) the "conduct of the dependant in relation to the testator and otherwise," to which s. 1 (6) of the Act directed the attention of the court, could not mean the difference between some proper provision and inadequate, or no, provision, but meant that a dependant whose conduct was unsatisfactory should receive less than he would otherwise receive.

[AS TO PROTECTION OF TESTATOR'S FAMILY, see HALSBURY, Hailsham Edn., Vol. 34, pp. 439-445, paras. 486-505; and FOR CASES, see DIGEST, C Supp.]

ADJOURNED SUMMONS.

A testator's widow and daughter applied for reasonable maintenance to be provided for them under the Inheritance (Family Provision) Act, 1938. HARMAN, J., granted the application. The facts appear in the judgment.

D *S. Pascoe Hayward, K.C.*, and *Lightman* for the plaintiffs, the widow and daughter.

A. C. Nesbitt for the first three defendants, the executors of the testator's will.

Parbury for other defendants, beneficiaries under the will.

A. G. N. Cross for the Attorney-General.

E HARMAN, J.: The testator, William Borthwick, married his wife, the first plaintiff, in 1909, when they were both 21. He was then a hairdresser's assistant, earning 26s. 0d. a week, at Hull. There were born to them four children—the first, a son born in 1913 who died in infancy; the second, a son, Reginald, born in 1917, who is a defendant; the third, a daughter, now F Mrs. Tutty, born in 1922, who is not concerned in the proceedings because she is neither a beneficiary under the will nor a dependant within the meaning of the Inheritance (Family Provision) Act, 1938, and, lastly, the second plaintiff, Margaret, born in 1926, who has come of age since the proceedings began. In about 1919 the testator gave up hairdressing and started G to manufacture scent with some moderate degree of success. In 1923, in partnership with his brother, he started a proprietary club in Hull. According to his wife, he neglected that business and behaved in rather an extravagant way so far as his personal expenditure was concerned. In 1925 he went bankrupt, and sent his wife and her two young children to live at his parents' house. He himself went to live in lodgings, saying that he would find a new home for the family. That, however, turned out to be the separation of the parties, H and it was not unconnected with the fact that at about that date he met a woman with whom shortly afterwards he began to live as his wife. He appears to have broken with her shortly before his death. When the testator left his wife and children at his parents' house, he made his wife an allowance of £2 a week. When Margaret was born in 1926, he increased the allowance to £2 10s. 0d., and in 1932 he increased it to £3 a week. I have no means of saying whether those were or were not reasonable allowances when first made. Some time between 1926 and 1939 a vast change came over the

testator's fortunes. He migrated to the south of England and became a very substantial man. He set himself up at Hatfield in an establishment called the "Old Rectory," which was a property valued for probate at £18,000, and lived in a comparatively large way there with the woman whom I have mentioned. His wife says, and I accept it, that she knew he was in comparatively improved circumstances, but had no idea how improved. He made no further provision for her, but still paid her £3 a week. He did not make any substantial provision for the education of his son or his daughters, all of whom left school at the age of 14 to seek their livelihood in the world as best they could. A

The first will of which I know was made on June 14, 1939. By that will he made a provision for his wife of £250 a year, dividing the residue between his children. At the same time he signed a statement which, it seems to me evident, he was advised to sign having regard to the passage in 1938 of the Inheritance (Family Provision) Act and the apprehension of either himself or his advisers that his will might be questioned by his wife on the ground that he had not made reasonable provision for her. The will appointed his solicitor, the defendant, Atkey, one of the executors and gave considerable benefits to him. When one finds that the statement justifying the will is witnessed by two clerks of Mr. Atkey, one cannot help feeling that Mr. Atkey had become apprehensive about the benefit which was given to him at the expense of the testator's family. The testator made further wills, with which I need not deal in detail, in 1940, 1942, and, eventually, on Apr. 21, 1944. On the signature of each of those documents he re-signed the statement of 1939 as though it were a new statement and as though the £250 a year which he had found reasonable for his wife in 1939 remained, apparently having regard to her conduct, still a reasonable provision for her in 1944, the same conduct being relied on. B C D

Under the will of April, 1944, the testator appointed two accountants, the defendants, Beauvais and Attwell, and Mr. Atkey to be his executors. He gave a legacy to the woman with whom he was living and that has been paid to her. He gave certain specific legacies to his executors of shares in a private company which were the main asset of his estate. Those shares are of great value and each executor under the will, as modified by a codicil, was to receive 2,000 shares valued for probate purposes at £7 apiece—a substantial gift. He then gave to his executors an option to purchase up to one-half of the remainder of his ordinary shares in this same company, which also was a very valuable benefit, because the price at which two of the executors, had the right to buy the shares was considerably under their probate value. That option has been exercised: there were provisions whereby the payment for those shares could be spread over a number of years which are still unexpired. By cl. 7 he bequeathed an annuity to his sister, Lillie Nicholson, a defendant here, which, in effect, was a gift of £5 a week from a fixed date. He bequeathed to his wife £250 a year payable quarterly. Both of those bequests were free of duty, and the wife got the £250 a year less tax. He gave his residue on the usual trusts for sale and conversion. Out of the ultimate residue there was to be set aside a sum of £5,000 for his son, the defendant, Reginald, and his issue, and a further sum of £1,000 is settled on his daughter, Margaret, the second plaintiff, and her issue. Subject to those two provisions, he directs his trustees to apply the residue for charitable purposes to be selected by them within a certain period. E F G H

The testator died in October, 1946, and his will was proved in January, 1947, at a gross sum of £240,000 odd. After a long controversy, it seems to be settled that the net estate within the meaning of the Act of 1938 is £130,000 or thereabouts. That is the amount, broadly speaking, which is available for division among the beneficiaries. It is agreed now before me, again after considerable controversy, that the maximum which I could

provide, having regard to the terms of the Act, for the dependants of the testator, who are, in effect, the plaintiffs, would be about £2,400 a year, as against the sum which they get which is about £280 a year. There is thus a large discrepancy between what they get and what it is within my power to give them. Here was the testator living with his mistress in affluence, keeping his wife in penury. She had no means beyond the allowance he made her.

- A She does not appear to have made any protest, she does not appear to have had anything like full knowledge of how things were with him, and she does not seem to have been conscious altogether of what his obligations were. She was living on a scale very different from that which she would have enjoyed if she had been in her rightful place in his home. It is not suggested that she was guilty of bad conduct which would justify him in excluding her from his
- B home or in separating from her, still less in divorcing her. It is obvious that he and his advisers were conscious that what he was doing looked a shabby enough act and were anxious to justify it, for what motive one can very well see. The means he takes to justify it are to promulgate this statement, the effect of which is, first, that in the early part of the married life the wife was extravagant and did not keep within the amount he gave her to pay the house-
- C keeping bills, and, secondly, that he was not happy with her because she did not fulfil many of the domestic duties which he expected of a wife. I have not the least idea what that means. He then says that when he became bankrupt on his own petition she told him to clear out. One cannot but ask oneself of what she is said to have told him to clear out. The uncontradicted evidence is that she and her children were given asylum at his parents' house, but that is
- D the excuse he gives for having left her. I think this document is a thoroughly dishonest document. Whether in 1939, when the testator first penned it, he was persuaded, either by himself or his advisers or those who expected to make money out of him, that there was something in these ridiculous charges, I do not know. They are refuted, not only by the wife, but also by his own brother and sister who both gave evidence that she was a good wife to him.
- E There is no room that I can see in the evidence for any suggestion that there was any fault on the part of the wife.

It is said on behalf of the Crown, who are here as protectors of the charities who take residue, that I must take the case as I find it, not colouring my judgment in the wife's favour through indignation at the shabby behaviour of the husband, nor considering what she would have been entitled to if she

F had had her rights. It is said, truly, that, if she had lived as the testator's wife at the Old Rectory, Hatfield, £250 a year would not have been adequate provision for her, but, it is said, she managed to live for 20 years or so on this miserable pittance of £3 a week and never complained about it, and, therefore, £250 a year, which is a larger sum, is a reasonable provision for her. In other words, it is said that the worse a man treats his wife during his life the less

G he need leave her when he is dead. I cannot accept such a cynical conclusion and I turn to the Act. Section 1 (1) provides that the court has no jurisdiction unless it is of opinion that the will does not make reasonable provision for the maintenance of a dependant. It is said that maintenance is the only thing which can be regarded. That does not mean that the court can only give the dependant just enough to put a little jam on her bread and butter. It has

H already been held that what is reasonable for one may not be reasonable for another. It must depend on the circumstances of the case. It certainly depends to some extent on the circumstances of the widow, but I think it must also depend on the circumstances of the testator, that is to say, whether he died a rich man or no, because the wife of a rich man is entitled to better provision for her maintenance than the wife of a poor one. Maintenance does not only mean the food a wife puts in her mouth. It also means her clothes, the house in which she lives, and the money which she is to have in her pocket, all of

which vary according to the means of her husband. Maintenance cannot mean only mere subsistence.

When one looks at sub-s. (6), one sees that one of the matters to which the court is directed to pay attention is the "conduct of the dependant in relation to the testator and otherwise." I cannot think that these words can make the difference between whether the dependant is left starving in the gutter or no. The courts have not taken that view. It must, however, mean that an extravagant or an erring wife may be given less than one against whom nothing can be said. I am also directed by sub-s. (7) to have regard to any statement in writing signed by the testator. Counsel for the plaintiff says that that statement can be used as evidence against the testator—that it shows that but for the malice which actuated the statement he would have made a better provision for his wife and that he realised that the provision he was making was not, without some excuse, a reasonable provision. So far I can go. It seems to me, that *qui s'excuse s'accuse* must be true of such a statement as that. I do not believe the testator's statement, and, if I disbelieve it, I am left with this, that the testator acknowledges that, if there is nothing in what he says, he would have made some further provision. If the wife had been used to living at the Old Rectory, Hatfield, and that had been the circumstance of her life for the last 20 years, it may well be that £2,400 a year would not have been too much to give her, but I do not think it would really help a woman in her position to have so much as that. She has not been used to anything on that sort of scale, and I think the circumstances in which she has been living are matters to take into account as well as the means of the testator to provide for her. I am not punishing the testator in what I propose to order. I am not saying that I approve of his actions during his life time. I am saying what I think a man in his position ought reasonably to have provided for his wife from whom he had parted through no particular fault on her part and who was living in straitened circumstances. I think the wife is entitled, in view of the ample means of the husband, to a generous scale of living regard being had to the kind of needs that she may be reasonably supposed to have, and I propose to make her income up to £1,000 a year.

That leaves the question of the second plaintiff. She is living with her mother and following some employment from which she gets a modest salary of £2 10s. 0d. a week, which, one may suppose, will increase to a certain extent. She will not, therefore, having regard to the means I propose to give her mother, be in any physical need if, as I imagine, her mother continues to live with her in amity. Nevertheless, she is, as it seems to me, reasonably entitled to something. The testator should have made more reasonable provision for her too. I propose that, while her mother is a widow and she herself is a spinster, she shall have £100 a year. If her mother remarries or dies and she remains still a spinster, she must apply again to the court if she wants further provision made for her. It is impossible at this stage to tell what may be the conditions prevailing by that time.

Order accordingly. Costs of all parties as between solicitor and client to be paid out of the residuary estate.

Solicitors: *Stevenson & Couldwell*, agents for *Gosschalk & Austin*, Hull (for the plaintiffs and certain defendant beneficiaries); *Atkey & Sons* (for the defendant executors); *Treasury Solicitor*.

[Reported by H. McL. MORRISON, Esq., Barrister-at-Law.]

Re LEGAL CHARGE DATED NOV. 26, 1937.

[CHANCERY DIVISION (Roxburgh, J.), February 8, 1949.]

Courts Emergency Powers—Enforcement of remedy—Mortgage—Bankruptcy of mortgagor—Trustee respondent to application—“Unable immediately” to perform obligation—Courts (Emergency Powers) Act, 1943 (c. 19), s. 1 (2) (4), s. 4 (3).

A A mortgagee applied under the Courts (Emergency Powers) Act, 1943, s. 1 (2), for leave to exercise any remedy available to him to compel the performance by the trustee in bankruptcy of the mortgagor of the obligations arising under the mortgage deed.

B HELD: (i) in determining whether or not the trustee was “unable immediately” to perform the obligation within the meaning of s. 1 (4) of the Act it was not material to consider why the bankrupt had been unable to do so before her bankruptcy.

(ii) “unable” in s. 1 (4) did not mean “unable in the prudent course of management,” but was to be given its literal meaning.

C [FOR THE COURTS (EMERGENCY POWERS) ACT, 1943, see HALSBURY’S STATUTES, Vol. 36, p. 461.]

PROCEDURE SUMMONS.

Application under the Courts (Emergency Powers) Act, 1943, by a mortgagee for leave to exercise his remedies against a trustee in bankruptcy.

D. B. Buckley for the mortgagee.

Stanley Rees for the trustee in bankruptcy.

D ROXBURGH, J.: This is an application by a mortgagee for leave to exercise his remedies against a trustee in bankruptcy. Section 4 (3) of the Courts (Emergency Powers) Act, 1943, provides:

E “Where an application is made by the mortgagee of any property for leave to exercise against the property any of the rights or remedies mentioned in s. 1 (2) of this Act, being a right or remedy arising by virtue of a default in the payment of any mortgage money or a breach of any mortgage obligation, the appropriate court may, for the purposes of this Act, treat any person appearing to the court to be affected by the exercise of the right or remedy as if he were the person liable to pay the mortgage money or to perform the mortgage obligation or, as the context may require, as if he were the mortgagor, and may grant relief accordingly.”

F That explains why in this case the trustee in bankruptcy is respondent. The equity of redemption is vested in him, and I have no doubt he is properly a respondent. I have then to look at s. 1 (4) which provides:

G “If, on any application for such leave as is required under this section for the exercise of any of the rights and remedies mentioned in sub-ss. (1), (2) and (3) of this section, the appropriate court is of opinion that the person liable to satisfy the judgment or order, or to pay the rent or other debt, or to perform the obligation, in question is unable immediately to do so by reason of circumstances directly or indirectly attributable to any war in which His Majesty may be engaged, the court may, subject to the provisions of this Act, refuse leave for the exercise of that right or remedy, or give leave therefor subject to such restrictions and conditions as the court thinks proper.”

H Under that sub-section I have to consider whether the trustee in bankruptcy is “unable immediately” to perform the obligation by reason of the circumstances indicated in the sub-section. It is, however, submitted that a further meaning is to be extracted from s. 1 (4) and s. 4 (3) in combination, namely, that, in considering whether or not the trustee in bankruptcy is “unable

immediately " to perform the obligation, I must take into account the reasons why the mortgagor was unable so to do before the bankruptcy, or, putting it in another way, why she became bankrupt. In my judgment, that is not the true meaning of these sub-sections read together. What I have to determine is whether in the circumstances the trustee in bankruptcy is unable immediately to perform the obligation, and his ability or inability to do so cannot be affected by any investigation of the financial difficulties of the mortgagor before her bankruptcy. I must, therefore, reject all the evidence which has been tendered so far as it relates exclusively to the circumstances which led to the financial difficulties and subsequent bankruptcy of the mortgagor, but I am anxious to listen to all evidence which has been filed in so far as it relates to the difficulties with which the trustee in bankruptcy finds himself confronted. [HIS LORDSHIP heard further evidence and argument and continued :] The property subject to this mortgage is a block of flats, and the evidence of the trustee is that in three months time this block of flats will be saleable for £8,000. The sum due on the mortgage is approximately £1,700. In that state of affairs it is obvious that the trustee is able immediately to perform the obligation. He is able to do it in many ways. If he feels that the building will be worth £8,000 in three months time, without doubt he can borrow the necessary money and redeem the mortgage. If he prefers, he can sell the property forthwith, realising, no doubt, less than £8,000, but much more, I feel certain, than £1,700. It being plain that the trustee in bankruptcy is able to discharge the mortgage immediately, the more difficult question whether this has anything to do with the war does not arise. I may add one further reflection. If I am wrong in my construction of the word "unable" and if it means (as has been submitted to me) "unable in the prudent course of management"—which is not the meaning I assign to it—it appears to me that in the circumstances the trustee is not unable in the prudent course of management to perform the obligation. Whether he is or is not unable in the prudent course of management to do so, in any case the court has a discretion, and I should not feel disposed to exercise my discretion in favour of the trustee when he can so easily extricate himself from any difficulty in which he finds himself. Accordingly, I give the leave asked for, and the costs of this application will be added to the security in the usual way.

Leave granted with costs.

Solicitors: *Butt & Bowyer* (for the mortgagee); *A. F. & R. W. Tweedie* (for the trustee in bankruptcy).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

HOLT v. W. H. RHODES & SON, LTD. AND ANOTHER.

[COURT OF APPEAL (Lord Merriman, P., Asquith, L.J., and Vaisey, J.), February 7, 9, 10, 1949.]

Master and Servant—Safe system of working—Relationship pro hac vice—Injury to driver of crane hired to stevedores—Responsibility of stevedores in respect of particular operation.

The plaintiff was in the general employment of the second defendants as a driver of a mobile crane. The crane, with his services, was hired to the first defendants, a firm of stevedores, to unload goods from a ship into a warehouse. The crane was electrically driven and power was provided by a cable which had to be connected with a point in a plug-box fixed to a pillar 12 ft. 7 ins. above the ground. The usual method of getting to that box was to drive the crane up to the pillar and use the struts at the back of the jib of the crane as a ladder. During the course

of the operation the stevedores stowed round the pillar some cargo, which prevented the plaintiff from obtaining access to the plug-box by means of his crane. Having been asked by the foreman of the stevedores to move the crane, which could not be done without unplugging, the plaintiff climbed up on the cargo, fell and sustained injuries. He claimed damages from both defendants for failing to provide a safe system of working.

HELD : if the control of the operation which caused the injury had passed for the time being to the stevedores, the relationship *pro hac vice* of master and servant would be created between them and the plaintiff, and a duty to provide a safe system of working for that particular operation would be on the stevedores and not only the duty owed by an invitor to an invitee.

Speed v. Thomas Swift & Co. ([1943] 1 All E.R. 539; [1943] 1 K.B. 557; 169 L.T. 67), *applied*.

[AS TO EXTENT OF MASTER'S DUTY TOWARDS SERVANT, see HALSBURY, Hailsham Edn., Vol. 22, pp. 187-189, para. 314; and FOR CASES, see DIGEST, Vol. 34, pp. 203-206, Nos. 1662-1692.]

Cases referred to :

- (1) *Speed v. Swift (Thomas) & Co., Ltd.*, [1943] 1 All E.R. 539; [1943] 1 K.B. 557; 169 L.T. 67; 2nd Digest Supp.
- (2) *Colfar v. Coggins & Griffith (Liverpool), Ltd.*, [1945] 1 All E.R. 326; [1945] A.C. 197; 172 L.T. 205; 2nd Digest Supp.
- (3) *Mersey Docks & Harbour Board v. Coggins & Griffith (Liverpool), Ltd.*, [1946] 2 All E.R. 345; [1947] A.C. 1; 175 L.T. 270; 2nd Digest Supp.

APPEAL by the plaintiff from a decision of His Honour JUDGE HARRISON, sitting at Liverpool County Court, dated July 29, 1948, dismissing an action for damages for personal injuries which had been remitted from the High Court, on the ground that neither of the defendants was guilty of negligence. The Court of Appeal dismissed the appeal against the second defendants, Mersey Shipping & Transport Co., Ltd., the plaintiff's general employers, but allowed it against the first defendants, W. H. Rhodes & Son, Ltd., a firm of stevedores on whose work the plaintiff was engaged at the time he was injured, and ordered a new trial. The facts appear in the judgment of LORD MERRIMAN, P.

Gorman, K.C., and *Robertson Crichton* for the plaintiff.

Beney, K.C., and *G. B. H. Currie* for the first defendants (the stevedores).

Nicklin for the second defendants (the plaintiff's general employers).

LORD MERRIMAN, P. : This is an appeal by the plaintiff in an action remitted from the High Court to the Liverpool County Court and tried by His Honour JUDGE HARRISON against the dismissal of his claim for damages agreed at the sum of £120 against both of two defendants. In the view which I take of this matter, it will be necessary in one respect to order a new trial, and, therefore, I desire to say as little about any controversial matters as possible, but I must say enough to make it clear why I think the learned judge was right as regards his judgment in relation to one of the defendants and why I think it is necessary that there must be a new trial as regards the other defendants.

This is a case of a not uncommon character in which, at the Mersey Docks, the owners of a travelling crane hired the crane with a driver to a firm of stevedores engaged in unloading a ship into a warehouse belonging to the Mersey Docks and Harbour Board. The two defendants were the owners of the crane, who are by common consent the general employers of the plaintiff, and the firm of stevedores, against both of whom a charge of negligence was brought.

The plaintiff took the crane to this warehouse at the North Brocklebank Dock for the first time. The sheds on these docks belong to the Mersey Docks and Harbour Board, and the Board provide, among other things, power to drive cranes. That is done by fixing at some convenient point in the shed a plug-box to which can be plugged in the flexible cable which connects the power with the motor in the crane. In general, these plug-boxes are not higher than 6 ft. from the ground so that they can be reached by a man standing on the ground, but in this case the plug-box was fixed to an iron pillar and stood 12 ft. 7 ins. from the ground. If a plug-box is out of reach, it is agreed that a proper and reasonable method of getting to it is for the driver to climb up the struts at the back of the jib of the crane until he is high enough to put his plug into the plug-box. The plaintiff had been there for four days, during which time the crane worked quite efficiently. So far as the provision and equipment of the crane was concerned, the plaintiff's general employers had fulfilled all their duties to him. All the plaintiff had to do was to draw his crane, or have it drawn, close to the pillar, climb up the back of the crane, plug in, and get on with his work. There is evidence, which again I gather was not disputed, that, as his general employers knew that it was necessary that the crane should not be left plugged in at night when the warehouse was locked up, they had instructed him to disconnect the plug before leaving the crane on the premises at the end of the day.

On or about the third day of the operations the stevedores had elected to stow round the pillar on which was the plug-box some of the cargo which was being unladen from the ship and in connection with which the crane was being used, and they stowed it in such a way as to make it impossible for the plaintiff to obtain access to the plug-box by means of his crane. Some time in the afternoon of the following day the foreman, who was in charge of the work generally, told the plaintiff that he was to move his crane to some other part of the work, which it was not possible to do without unplugging. The plaintiff, therefore, climbed up the obstruction and in doing so fell between some oil drums and bags of sugar and injured himself.

I now come to the difficulty in this case. Everybody is agreed that, in so far as this action rests against either of the defendants on the relationship of master and servant (and in that I am including not merely the general relationship of master and servant but the relationship *pro hac vice* in regard to the particular operation which was the cause of the injury to this man) there was a duty to provide a safe system of working. There can be no doubt as a general proposition that if the general employers of the plaintiff were trying to pass the liability to the stevedores they have to discharge a very substantial burden of proof. Similarly, a heavy burden lies on the plaintiff to show that *pro hac vice* he can impose the duty of master on some other shoulders, namely, those of the stevedores. Unfortunately, on the very eve of the judgment the trial of this case was complicated by the fact that the plaintiff's general employers assumed through their counsel the responsibility of a master towards a servant in relation to this matter, and accepted the legal duty of providing a safe and proper system of working. It may be that, if the learned judge had taken the view that this constituted an admission, binding on these defendants, that for everything up to and including the moment at which the plug was pulled out of the plug-box, *i.e.*, for everything which could be included in the system of working, whether they were really responsible for it or not, these defendants had accepted the responsibility, they could not have complained, but the learned judge did not do so. Having based his judgment on the assumption that this liability had been accepted by these defendants, he proceeded to deal with it, in my opinion, quite correctly, because, unless a purely artificial situation is to be raised as against the plaintiff's general employers by this admission, it seems to me to be impossible to hold them

responsible for a defective system of working arising from the fact that the plaintiff in the circumstances created by the casual storing by the stevedores of this cargo round the pillar had to climb up to remove the plug. To make them responsible for such a thing would, in effect, be to say that they had to send this crane driver out with a man at his elbow to make sure that at no given moment, for some casual necessity not part of the general system of working at all, there was no sort of interference with the free access to a plug-box or anything of that sort. To impose that sort of responsibility on employers would be absurd. Even if they had sent an inspector to see that the part of the system over which they had no control at all, namely, the access to the plug-box, was everything that it should be, any reasonable employer would have been satisfied if everything proved satisfactory on two days' inspection, and there would have been an end of the matter. This accident happened on the fourth day. Except on the basis of absolute insurance, absolute warranty of safety, it is impossible to hold the plaintiff's general employers responsible for the fact that a good system provided by them had been interfered with by a casual act on the part of the stevedores.

For that there is authority. Our attention has been called to *Speed v. Thomas Swift & Co., Ltd.* (1) which is one of the latest cases on the duty of providing a safe system. That case was described by LORD SIMON, L.-C., in *Colfar v. Coggins & Griffith (Liverpool), Ltd.* (2) ([1945] 1 All E.R. 328) as an illustration of the doctrine of safe working which should be regarded as the extreme point beyond which that doctrine should not be extended, but, so far as the statement of the principle is concerned, no exception was taken to it, and nothing but approval was accorded to the decision. In *Speed's* case (1) LORD GREENE, M.R., said ([1943] 1 All E.R. 541) that he agreed with the submission that the duty of providing a safe system must be considered, not generally, but in relation to the particular circumstances of each job. That does not mean that it must be considered in relation to every casual circumstance that occurs in the course of the job. The point which arises in the present case was dealt with by GODDARD, L.J., who agreed with the MASTER OF THE ROLLS. Speaking of the removal of a ship's rail in the process of working the ship's derricks by the "married" system as contrasted with the "single", he said (*ibid.*, 546) :

"If the master were himself in charge of the operation and saw that the rail was properly protected, he would be fulfilling his duty of providing a proper system : if, when his back was turned or he had gone to another job, one of the men removed the protection and an accident happened, I cannot see that it could be said that the master had failed in his duty."

That seems to me exactly to cover the case which I have been putting. If the plaintiff's general employers had sent the hypothetical inspector on the first two days to see that everything in the whole system was perfect, not only that part for the provision of which they were responsible, but the part for which the stevedores would be responsible—and, indeed, to some extent the Mersey Docks and Harbour Board, for they provided the power—and he had then left, having satisfied himself that everything was in order, it could not be said that the plaintiff's employers failed in their duty if somebody, by some casual act interfering with the system, created difficulties out of which the accident arose. Therefore, I regard this appeal as against the second defendants as hopeless, and, in my opinion, it ought to be dismissed.

The judgment proceeded against the stevedores on the basis of a general charge of negligence and a defence of contributory negligence. I feel that there must be a new trial because I think there was evidence which at least suggests that this was a case in which the control of the operation which caused the injury had passed for the time being to the stevedores, and also because the learned county court judge, by reason of the admission which had

been made, was never asked to express an opinion on this part of the case on the basis that the stevedores were *pro hac vice* the masters and so bore that relation to the plaintiff. It is impossible for us to impose on the parties and on the county court judge a finding of our own on a matter on which he has not been asked to make a finding. Furthermore, I feel it impossible, even if it were open to us to do so (which I think it is not), to say that the evidence is all one way, and, therefore, that it is futile for us to send the case back for a new trial. As between the plaintiff and the stevedores, the plaintiff is asserting that he has the right of a servant against a master. If he establishes that, he is, of course, in a very different position from that of an invitee. A

I propose that the appeal, in so far as it relates to the plaintiff's general employers, be dismissed, but that, in so far as it relates to the dismissal of the action as against the stevedores, the appeal be allowed, the judgment dismissing the plaintiff's claim be set aside, and the case be remitted for re-trial to the Liverpool County Court by the other learned judge who has jurisdiction there. B

ASQUITH, L.J. : I agree. The learned county court judge did not decide the real issue in the case or make findings of fact which would enable us to determine it because he thought that an admission made by the plaintiff's general employers committed him as between all three parties to a particular conclusion. I think the learned judge was mistaken in attributing that effect to the admission. It could not prejudice or estop any party except the parties on whose behalf it was made, the plaintiff's general employers, and, in particular, it could not deprive the plaintiff of any rights which he possessed against the stevedores even if he did not actively protest against the admission. D The general employers could not place the plaintiff in the dilemma that he must either repel an admission by them or absolve the stevedores from liability. By giving the effect he did to the admission, the learned judge regarded himself as absolved from deciding whether the stevedores were liable to the plaintiff as masters who were under a duty to provide a safe system of work. E

VAISEY, J. : I agree.

Appeal relating to the first defendants allowed with costs. Judgment set aside and case remitted to Liverpool County Court for re-trial by another judge as between plaintiff and first defendants. Costs of first hearing to be in discretion of county court judge, including question whether costs paid to successful defendants should or should not be included against first defendants in "a certain event." F
Appeal relating to second defendants dismissed without costs.

Solicitors : *Pattinson & Brewer*, agents for *John A. Behn, Twyford & Reece*, Liverpool (for the plaintiff) ; *Berrymans*, agents for *Barrell & Co.*, Liverpool (for the first defendants) ; *P. F. Walker*, agents for *Weightman, Pedder & Co.*, G Liverpool, (for the second defendants).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

FORD v. LANGFORD.

[COURT OF APPEAL (Bucknill and Asquith, L.JJ., and Hodson, J.), January 24, 25, 1949.]

Rent Restriction—Evidence—Application of Acts to dwelling-house—Burden of proof—Payment of rent—Whether tenancy or service occupation—Increase of Rent and Mortgage Interest (Restrictions) Act, 1938 (c. 26), s. 7 (1).

By s. 7 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938: "If any question arises in any proceedings whether the principal Acts apply to a dwelling-house, it shall be deemed to be a dwelling-house to which those Acts apply unless the contrary is shown."

In 1926, the defendant was engaged by a Capt. B. as a gardener at £2 per week and occupied a cottage on Capt. B.'s estate. In 1944 Capt. B. died and his executors and later, a purchaser of the property, continued to employ the defendant as a gardener, he remaining in occupation of the cottage. In 1948 the plaintiff acquired the property and took proceedings in the county court for possession of the cottage. The learned county court judge held that the defendant's occupation was by way of service occupancy, and, accordingly, that the defendant was not entitled to the protection of the Rent Acts. On appeal it was argued by counsel for the plaintiff, *inter alia*, that the burden of proving that the defendant had paid rent for the cottage was on the defendant and was not placed on the plaintiff by s. 7 (1) of the Act of 1938.

HELD: section 7 (1) means that where in any proceedings the question is raised whether the Acts apply to a particular house, that house is to be deemed to be within the financial scope of the Acts unless the contrary is shown, but the sub-section does not raise a presumption regarding any other matter, *e.g.*, whether or not a person who alleges that he is a tenant and not a service occupier has paid any rent, and, therefore, the contention of the plaintiff was right.

Dictum of SALTER, J. in Bracey v. Pales ([1927] 1 K.B. 824; 136 L.T. 283), *approved*.

[AS TO SERVICE OCCUPANCY, see HALSBURY, Hailsham Edn., Vol. 20, p. 13, para. 8; and FOR CASES, see DIGEST, Vol. 30, pp. 519-521, Nos. 1746-1763.]

Cases referred to:

- (1) *Bracey v. Pales*, [1927] 1 K.B. 818; 136 L.T. 282; Digest Supp.
- (2) *Marsh v. Estcourt*, (1889), 24 Q.B.D. 147; 54 J.P. 294; 30 Digest 521, 1763.
- (3) *Ramsbottom v. Snelson*, [1948] 1 All E.R. 201; [1948] 1 K.B. 473; 112 J.P. 160.
- (4) *Thompsons (Funeral Furnishers), Ltd. v. Phillips*, [1945] 2 All E.R. 49; 2nd Digest Supp.
- (5) *Wright v. Arnold*, [1946] 2 All E.R. 616; [1947] K.B. 280; 176 L.T. 45; 2nd Digest Supp.
- (6) *Reed v. Cattermole*, [1937] 1 All E.R. 541; [1937] 1 K.B. 613; 156 L.T. 389; 21 Tax Cas. 35; Digest Supp.
- (7) *Hughes v. Chatham Overseers, Burton's Case*, (1843), 5 Man. & G. 54, 77; Bar. and Arn. 61; Cox & Atk. 14; 1 Lut. Reg. Cas. 51; Pig. & R. 35; 7 Scott, N.R. 581; 2 L.T.O.S. 149, 189; 8 J.P. 89; 30 Digest 521, 1757.

APPEAL by the defendant from an order of His Honour JUDGE KIRKHOUSE JENKINS at Hungerford County Court, dated June 21, 1948, directing the defendant to give up possession of a house known as Lovelocks Cottage.

In 1926 the defendant was engaged by a Capt. Burmester, who was the owner of a large residential estate, as a gardener at £2 a week wages. The defendant then entered into occupation of a cottage on the estate. According to him, he originally asked for 45s., but Capt. Burmester said, "No, £2

and the cottage" adding "5s. a week." In 1944, Capt. Burmester died, but the defendant remained in the cottage and continued to receive payment for his services as a gardener from the executors of the estate. In 1948, the property was sold to a Mr. Streatfield-Moore, who in turn employed the defendant, the defendant continuing to live in the cottage. At no time was any rent paid by the defendant, nor was there a rent book. Later, Mr. Streatfield-Moore sold the property to the plaintiff who claimed possession of the cottage from the defendant. In evidence in those proceedings Mr. Streatfield-Moore stated: "I bought the estate. Defendant was in the cottage. He worked as gardener for me. He never paid me money rent. It was sort of understood 5s. be deducted per week . . . The cottage was to enable him to perform the duties of gardener." The learned county court judge held that there was no such tenancy as would bring the case within the Rent Restrictions Acts as the defendant only held the cottage by way of a service occupancy. The Court of Appeal now dismissed the appeal.

Miss Constance Colwill for the defendant.

Barry, K.C., and *H. D. Peacock* for the plaintiff.

BUCKNILL, L.J.: stated the facts, found that there was evidence on which the county court judge could conclude that the arrangement made between the defendant and his original employer, Capt. Burmester, did not establish a tenancy within the meaning of the Rent Acts, and continued: Counsel for the plaintiff argued that before it can be said that the Rent Restrictions Acts apply to any case it must be shown that the tenant has paid a rent or is paying a rent. The authority for that is *Bracey v. Pales* (1). In that case *SALTER, J.*, said ([1927] 1 K.B. 824):

"On the other hand two Scottish cases have been referred to in which it was laid down that a servant who by virtue of his employment and as part of his remuneration occupies a house belonging to his employers does so under his contract of service and not under a contract of tenancy, and that the Rent Restrictions Acts do not apply to his occupation. In my opinion it is not here necessary to decide this question, because, even if the defendant was a tenant of Mr. Bracey or the plaintiff at common law, he was not a tenant under the Rent Restrictions Acts so as to be entitled to the protection of those Acts. If he was a tenant at all, he was a rent free tenant, and the Acts do not protect a tenant who holds rent free."

In support of that argument counsel pointed out that by s. 12 (7) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, the Act does not apply where rent payable in respect of any tenancy of any dwelling-house is less than two-thirds of the rateable value thereof. Counsel for the plaintiff also argued that the burden was on the defendant to prove that he had paid rent for this house and that s. 7 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938 does not apply to any question relating to the payment of rent. That sub-section, it is contended, means that where in any proceedings the question is raised whether the Acts apply to a particular house, that house is to be deemed to be within the financial scope of the Acts unless the contrary is shown, and the sub-section does not raise a presumption regarding any other matter, *e.g.*, as in the present case, whether or not a person who alleges that he is a tenant and not a service occupier has paid any rent. I agree with that argument of counsel for the plaintiff. I do not think one ought to extend s. 7 (1) so far as to put on the landlord and not on the tenant the burden of proving such a matter as is in issue here. In this case there is no satisfactory evidence that any rent was ever paid by the defendant. The interpretation I put on the conversation between the defendant and Captain Burmester is simply this: "I will pay £2 a week in wages. I shall want you to live in this cottage.

It will be very convenient to have you there, and I reckon that that cottage is worth 5s. a week." I do not think that one can infer from that that the defendant thereby began to pay rent and has since continued to do so. I think that this appeal fails.

- ASQUITH, L.J. : I entirely agree. The main point taken by the defendant is that there was no evidence on which the learned county court judge could find that his possession was a service occupation. Counsel for the defendant relied mainly on a series of decisions, mostly rather old ones, relating to the question whether or not a person has the status of service occupier or that of a tenant for the purpose of qualifying or being disqualified for the franchise or for certain offices or for the purpose of being liable or non-labile to rates. Those cases were often decided on the wording of the relevant statutes and much stress was laid on whether an employee, for the purpose of performing a contractual duty, had been *required* (and not merely permitted) by his employer to live in the premises in question. The man's status was only adjudged to be that of a service occupier where there was a positive requirement. Even however, in those early cases, external necessity as opposed to contractual constraint came to be regarded as sufficient in some cases to confer the status of service occupier : see, for instance, passages from other decisions, notably from WILLS, J., in *Marsh v. Estcourt* (2) cited by LORD GODDARD, C.J., in *Ramsbottom v. Snelson* (3). If necessity can take the place of contractual requirement, it is not a very far cry from necessity to overwhelming considerations of convenience. However that may be, the modern decisions in cases where franchise and similar questions were not concerned do seem to me to lay down a somewhat less rigid criterion. The matter was before this court in *Thompsons (Funeral Furnishers), Ltd. v. Phillips* (4). It is true that the defendant in that case contracted to live at premises and to perform some of his contractual duties there. I am not overlooking that distinction between the facts of that case and the present case or the desirability of keeping in mind the facts of cases in which a general proposition is laid down. At the same time the court does appear to me in that case rather deliberately to have laid down a principle of wider application. The test laid down was whether the substance of the agreement was that the defendant was to occupy the premises as the landlord's servant in order to perform his services in part on those premises or, put in slightly different language a little earlier, whether he occupied the premises as the servant of the landlord for the purpose of performing his master's services. In the event in that case it was held that it was a service occupation and not a tenancy and this conclusion was reached, although in fact rent, so-called, was actually paid at 15s. a week. The agreement had provided for that sum to be deducted from the amount of the wages, but in this respect the agreement was departed from. In the present case, on the other hand, there was no payment of a cash rent at any stage. The evidence pointing to a payment by deduction was extremely hazy. It was rejected by the learned judge, and he was entitled to reject it.

- [HIS LORDSHIP reviewed the evidence as to the agreement between the plaintiff's immediate predecessor in title and the defendant, in which it was stated that the cottage was to enable the defendant to perform the duties of gardener, and continued :] It seems to me very difficult to say, as we are invited to say by counsel for the defendant that the words "the cottage was to enable him to perform the duties of gardener," does not afford some evidence in support of the finding or inference of service occupation, but let me assume that I am entirely wrong about that. I think the plaintiff is entitled to succeed on another ground to which he attached importance. He contends (i) that the protection of the Rent Restrictions Acts cannot be invoked in favour of a rent-free tenant : see *Bracey v. Pales* (1), a case which I do not think has ever been doubted ; (ii) that the learned county court judge either directly or by the

clearest implication found the defendant paid no rent; and (iii) that there was evidence on which he could so find. If it is necessary to decide the case on this point, in my view, all three of those propositions are well-founded. I think that it is for the defendant to prove that rent was paid in order to bring himself within the protection of the Rent Restrictions Acts and that the learned judge has by clear implication rejected those parts of the evidence which alone can be relied on as supporting that conclusion. Section 7 (1) of the Act of 1938 falls to be considered here. It provides :

“ If any question arises in any proceedings whether the principal Acts apply to a dwelling-house, it shall be deemed to be a dwelling-house to which those Acts apply unless the contrary is shown.”

That provision does not seem to me to raise a presumption in favour of the defendant that rent was paid. The only presumption which it seems to me to raise in his favour is that the house is within the limits of rateable value laid down in the Rent Restrictions Acts. In *Wright v. Arnold* (5), it was held that the provision creates no presumption in favour of the tenant that the house was a dwelling-house within the definition of dwelling-house contained in the Act. For these reasons I think that the appeal fails.

HODSON, J. : I agree that this appeal fails on the ground which has just now been referred to by ASQUITH, L.J., that the protection of the Acts is not available to a rent-free tenant, that the defendant paid no rent, and that there was evidence on which the learned county court judge could come to that conclusion.

I feel doubt whether the learned county court judge was entitled to come to the further conclusion that whether or not a payment was made by deduction from the wages which the defendant received, yet he was still a service occupant because he was required to occupy the cottage. The latest case to which we have been referred on this subject, *Thompsons (Funeral Furnishers), Ltd. v. Phillips* (4) was a case in which there was a clear compulsion on the defendant by contract to occupy the premises. I recognise that there may be cases in which external necessity may take the place of compulsion by contract, but I am bound to say that the position seems on the authorities to be that the occupier is, so to speak, identified with the owner in the case of service occupancy instead of having in many respects a separate identification as tenant. The point is emphasised in another connection by LORD WRIGHT, M.R., in *Reed v. Cattermole* (6) where he quotes the language of TINDAL, C.J., in *Hughes v. Chatham Overseers, Burton's Case* (7) ([1937] 1 All E.R. 550) :

“ ‘ But it may be, that a servant may occupy a tenement of his master's, not by way of payment for the services, but for the purpose of performing them ; it may be that he is not permitted to occupy, as a reward, in the performance of his master's contract to pay him, but required to occupy in the performance of his contract to serve his master ’.”

It is unnecessary to go through the cases in detail, but—and I think counsel for the plaintiff conceded this—it must be for the owner to establish that the defendant was required to occupy the premises. I find nothing in the evidence which is sufficient to justify a finding of compulsion, whether by contract or by necessity, so as to justify the use of such a strong word as “ required.” For these reasons I would rest my judgment on the point which is principally relied on by the plaintiff, namely, that no rent was paid. I agree that this appeal should be dismissed.

Appeal dismissed with costs.

Solicitors : *Maude & Tunnicliffe*, agents for *Louch, Belcher & Co.*, Newbury (for the defendant) ; *J. D. Langton & Passmore*, agents for *Charles Lucas & Marshall*, Hungerford (for the plaintiff).

[Reported by C. N. BEATTIE, Esq., Barrister-at-Law.]

**Re LLEWELLIN'S WILL TRUSTS. GRIFFITHS AND
ANOTHER v. WILCOX AND OTHERS.**

[CHANCERY DIVISION (Jenkins, J.), February 10, 1949.]

Trustee—Profit from trust—Remuneration as director of company—Appointment of trustee as director permitted by will.

A A testator, who died possessed of a holding of the majority of the shares in L. Co., Ltd., provided by his will: "I also declare that my trustees may at their discretion retain any investments I may have at the time of my decease . . . And in particular in reference to the shares held by me in L. Co., Ltd., I empower my trustees to retain the said shares for so long as they shall think fit and to make such arrangements with the said company in reference thereto and for the appointment of my said trustees or either of them or any other persons as a director or managing director of the said company in my place . . ." The articles of association of the L. Co., Ltd., provided for the remuneration of directors and the managing director.

B
C HELD: on the true construction of the will, the words of, which must be construed with regard to the terms of the articles of association, the trustees were entitled to procure their own appointment as directors of the L. Co., Ltd., at such remuneration as they might arrange with the company, and were not liable to account for that remuneration to the testator's estate.

D [AS TO TRUSTEES LIABILITY TO ACCOUNT FOR PROFIT, see HALSBURY, Hailsham Edn., Vol. 33, pp. 312, 313, para. 545; and FOR CASES, see DIGEST, Vol. 43, pp. 863-866, 974-976, Nos. 3097-3117, 4145-4164.]

Cases referred to:

(1) *Re Macadam*, [1945] 2 All E.R. 664; [1946] Ch. 73; 173 L.T. 395; 2nd Digest Supp.

(2) *Re Gee*, [1948] 1 All E.R. 498; [1948] Ch. 284.

E ADJOURNED SUMMONS to determine *inter alia* whether, on the true construction of the testator's will, the trustees were empowered to procure their own appointment as directors of Llewellyn's Machine Co., Ltd., by virtue of the testator's holding of shares in that company, and to retain remuneration arranged and received by them in respect of those offices. JENKINS, J., held that they were so empowered. The facts appear in the judgment.

F *Raymond Jennings, K.C.*, and *B. S. Tatham* for the plaintiffs, the trustees. *F. B. Alcock* for the first defendant, a personal representative of a deceased annuitant.

W. F. Waite for the second, third and fourth defendants, annuitants.

Michael Albery for the fifth and sixth defendants, beneficiaries.

G *John Lee* (with him *Danckwerts*) for the Attorney-General.

JENKINS, J.: The question I have to decide is whether the trustees of the testator's will are accountable to the estate for remuneration received by them as managing director and director of a company called Llewellyn's Machine Co., Ltd., the bulk of the shares in which form part of the testator's estate.

H The general principle of equity is plain. It is, that a trustee may not profit from his trust. Thus, if a trustee of shares in a company by virtue of the control over the company which those shares give him gets himself appointed to the post of director or managing director, then, although his remuneration is not paid to him in respect of the trust holding but in respect of the work he does as director or managing director, yet, because he gains that emolument by virtue of the trust holding, he is not entitled to retain the remuneration for his own benefit. That principle is well-settled, and I have been referred to

two recent cases in which it has been discussed, namely, *Re Macadam* (1) and *Re Gee* (2). Far be it from me to say anything purporting to trench on that well-established and on the whole salutary rule. For the purposes of this judgment I wholly accept the position that,⁴ unless there is something in the testator's will entitling the trustees to retain any remuneration which they may receive as director or managing director of this company, then the rule must apply, but there is no rule of equity which says that a testator, if so minded, may not provide that his trustees can hold salaried offices in companies which the testator's estate controls and receive the emoluments attached to those offices without liability to account. A testator is perfectly at liberty to include such a provision in his will if he thinks fit, and, indeed, as a matter of business it is often a very sensible provision to make.

The clause in this will which is relied on as excluding the general rule to which I have referred, but is, on the other hand, said by those who oppose the trustee's right to remuneration not to be wide or explicit enough for the purpose, is cl. 11, which is in these terms :

"I also declare that my trustees may at their discretion retain any investments I may have at the time of my decease whether the same may or may not be authorised by law as investments for trust funds without being answerable for any loss thereby occasioned to my estate. And in particular in reference to the shares held by me in Llewellyn's Machine Co., Ltd., I empower my trustees to retain the said shares for so long as they shall think fit and to make such arrangements with the said company in reference thereto and for the appointment of my said trustees or either of them or any other persons as a director or managing director of the said company in my place or if thought advisable by my said trustees to dispose of my shares in the said company or any part thereof upon such terms and conditions as they shall think fit and if they shall deem it necessary or advisable so to do to take such steps as they legally can to wind up the said company."

There one has a clause in which the testator expressly provides that his trustees may make such arrangements with the company for the appointment of both or either of them or any other persons as a director or managing director of the company in the testator's place. Those words, I think, must be construed with regard to the terms of the articles of association of the company, and the testator must be deemed to have known of the contents of those articles. I think he must be deemed, when he referred to "arrangements for the appointment of the trustees or any other persons as a director or managing director," to have meant "as a director or managing director in accordance with the articles of association of the company." If one looks at the articles, one finds that they adopt the 1908 Table "A" with modifications, and the articles dealing with remuneration, so far as material for the present purpose, are arts. 69 and 72 of that Table "A." Article 69 provides :

"The remuneration of the directors shall from time to time be determined by the company in general meeting."

By art. 72 :

"The directors may from time to time appoint one or more of their body to the office of managing director or manager for such term, and at such remuneration (whether by way of salary, or commission, or participation in profits, or partly in one way and partly in another) as they may think fit, and a director so appointed shall not, while holding that office, be subject to retirement by rotation . . ."

One finds, then, that the testator has expressly empowered his trustees to make such arrangements with the company as they think fit for the appoint-

ment of themselves or any other person to offices which will or may carry remuneration. I think they can fairly be described as remunerated offices.

A What is the effect of the express authority thus given by the testator to his trustees? In my judgment, it cannot mean anything else, as a matter of common sense and as a matter of ordinary construction, than that the testator's trustees, notwithstanding that they are trustees, shall have power to make such arrangements as they think fit for their appointment as director or managing director, and, those being, under the terms of the articles, remunerated or potentially remunerated offices, the arrangements which they are empowered to make include arrangements as to the remuneration which they are to receive. That is the construction I place on the words, and I think the conclusion I have reached is reinforced by the fact that the power given by B the testator extends to making arrangements for the appointment of other persons as a director or managing director. As pointed out by counsel for the annuitants, it is hardly to be expected that any other person could be induced to take office unless the arrangements made with him included some arrangement as to his remuneration. As a matter of construction, one cannot give the word "arrangements" any narrower significance where C the persons appointed are to be the trustees themselves. True, that the testator did not say in express terms that the trustees, when they make arrangements for the appointment of themselves as director or managing director, are not to be liable to account to the estate for the remuneration derived from their office, but that seems to me to follow as a matter of necessary implication. In fact, it seems to me to be the main purpose of inserting this provision.

D For the reasons which I have endeavoured to state, the conclusion to which I have come is that, on the true construction of this particular will the plaintiffs, notwithstanding that they are trustees of the testator's will, are entitled to arrange with the company not only for their appointment as managing director and director of the company, but also for their remuneration in those capacities and, further, are entitled to retain that remuneration for E their own benefit without being liable to account to the testator's estate. That means, the shares being held as they are, that the trustees are in the invidious position of fixing their own remuneration, being completely in control of the company. In this respect they are in a position in which their duty and their interest conflict, but that is the result which must inevitably ensue F where a testator empowers his trustees to be directors of and receive remuneration as directors of a company which his representatives control by virtue of his shareholding. The fact that the construction I have placed on the will has that consequence is no ground, in my judgment, for my giving it any other construction.

G *Order accordingly. Costs of all parties as between solicitor and client to be paid out of the capital of the fund.*

Solicitors: *Haslewood, Hare & Co.*, agents for *Veale & Co.*, Bristol; (for the plaintiffs and second, third and fourth defendants); *Gustavus Thompson & Sons*, agents for *Scott & Fowler*, Gloucester (for the first defendant); *Joynson-Hicks & Co.*; *E. F. Turner & Sons* (for the sixth defendant); *Treasury Solicitor*.

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

Re SCHOLFIELD (*deceased*). SCHOLFIELD *v.* SCHOLFIELD
AND OTHERS.

[CHANCERY DIVISION (Romer, J.), January 27, February 16, 1949.]

*Administration—Will—Capital or income—Settled leaseholds—War damage
Value payments—War Damage Act, 1943 (c. 21), ss. 7 (1), 10 (2).*

By his will, dated May 25, 1935, the testator gave freehold and leasehold properties to trustees on trust, until the death of his last surviving child, to pay out of the income thereof certain monthly sums to various persons, subject to the payment of all incidental expenses and outgoings, and, after provision had been made for repairs, but not for the depreciation of leasehold terms, any surplus income each year was to be divided among his children or their issue. On the death of his last surviving child, the properties were to be sold, and the proceeds thereof divided among the issue of his children. The testator died on Sept. 22, 1942. During the war, both before and after the testator's death, many of the properties suffered war damage. Claims in respect of the damage were made under the War Damage Act, 1943, and value payments had been made to the executors by the War Damage Commission. The leases of the properties which were the subject of the claims (and which had been disclaimed under the Landlord and Tenant (War Damage) Acts, 1939 and 1941) expired, for the most part, in 1960 or 1962. The question to be determined was whether the value payments received in respect of the leasehold properties should be treated as capital or income or apportioned between capital and income. The income beneficiaries contended that they should be treated as proceeds of sale of settled leaseholds, while the remaindermen contended that they were, in substance, moneys paid under a policy of insurance so that the Trustee Act, 1925, s. 20, applied.

HELD : (i) the value payments were neither proceeds of sale nor moneys paid under a policy of insurance, and, therefore, neither the Settled Land Act, 1925, s. 79, nor the Trustee Act, 1925, s. 20, applied. Although s. 10 (2) of the War Damage Act, 1943, introduced the conception of a sale of the property which was the subject of a value payment, it did so merely for the quantification of the payment to be made.

(ii) on the true construction of the will, the testator desired that the benefits incidental to his leaseholds should expire with the leaseholds themselves, and, therefore, the value payments should, so far as possible, be treated in the same way as the leasehold properties from which they were derived. Accordingly, contributions made under the Act of 1943 should be treated as capital, as required by s. 66 of the Act, and recouped to *corpus*, and, subject thereto, each of the value payments should be invested in the purchase of an annuity for a period corresponding to the period which, at the date of the war damage, remained unexpired of the lease of the property in respect of which the payment was made, and those annuities should be applied by the trustees as though they represented the income arising from the leasehold properties.

Askew v. Woodhead (1880) (14 Ch.D. 27; 42 L.T. 567), *applied*.

[FOR THE WAR DAMAGE ACT, 1943, ss. 10, 66, and sched. II, para. 2, see HALSBURY'S STATUTES, Vol. 36, pp. 348, 393 and 434.]

Cases referred to :

- (1) *Askew v. Woodhead*, (1880), 14 Ch.D. 27; 42 L.T. 567; 44 J.P. 570; 11 Digest 247, 1477.
- (2) *Re Bladon*, [1912] 1 Ch. 45; 105 L.T. 729; 40 Digest 656, 1954.
- (3) *Re Thompson*, [1948] 2 All E.R. 223; [1949] Ch. 1.

ADJOURNED SUMMONS to determine (*inter alia*) whether sums received by

A the testator's executors from the War Damage Commission as value payments under the War Damage Act, 1943, in respect of settled leaseholds were to be treated as capital or income or apportioned between capital and income. ROMER, J., held that the value payments should so far as possible be treated in the same way as the leasehold properties from which they were derived, and he directed that each of the value payments should be invested in the purchase of an annuity for a period corresponding to the period which, at the date of the war damage, remained unexpired of the lease in respect of which the payment was made, and that the annuities should be applied as though they were income from the properties. The facts and the relevant clauses of the will appear in the judgment.

B *R. Cozens-Hardy Horne* for the plaintiff (a trustee).

G. T. Hesketh for the income beneficiaries.

J. A. Wolfe for the remaindermen.

Cur. adv. vult.

C Feb. 16. ROMER, J., read the following judgment. By his will dated May 25, 1935, the testator, Sidney Scholfield, after appointing executors and trustees and giving a small annuity, disposed of his real and leasehold properties (by cl. 4 of his will) in the following terms :

D "I give devise and bequeath all my real and leasehold properties (except my residence No. 100 Eltham Road Lee aforesaid) to my trustees upon the trusts and with and subject to the powers and provisions hereby declared of and concerning the same that is to say that my trustees shall during the lives of my children now living and the survivors or survivor of them hold the rents profits and income accrued or accruing at the time of my decease and to accrue from and after my decease of and from the said properties after payment thereof of all incidental expenses and outgoings upon trust to make the following payments (all such payments being made free of all duties) that is to say on the twelfth of each month to pay to Beatrice Louise Elizabeth the widow of my son Thomas and on her death to the children of my said son then living if more than one in equal shares the sum of £8 and to each of my other children then living during their lives and the issue of any deceased child other than the said Thomas (such issue taking their parents share in equal shares if more than one) the sum of £30 and to each of my brothers James Edward and John the sum of £10 and upon further trust on Mar. 31 next after the expiration of the period of six months from my death to prepare an account of the receipts and payments (including all amounts payable for rates and taxes due on or before that date and making provision for repairs but without making any provision for the depreciation of leasehold terms) of the said properties for the period from my death and thereafter on every subsequent Mar. 31 for the preceding twelve months and on Apr. 12 following to divide as aforesaid between my children then living other than the said Thomas and the issue of any such child who may be then dead (such issue taking their parents share and equally between them if more than one) any surplus income appearing from such account to be in my trustees' hands on the date of taking such account."

H By cl. 5 the testator declared that the said monthly payments of £30 as above directed should be paid free of taxes and duties and should be treated as payments on account of the beneficiaries' shares of the income derived from the said freehold and leasehold properties. By cl. 6 the testator directed that on the death of the survivor of his said children his trustees should sell the said real and leasehold properties and divide the net proceeds of such sale into the same number of shares as there should have been children of his other than the said Thomas leaving issue living at the date of distribution who

should have attained or should attain the age of 21 years or being daughters have been married under that age and should hold one of such shares on trust for such issue of any such child and in equal shares if more than one. By cl. 7 the testator authorised his trustees to compromise any claim from the lessors of any of his leasehold properties on account of dilapidations or other breach of covenant and for such purpose to surrender any leasehold properties to the lessors. By cl. 8 the testator gave, devised, and bequeathed to his trustees No. 100, Eltham Road, Lee, aforesaid, and all the rest of his personal estate upon the usual trusts for sale and conversion and upon trust to hold the proceeds (after payment of his funeral and testamentary expenses) in trust for all his children (other than Thomas) in equal shares with a substitutional gift in favour of grandchildren as therein mentioned. By cl. 9 the testator gave £1 a week to such one of his trustees as should collect the rents of his freehold and leasehold properties.

The testator died on Sept. 22, 1942, and his will was proved on Dec. 28, 1942. The testator had five children, one of whom predeceased him. The other four children are parties to this application, as also are the testator's grandchildren and great grandchildren now in being. Particulars of the freehold and leasehold properties which the testator possessed at the date of his will and of his death are stated in para. 6 of the plaintiff's affidavit sworn in support of the summons. [HIS LORDSHIP read the particulars, and continued :] The plaintiff's affidavit states that at the date of the testator's will all of the said freehold and leasehold properties were let and it is believed that the average net yearly income from the properties was approximately £2,778. During the recent war many of the said properties suffered serious war damage. In some cases the damage was suffered before the testator's death, in other cases after his death. Claims in respect of such damage were made under the War Damage Act, 1943, and value payments have been made to the executors by the War Damage Commission. In one case the amount of such payment has not been agreed. The leases of the properties which are the subject of these claims all expire (with the exception of one block) in 1960 or 1962. The leases of the properties have been disclaimed under the Landlord and Tenant (War Damage) Acts, 1939 and 1941. I was told that £2,714 is now required each year to provide for the income payments bequeathed by the testator's will. The net income now available for these payments is about £1,174 per annum, and, if the value payments which have been received were invested in authorised securities, an additional income of about £150 per annum would become available.

In these circumstances this originating summons has been issued in order to obtain the directions of the court as to the manner in which the value payments received, or to be received, should be disposed of by the trustees in administering the trusts of the testator's will. Question 1 of the originating summons is as follows :

"That it may be determined whether upon the true construction of the said will and in the events which have happened (a) the whole of the sums which have been or may hereafter be received by the trustees of the said will from the War Damage Commission by way of value payments in respect of the testator's freehold and leasehold properties which were specifically devised and bequeathed by cl. 4 of the said will ought to be invested and treated as capital on the footing that the income of the investments for the time being representing the same should be applicable in the same manner as the rents profits and income of the properties in respect of which such payments were made, or (b) any and if so what part of such sums ought to be treated as income or apportioned between capital and income."

It was conceded, and rightly, at the hearing before me that the value payments

which have been received from the War Damage Commission in respect of the testator's freehold properties should be treated wholly as capital and retained and invested by the trustees accordingly. Accordingly, the question for decision is confined to the payments which have been or will be received in respect of the settled leaseholds.

The War Damage Act, 1943, s. 10 (1), is in the following terms :

- A "Subject to the provisions of this Part of this Act, the amount of a value payment shall be an amount equal to the amount of the depreciation in the value of the hereditament caused by the war damage, that is to say, the amount by which the value of the hereditament in the state in which it was immediately after the occurrence of the damage is less than its value in the state in which it was immediately before the occurrence of the damage."

- B Section 10 (2) provides how the value of a hereditament in any state shall be ascertained for the purpose of computing the amount of a value payment, namely, by reference to a notional sale on the hypotheses indicated by the sub-section and by sched. II, para. 2, to the Act. Section 66 of the Act provides that contributions made under the Act shall be treated for all purposes as outgoings of a capital nature. It will be seen that, although s. 10 of the Act introduces the conception of a sale of the property which is the subject of a value payment, it only does so for one purpose, namely, the quantification of the payment which is to be made. The section does not provide that the value payment, when received, is to be treated as though it represented the proceeds of sale of the property concerned and the Act nowhere lays down the manner in which, as between tenant for life and remainderman of settled property, a value payment is to be dealt with or disposed of.

The Settled Land Act, 1925, s. 79, provides :

- E "Where capital money arising under this Act is purchase money paid in respect of (a) a lease for years . . . the trustees of the settlement or the court, as the case may be . . . may, notwithstanding anything in this Act, require and cause the same to be laid out, invested, accumulated, and paid in such manner as, in the judgment of the trustees or of the court, as the case may be, will give to the parties interested in that money the like benefit therefrom as they might lawfully have had from the lease . . . in respect whereof the money was paid, or as near thereto as may be."

- F The Lands Clauses Consolidation Act, 1845, s. 74, contained similar provisions to these and the Court of Appeal considered their effect in *Askew v. Woodhead* (1). In that case the appellant was entitled for life under a marriage settlement to leaseholds, which were taken under the powers of the Lands Clauses Consolidation Act, 1845. At the time of their compulsory acquisition these leaseholds had eight years to run and the purchase money was sufficient to provide an annuity for eight years of much larger amount than the net annual proceeds of the leaseholds. The Court of Appeal held that the appellant was entitled to receive an annuity of such an amount that the payment of it would exhaust the fund in the number of years which the leaseholds had to run. The Settled Land Act, 1925, s. 81, deals with capital arising otherwise than under the Act but, inasmuch as the question with which I am concerned is whether the value payments in issue are or are not capital, the section affords me no assistance. The Trustee Act, 1925, s. 20 (1), is in the following terms :

- H "Money receivable by trustees or any beneficiary under a policy of insurance against the loss or damage of any property subject to a trust or to a settlement within the meaning of the Settled Land Act, 1925, whether by fire or otherwise, shall, where the policy has been kept up under

any trust in that behalf or under any power statutory or otherwise, or in performance of any covenant or of any obligation statutory or otherwise, or by a tenant for life impeachable for waste, be capital money for the purposes of the trust or settlement, as the case may be."

On behalf of the income interests which were represented before me it was contended that the value payments should be assimilated in treatment to proceeds of sale of settled leaseholds. On behalf of the remaindermen it was argued that such payments constitute, in substance, moneys paid under a policy of insurance and, as such, should be disposed of in accordance with s. 20 of the Trustee Act, 1925, or, alternatively, that they so closely resemble such policy moneys that the section should be applied by analogy. In my judgment, the value payments in question are neither proceeds of sale nor moneys paid under a policy of insurance. They resemble the latter more than the former, but the resemblance does not, in my opinion, attract the operation of s. 20 of the Trustee Act, 1925.

The testator in the case before me was at pains to ensure that the benefits incidental to his leaseholds should expire with the leaseholds themselves. Nothing was to be preserved for those interested in *corpus*. In the event the leaseholds have disappeared, not by expiry but by war damage followed by disclaimer. In their stead, however, are sums of money. If these sums of money are to be regarded as capital, they will eventually pass intact to those who (until the date of ultimate distribution) would have taken no benefit in the leaseholds themselves, namely, the remaindermen, and they will so pass at the expense of the income beneficiaries to whose immediate enjoyment the leaseholds had, by the will, been exclusively dedicated. It is clear that such a result would gravely disturb the manifest intentions of the testator as expressed in relation to his leasehold properties. The fact that money has, through wholly fortuitous circumstances, been substituted for an interest in property affords, in my judgment, no ground for effecting, in addition, a substitution of beneficial interests. Fairness of administration would appear to require that, so far as possible, the rights of the beneficiaries should survive the destruction of the property from which they derived the income which the testator gave them. Must, then, these rights be adversely varied by reason of any statutory requirement? Not, as I think, by reason of s. 20 of the Trustee Act, 1925, because, as I have already indicated, the value payments have not been received under a policy of insurance. They have been received from the State in pursuance of the compulsory scheme of indemnity laid down by the Act of 1943. Nor is any such requirement to be found in the War Damage Act itself, for that Act makes no reference to the matter at all. No other statute has, so far as I am aware, any bearing on the point, and, accordingly, I am not constrained by any statutory requirement to treat these value payments as capital. Nor, in my judgment, am I so constrained by any previous decision of the courts. In *Re Bladon* (2) it was held by the Court of Appeal that, where licensed premises form part of a settled estate and the licence is extinguished under the provisions of the Licensing Act, 1904, the proportion of the compensation allocated to the freeholder of the premises represents capital money of the estate. The decision, however, rested entirely on the provisions of the Licensing Act, 1904, s. 2, and those provisions clearly have no relevance to the present case. In *Re Thompson* (3) compensation was paid under the Compensation (Defence) Act, 1939, s. 2 (1) (b), on the de-requisitioning of leasehold property held on trust for sale. The tenant for life was entitled to the annual produce of the testator's residuary estate, of which the property in question formed part. *HARMAN, J.*, held that the compensation money could not properly be described as annual produce of the residuary estate, its proper description being, in effect, dilapidations. Accordingly, he decided against the claim of the tenant for life, but it seems

to me that the circumstances of that case are far removed from the circumstances of the case before me.

In my judgment, I am, accordingly, free to decide, as I do decide, that so far as possible the value payments should be treated in the same way as the leasehold properties from which they were derived. It would be right, I think, to recoup to *corpus* as capital the contributions made under the Act of 1943. Subject to this being done, I will direct (following *Askew v. Woodhead* (1)) that each of the value payments ought to be invested in the purchase of an annuity for a period corresponding to the period which remained, at the date of the war damage, unexpired of the lease of the property in respect of which the payment was made. Such annuities will be applied by the trustees as though they represented rents, profits and income arising from the testator's leasehold properties.

Order accordingly.

Solicitors: *Hawker & Webb* (for all parties).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

C

Re MOSS (*deceased*). HOBROUGH v. HARVEY AND OTHERS.

[CHANCERY DIVISION (Romer, J.), February 11, 1949.]

Charitable Bequest—Gift “to use at her discretion for her work for the welfare of cats and kittens needing care and attention.”

D

By her will, dated Apr. 27, 1947, a testatrix, who died on July 1, 1947, directed that her leasehold house should be sold and one half the proceeds of sale be given to V.H.A.H. “for her to use at her discretion for her work for the welfare of cats and kittens needing care and attention.” The residuary estate was bequeathed to V.H.A.H. for the same purpose. V.H.A.H. had for many years carried on the work of receiving, sheltering and caring for unwanted or stray cats. If the cats brought to her were ill or badly injured she would have them painlessly destroyed, and for the others she attempted to find good homes.

E

HELD: the gifts were calculated to develop the finer side of human nature of which care for old and sick animals was a manifestation, and, therefore, were for the benefit of mankind and charitable.

F

Re Grove-Grady ([1929] 1 Ch. 557; 140 L.T. 659), *applied*.

[AS TO GIFTS FOR THE PROTECTION OF ANIMALS, see HALSBURY, Hailsham Edn., Vol. 4, pp. 124, 125, paras. 165, 166; and FOR CASES, see DIGEST, Vol. 8, pp. 258, 259, Nos. 200-208.]

G

Cases referred to:

- (1) *Re Grove-Grady*, [1929] 1 Ch. 557; 140 L.T. 659; Digest Supp.
- (2) *Inland Revenue Comrs. v. National Anti-Vivisection Society*, [1947] 2 All E.R. 217; 177 L.T. 226; 2nd Digest Supp.
- (3) *Armstrong v. Reeves*, (1890), 25 L.R. Ir. 325; 8 Digest 258, 204 *i*.
- (4) *Marsh v. Means*, (1857), 30 L.T.O.S. 89; 21 J.P. 725; 8 Digest 312, 933.
- (5) *Re Cranston*, [1898] 1 I.R. 431; 8 Digest 259, 214 *i*.
- (6) *Re Douglas*, (1887), 35 Ch.D. 472; 56 L.T. 786; 8 Digest 258, 205.

H

ADJOURNED SUMMONS to determine whether on the true construction of the will of the testatrix bequests to the first defendant of the residuary estate and of a moiety of the net proceeds of the sale of a leasehold house “for her to use at her discretion for her work for the welfare of cats and kittens needing care and attention” were valid and enforceable charitable gifts. ROMER, J., held that they were so.

Tonge for the plaintiff, the trustee of the will.

G. D. Johnston for the first defendant, Violet Heather Amwell Harvey, to whom the gifts to be construed were made.

F. B. Marsh for the second and third defendants, next-of-kin.

Danckwerts for the Attorney-General.

ROMER, J. : The question which I have to determine on this summons is as to the validity of a bequest contained in the will, dated Apr. 27, 1947, of a Miss Dorothy Moss who died on July 1, 1947. The will, after appointing executors and making certain specific legacies, gave a series of pecuniary legacies. They were followed by this direction :

"I direct that my leasehold house known as 20 Woodside Wimbledon aforesaid shall be sold and one half of the net proceeds of the sale to be given to my friend Violet Heather Amwell Harvey of Great Amwell Vicarage in the county of Hertford spinster for her to use at her discretion for her work for the welfare of cats and kittens needing care and attention."

The testatrix disposed of the other half of the net proceeds of sale and directed that it should be divided among certain women including "my friend Violet Heather Amwell Harvey aforesaid." She then directed that her residuary estate should be given :

" . . . unto my friend Violet Heather Amwell Harvey aforesaid for her to use at her discretion for her work for the welfare of cats and kittens needing care and attention."

The question at issue is whether these dispositions to Miss Harvey for her work for the welfare of cats and kittens needing care and attention is good or whether for any reason it fails. Miss Harvey says that if, on the true construction of this will, she is entitled to take this half of the proceeds of sale of the house and the residue for her own absolute use, she will dedicate them to the purposes which the testatrix indicated in her will. It seems to me plain that, in effect, she is a trustee of these sums, and the object, purpose and intent of the gift was that it was to be applied in furtherance of the work which she has been carrying on. I arrive at that conclusion both on the construction of the two gifts themselves and also from the fact that there is an independent gift of a share of the other half of the proceeds of sale to Miss Harvey bequeathed in such terms as to make it plain that she was to take that for her own personal benefit. Therefore, Miss Harvey is to be treated, as she is willing to be treated, as a trustee of the money.

The next question is whether the gift fails for any reason. As it is for Miss Harvey's work for the welfare of cats and kittens needing care and attention, one looks to the evidence to see what that work is. So far as is material, the evidence shows that for many years before the death of the testatrix this lady had carried on a work mainly for the relief of cats and kittens which were in need of human assistance. She says that for more than 35 years before Dec. 10, 1947, she had at the Old Vicarage at Amwell, in Hertfordshire, carried on the work of :

" . . . receiving and sheltering cats and kittens some of which were strays and the remainder of which were brought to me by owners who no longer wanted them or could not keep them. If such cats and kittens were badly ill or hurt or otherwise beyond recovery I had them put to sleep in chloroform lethal boxes. If they were healthy I kept them for a time to endeavour to find good homes for them. Until 1939 the work gradually increased and about 1938 we sometimes had anything from 50 to 60 cats and kittens at a time under our care. When the war broke out in 1939 we had to reduce the numbers, but I have been able to increase

the work again since the cessation of hostilities and in 1947 about a hundred animals passed through my hands and the number at any one time averaged about 16."

A This lady moved from the Old Vicarage to her present home at "Woodside," Hertford Heath, in Hertfordshire, and on her removal she transferred her work there and carried it on without break or interruption. She is still carrying it on at her new home, and has more accommodation there than she had previously. She says that the animal welfare work has increased and

B "... in consequence, in the case of some of the unwanted cats for whom it is unlikely a new home can be found I am obliged to put them to sleep without keeping them more than a day or so; others which are likely to get good homes I keep for as long as possible. In the case of strays I keep them a week to give them a chance of being claimed and during that time I try to find the owners. If I had more money available I could keep all these cats for longer periods which I know would be the wish to the testatrix."

C She refers to the steps she has taken to get assistance and provide proper accommodation for the animal welfare work in connection with which also she says she has frequently to consult veterinary surgeons. She shows that, although she has had grants from the funds of the Dumb Friends League and other casual financial help, she has had to spend considerable sums out of her own pocket. She says that the testatrix was a friend of hers with whom she was in frequent correspondence and that the testatrix always took a great interest in her work.

D It is said on behalf of Miss Harvey that it does not matter whether this is a charitable gift or not, because there is no element of perpetuity or uncertainty, and, therefore, it is a good trust which can be properly executed by the court. It is further said that, in any case, the gift is charitable. On behalf of the next-of-kin it is urged that the gift is bad for perpetuity and uncertainty, and that it is not a charitable gift. Inasmuch as I am satisfied that this is a valid charitable object, the bequest does not fail, and I propose to base my decision on that ground. RUSSELL, L.J., in *Re Grove-Grady* (1) laid it down clearly that a gift in favour of animals depends for its validity on the question whether such a gift produces a benefit to mankind. He said ([1929] 1 Ch. 582):

E "So far as I know there is no decision which upholds a trust in perpetuity in favour of animals upon any other ground than this, that the execution of the trust in the manner defined by the creator of the trust must produce some benefit to mankind. I cannot help feeling that in some instances matters have been stretched in favour of charities almost to bursting point: and that a decision benevolent to one doubtful charity has too often been the basis of a subsequent decision still more benevolent in favour of another."

G Later he said (*ibid.*, 588):

"In my opinion, the court must determine in each case whether the trusts are such that benefit to the community must necessarily result from their execution."

H The observations of the Lord Justice on those matters received recognition in the House of Lords in *Inland Revenue Comrs. v. National Anti-Vivisection Society* (2).

Therefore, one has to see whether the present case passes that test, namely, the test whether the gift produces some benefit to mankind. In my judgment, it passes that test with honours. It seems to me that the care of and consideration for animals which through old age or sickness or otherwise are unable to care for themselves are manifestations of the finer side of human nature, and gifts

in furtherance of these objects are calculated to develop that side and are, therefore, calculated to benefit mankind. That is more especially so, perhaps, where the animals are domestic animals. That appears to have been the view of the matter taken by LORD HANWORTH, M.R., in *Re Grove-Grady* (1) where, after referring to certain authorities, he said ([1929] 1 Ch. 570) :

"From these authorities it seems clear that if the object be to enhance the condition of animals that are useful to mankind, or to secure good treatment for animals, whether those animals are useful to mankind or not (see *per* CHATTERTON, V.-C., in *Armstrong v. Reeves* (3) and *per* WOOD, V.-C., in *Marsh v. Means* (4)), or to insure humane conduct towards, and treatment of, them whether in respect of a particular subjection of them to the use of mankind, as for food (*Re Cranston* (5)), or in what is called vivisection, such objects are to be deemed charitable."

It appears to me that, taking a fair view of this lady's activities as they emerge from her affidavit, it may truthfully be said of them that they conform to all those tests and criteria to which LORD HANWORTH draws attention. I need, I think, only add that a gift to the Institution of the Home for Lost Dogs was regarded as a charitable gift in *Re Douglas* (6).

Counsel for the next-of-kin has urged that this is not a trust for the protection of cats and kittens or protection from cruelty, but is merely a gift for their welfare. I do not take that view of the matter. The gift in the will is not merely a gift to be used at the lady's discretion for the welfare of cats and kittens. It is for the welfare of cats and kittens needing care and attention. It is plain that a gift to prevent cruelty in relation to cats and kittens would be good as having an elevating effect on mankind. For my part, I can see no difference between that and a gift the object of which is to alleviate distress among cats and kittens. It seems to me that, that being the object which the testatrix had in mind, the object which she intended to benefit, and it being, in substance, the object of the work which this lady has carried out and is now carrying out, the gift is perfectly good as being a valid charitable bequest, and I so hold.

Declaration that the gift was charitable and valid. Costs of all parties as between solicitor and client out of the fund in due course of administration.

Solicitors : *Taylor, Jelf & Co.*, agents for *Wilson & Sons*, Salisbury (for the plaintiff); *Batchelor, Fry & Co.*, agents for *Gisby & Son*, Ware, Herts. (for the first defendant); *Markby, Stewart & Wadesons* (for the second and third defendants); *Treasury Solicitor*.

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

Affirmed. C.A. [1949] 2 All E.R. 198.

JONES v. BELLEGROVE PROPERTIES, LTD.

[KING'S BENCH DIVISION (Birkett, J.), February 2, 3, 4, 1949.]

Limitation of Action—Debt—Acknowledgment—Balance sheets of debtor company handed to shareholder creditor—Parol evidence to explain entries—Limitation Act, 1939 (c. 21), ss. 23 (4), 24 (1) (2).

By s. 23 (4) of the Limitation Act, 1939, "Where any right of action has accrued to recover any debt or . . . pecuniary claim . . . and the person liable or accountable therefor acknowledges the claim . . . the right shall be deemed to have accrued on and not before the date of the acknowledgment . . ." By s. 24, "(1) Every such acknowledgment as aforesaid shall be in writing and signed by the person making the acknowledgment. (2) Any such acknowledgment . . . shall be made to the person, or to an agent of the person, whose title or claim is being acknowledged."

In 1936 the plaintiff lent £1,807 to the defendant company in which he was a shareholder. At the annual general meeting of the company in December, 1946, the plaintiff was handed by a director the accounts of the company, signed by the accountants and two directors, which included the balance sheets for the years 1939 to 1945, in each of which was the entry: "Sundry creditors £7,638 8s. 10d."

A HELD: (i) parol evidence was admissible to show that the sum mentioned in this entry included the debt due to plaintiff.

(ii) the entry, thus explained, constituted an acknowledgment of the debt due to the plaintiff within the meaning of the Limitation Act, 1939, ss. 23 (4) and 24 (1).

B (iii) although the plaintiff was present at the meeting in December, 1946, in his capacity as shareholder, he was also, in fact, a creditor, and the communication then made to him was sufficient to satisfy s. 24 (2) of the Act which did not require that an acknowledgment should be in any particular form.

[AS TO WHAT ACKNOWLEDGMENTS ARE SUFFICIENT, see HALSBURY, Hailsham Edn., Vol. 20, pp. 631-636, paras. 800-805; and FOR CASES, see **C** DIGEST, Vol. 32, pp. 357-377, Nos. 409-607.]

Cases referred to:

- (1) *Spencer v. Hemmerde*, [1922] 2 A.C. 507; 128 L.T. 33; 32 Digest 364, 484.
- (2) *Green v. Humphreys*, (1884), 26 Ch.D. 474; 51 L.T. 42; 32 Digest 361, 449.
- D** (3) *Bowring-Hanbury's Trustee v. Bowring-Hanbury*, [1942] 1 All E.R. 516; [1942] Ch. 276; 167 L.T. 188; *affmd.*, [1943] 1 All E.R. 48; [1943] Ch. 104; 168 L.T. 72; 2nd Digest Supp.
- (4) *Re Bearan*, [1912] 1 Ch. 196; 105 L.T. 784; 23 Digest 360, 4273.
- (5) *Ledingham v. Bermejo Estancia Co., Ltd.*, *Agar v. Bermejo Estancia Co., Ltd.*, [1947] 1 All E.R. 749; 2nd Digest Supp.
- E** (6) *Re Coliseum (Barrow), Ltd.*, [1930] 2 Ch. 44; 143 L.T. 423; Digest Supp.
- (7) *Hartley v. Wharton*, (1840), 11 Ad. & El. 934; 3 Per. & Dav. 529; 32 Digest 377, 613.
- (8) *Re Atlantic & Pacific Fibre Importing & Manufacturing Co.*, [1928] Ch. 836; 140 L.T. 18; Digest Supp.
- F** (9) *Read v. Price*, [1909] 2 K.B. 724; 101 L.T. 60; 32 Digest 377, 610.

ACTION for money lent.

G The plaintiff, a shareholder in the defendant company, sought to recover money lent to the company in 1936. The company pleaded that the action was barred by the Limitation Act, 1939, s. 2 (1) (a). In reply, the plaintiff contended *inter alia* that there had been a written acknowledgment of the debt in balance sheets for the years 1939-1945 which had been communicated to him in 1946. BIRKETT, J., gave judgment for the plaintiff.

Marshall, K.C., and *I. H. Jacob* for the plaintiff.
S. Terrell for the defendant company.

H BIRKETT, J.: The plaintiff, Francis Edward Jones, claims from the defendant company, Bellegrove Properties, Ltd., a sum now agreed at £1,807, the balance of money lent by the plaintiff to the defendant company in 1936 as set out in the particulars of the claim. The defendants say that the debt did not accrue within six years before action brought, and is, therefore, barred by the Limitation Act, 1939, s. 2 (1) (a). To that defence, in his reply, the plaintiff pleads that within six years before the action the defendant company made an acknowledgment in writing, signed by their agents, Messrs. J.

Altman & Co., chartered accountants, to him that the debt now sued for remained unpaid and due to him. As particulars it is stated that at the annual general meeting of the defendant company on Dec. 31, 1946, at which the plaintiff was present, the accounts and balance sheets for the seven years ending May 21, 1945, were presented to the meeting. These accounts were signed by the accountants as agents of the defendant company, and they contained a statement that the defendant company owed their creditors, of whom the plaintiff was one, during each of the said years, the sums therein set out. Part of each of the sums so set out represented the debt of £1,807 due and owing to the plaintiff by the defendant company.

That is the first main issue in this action. The defendants say that the debt is statute-barred, and they deny that there has been any acknowledgment in writing taking it out of the Limitation Act, 1939. [His LORDSHIP recited the facts relating to the formation of the defendant company in 1936, found that the sum claimed by the plaintiff was lent by him to the company, referred to meetings of the company in 1942 and 1945 and to the appointment of a Mr. Silver as a director and continued:] It is plain that Mr. Silver was thoroughly aware of the debt owing to the plaintiff. The next meeting of the defendant company was the annual general meeting on Dec. 31, 1946, and the plaintiff said—and it is the only evidence I have before me about what happened: “Mr. Silver said: ‘These are the accounts for five or six years. Would you care to look at them?’” These were the accounts from 1939 to 1945, signed by the chartered accountants and by two of the directors of the company. In those documents, which were balance sheets as at May 21, 1939, 1940, 1941, 1942, 1943, and 1945, there is a figure under the heading of “Sundry Creditors £7,638 8s. 10d.” This figure included the loan made by the plaintiff to the company.

Counsel for the defendant company submitted that the debt was statute-barred by reason of the Limitation Act, 1939. Section 23 (4) of that Act, however, provides:

“Where any right of action has accrued to recover any debt or . . . pecuniary claim, or any claim to the personal estate of a deceased person or to any share or interest therein, and the person liable or accountable therefor acknowledges the claim or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgment or the last payment: Provided that a payment of a part of the rent or interest due at any time shall not extend the period for claiming the remainder then due, but any payment of interest shall be treated as a payment in respect of the principal debt.”

By s. 24:

“(1) Every such acknowledgment as aforesaid shall be in writing and signed by the person making the acknowledgment. (2) Any such acknowledgment or payment as aforesaid may be made by the agent of the person by whom it is required to be made under the last foregoing section, and shall be made to the person, or to an agent of the person, whose title or claim is being acknowledged or, as the case may be, in respect of whose claim the payment is being made.”

Counsel for the defendant company submitted that these balance sheets containing the entry, “sundry creditors £7,638 8s. 10d.”, were not a clear admission of liability to any one, and would, therefore, not be an acknowledgment within the Act of 1939. He argued that “sundry creditors” was a mere statement of fact as to liabilities to shareholders and not to creditors.

In *Spencer v. Hemmerde* (1) a decision of the House of Lords, LORD SUMNER stated the essential conditions of the acknowledgment which was required under the statutes existing in 1922, and said ([1922] 2 A.C. 532):

A “In the earlier case of *Green v. Humphreys* (2), COTTON, BOWEN and FRY, L.JJ., express a view which gets rid of the old difficulties and in my opinion ought to be adopted. COTTON, L.J., recites the familiar formula: ‘The rule seems to be this, that if there is an absolute unconditional acknowledgment, not controlled by any other language in the letter, then the court comes to the conclusion that by that acknowledgment the party intends a promise to pay that which he acknowledges to be due,’ and he concludes: ‘... on a fair construction of the language there must be an acknowledgment of the claim as one which is to be paid by the writer.’ The judgments of BOWEN and FRY, L.JJ. are to the same effect. The former says: ‘It is clearly settled that to take a case out of the statute there must be an acknowledgment or a promise to pay, and that where there is a clear acknowledgment that the debt is due from the person giving that acknowledgment, a promise to pay will be inferred’; and FRY, L.J., asks: ‘... what is an acknowledgment?’ In my view an acknowledgment is an admission by the writer that there is a debt owing by him, either to the receiver of the letter or to some other person on whose behalf the letter is received.”

C Counsel for the defendant company also relied on *Bowring-Hanbury’s Trustees v. Bowring-Hanbury* (3) which went to the Court of Appeal. The headnote ([1943] Ch. 104) is:

D “A creditor, who was the sole executor of the will of his wife, stated, in an Inland Revenue affidavit made by him to obtain probate, that the list of debts of the estate included a sum of £9,000 due to him as representing the balance of a loan made by him to his wife after repayment to him of £1,000 in June, 1929. He became bankrupt in 1935, and the solicitors who were acting for him as executor of his wife’s estate, sent to his trustee in bankruptcy a letter enclosing a copy of the executor’s cash accounts and an estimate of the outstanding assets and liabilities. E A note was appended to this document stating that: ‘In addition to the above outstanding liabilities there is a possible claim by [the executor] for £9,000, the balance of a loan made to the deceased in 1924.’ The trustee having commenced proceedings in 1936 to recover this sum from the executor, the defence was set up that the claim was barred under the Limitation Act, 1923, s. 3. F Held, (1) that the statement in the affidavit did not constitute an acknowledgment ...”

LORD CLAUSON, delivering the judgment of the court, said ([1943] 1 All E.R. 50; [1943] Ch. 109):

G “The law as to the operation of an acknowledgment (which is authoritatively expounded by LORD SUMNER in the House of Lords in *Spencer v. Hemmerde* (1)) has been altered by the Limitation Act, 1939, but (see s. 33 of that Act) not so as to affect the present case. BENNETT, J., referring to the decision of NEVILLE, J., in *Re Beavan* (4), held that the statement in the Inland Revenue affidavit was a mere statement of facts and not an acknowledgment of anything to anybody, and could not be taken to imply a promise, and in any case was not made to the creditor or the creditor’s agent. This decision appears to us to be plainly right ... H However this may be (and we express no opinion on the point) it is a complete answer to the plaintiff’s plea based on this letter that there was no evidence of any authority given to the solicitors by the defendant, to make any acknowledgment of the debt on his behalf. We, accordingly, see no ground for interfering with the decision of BENNETT, J. ...”

Counsel for the defendant company cited these authorities in support of his contention that this statement of “sundry creditors” in the balance sheets

is akin to the mere statement of facts in the affidavit to the Inland Revenue and ought to have no effect.

I do not know that the decision of ATKINSON, J., in *Ledingham v. Bermejo Estancia Co., Ltd.*, *Agar v. Bermejo Estancia Co., Ltd.* (5) carries this matter much further, because in that case there was a note in the balance sheet indicating that a certain sum was due to the lender. It was cited to me for the reason that in the present case the plaintiff's name does not appear in this balance sheet. There is no specific sum allotted to the plaintiff in the general sum of £7,638, and while that decision of ATKINSON, J., could not be contested because in the balance sheet there appeared a specific acknowledgment, a specific person and a specific sum, that was not so in the present case. In the important case of *Re Coliseum (Barrow), Ltd.* (6), MAUGHAM, J., said ([1930] 2 Ch. 47) :

"It is now well settled that an acknowledgment will keep a debt alive only if it amounts to a fresh promise to pay (*Green v. Humphreys* (2)), and that the acknowledgment must be made to the creditor or to his agent : that is beyond dispute. In the present case the directors of the company, at various board meetings held from time to time, passed the balance sheets before them and two of them signed the balance sheets on behalf of the board pursuant to s. 113 of the Companies (Consolidation) Act, 1908. Accordingly, had the statement been made in the balance sheet that the company owed a specified sum to a shareholder to whom the balance sheet was sent in the usual way that would have amounted, I think, to a sufficient acknowledgment within the authorities."

In the balance sheets in the present case there is a general figure of £7,638 8s. 10d. and in that general sum there is this specific sum lent by the plaintiff. That is abundantly clear, and I cannot doubt that in any case such as the present, where a balance sheet confines itself to a general figure, oral evidence is admissible to show the constituent elements of that figure. Evidence was given in this case by a witness for the defence who expressly stated that that figure includes loans to the company.

In *Hartley v. Wharton* (7), the defendant, after he had reached his majority, had written a letter affirming a debt incurred during his infancy. The letter read (11 Ad. & El. 935) :

"Sir, I am sorry to give you so much trouble in calling, but I am not prepared for you ; but will without neglect remit you in a short time.—Yours respectfully,
Monday night, 6 o'clock."

There was no address, and it was submitted that the document was insufficient to satisfy the statute because it contained no amount and did not specify the date or the creditor's name. LORD DENMAN, C.J. (*ibid.*, 937) said :

" . . . there was proof of the delivery of the goods ; and the question is whether the replication, alleging a ratification by writing after the defendant was of age, has been proved. There is no date to the writing ; but the Act requires none, but only a promise or ratification made by some writing signed by the party to be charged therewith. Then it is urged that the party to whom the promise was made is not named. That I do not think necessary. If such a promise were in a letter, the address would be evidence ; and, if that were in an envelope, evidence might be given to connect the two : and so evidence may be given showing for or to whom the written acknowledgment was made, by delivery or otherwise. Then it is said that no sum is named. I do not say that it might not have been desirable that the statute should have required this ; but it does not do so in fact. And the decisions of the Courts of Common Pleas and Exchequer, and of LORD TENTERDEN at *Nisi Prius* show that

this is not necessary ; though an earlier decision of the Common Pleas points the other way."

So I entertain no doubt that evidence may be given to show that in this general sum in the balance sheet, the specific debt due to the plaintiff is owing.

In *Re Atlantic and Pacific Fibre Importing and Manufacturing Co., Ltd.* (8) the headnote is ([1926] Ch. 836) :

- A "A balance sheet contained in an annual report sent by a company to its shareholders and filed with the Registrar of Companies and stating the total amount of the company's indebtedness under its debentures for principal and interest accrued thereon since their issue is, although not sent to the debenture holders, a sufficient acknowledgment by the company of its liability under the debentures to take the case out of the operation of s. 3 of the Civil Procedure Act, 1833."

The balance sheet stated the following liabilities (*ibid.*, 837) :

- C " 'On debentures, £23,925 8s. 6d.' And the balance sheet in the report for the year ending Dec. 31, 1926, contained, under the heading 'Sundry creditors' the following entry : 'Accrued interest on debentures, £80,733 2s. 7d.' That sum representing the aggregate amount of interest accrued and unpaid on all the issued debentures, at the rate of 10 per cent., as from the dates on which the debentures were respectively issued. The notices and reports incorporating the balance sheets were sent to the plaintiff and those other debenture holders who happened also to be shareholders of the company, but were not sent to those debenture holders who were not shareholders, and a print of the balance sheet so signed by the directors was filed in each year with the Registrar of Companies."

CLAUSON, J., stated (*ibid.*, 839) :

- E "In my judgment the issue of the balance sheets constituted, in the circumstances, a sufficient acknowledgment of the company's indebtedness to the plaintiff and the other debenture holders under the debentures."

In *Read v. Price* (9) the headnote states ([1909] 2 K.B. 724) :

"Parol evidence is admissible to prove the contents of a written acknowledgment which has been lost."

COZENS-HARDY, M.R., said (*ibid.*, 730) :

- F "Three points were raised. The first was that any acknowledgment to take the case out of the statute of limitations applicable to the bond must be in writing, and no writing was produced. We did not call upon the counsel for the respondents to deal with that, or with the second point as to the admissibility of parol evidence of the contents of the written acknowledgment, because it seemed to us quite clear that, although the statute says the acknowledgment must be in writing, you may prove the writing in any way. You may prove the existence of the writing by the ordinary law of evidence, and when the writing is lost, and the proof of the loss is satisfactory to the court, you may give secondary evidence of the contents of the lost document, just as in cases where writing is required under the Statute of Frauds you can always prove the existence of the writing by parol evidence, if proof is given of the loss of the written document."

I can state quite shortly my own conclusions. I entertain no doubt that there was a debt in existence at the time of the issue of the writ. That has not been seriously contested. I hold that the balance sheets for 1939 to 1945 inclusive are a sufficient acknowledgment within the meaning of the Limitation Act, 1939. They are in writing, signed by the agent of the defendant company

(J. Altman & Co.), and also signed by two directors of the defendant company, and I hold that the requirements of s. 24 (1) :

"Every such acknowledgment as aforesaid shall be in writing and signed by the person making the acknowledgment "

have been satisfied. With regard to s. 23 (4) :

"Where any right of action has accrued to recover any debt or . . . pecuniary claim . . . and the person liable or accountable therefor acknowledges the claim . . . the right shall be deemed to have accrued on and not before the date of the acknowledgment . . . "

I hold that there was here an acknowledgment within the sub-section. With regard to s. 24 (2) :

"Any such acknowledgment . . . shall be made to the person, or to an agent of the person . . . "

It has been argued that the plaintiff was only present at the meeting in December, 1946, as a shareholder and not in the capacity of a creditor, and, therefore, the communication which was made at that meeting had no effect as an acknowledgment made to a creditor. I am unable to accept that contention. No particular form of acknowledgment is required. When the plaintiff attended the meeting it is true he went there in his capacity as shareholder, but he was also a creditor, and, in my view, it cannot be said that this is not an acknowledgment of indebtedness to a creditor merely because he happens to be a shareholder and would not otherwise have been at the meeting.

For these reasons I give judgment for the plaintiff here for the sum of £1,807, with the costs of the action.

Judgment for the plaintiff with costs.

Solicitors : *Harold Miller & Fraser*, agents for *Weigall & Inch*, Margate (for the plaintiff) ; *Kenneth Brown, Baker, Baker* (for the defendant company).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

ORR-LEWIS v. ORR-LEWIS.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, J.), February 16, 1949.]

Conflict of Laws—Restraint of foreign proceedings—Burden of proof—Divorce petition—Injunction to restrain respondent from proceeding with divorce suit in France.

The jurisdiction of the English courts to restrain the respondent in a matrimonial suit in England from proceeding in another country with a suit for the dissolution of the marriage is one which should be exercised with great caution and only if it is shown that the continued prosecution of the foreign suit would be oppressive or vexatious or would cause irreparable damage to the petitioner in England.

Cohen v. Rothfield ([1919] 1 K.B. 410 ; 120 L.T. 434), *applied*.

[AS TO RESTRAINT OF FOREIGN PROCEEDINGS, see HALSBURY, Hailsham Edn., Vol. 6, pp. 360-362, para. 416 ; and FOR CASES, see DIGEST, Vol. 11, pp. 480-483, Nos. 1335-1358.]

Cases referred to :

(1) *Cohen v. Rothfield*, [1919] 1 K.B. 410 ; 120 L.T. 434 ; 11 Digest 478, 1315.

(2) *Bushby v. Munday*, (1821), 5 Madd. 297 ; 11 Digest 482, 1344.

SUMMONS by a petitioning wife asking for an injunction restraining the husband from proceeding in France with a suit for the dissolution of the marriage. WILLMER, J., held that the wife had not shown that the continued prosecution of the French suit would be oppressive or vexatious and refused the injunction. The facts appear in the judgment.

Geoffrey Lawrence for the wife.

A Hollins for the husband.

B WILLMER, J. : The petitioning wife asks for an injunction restraining the respondent husband from proceeding with certain proceedings commenced by him in the republic of France for the dissolution of the marriage. The wife in this country is proceeding against her husband on the ground of cruelty, and I am informed that in the French suit the husband is seeking a decree from the French court on the ground of the wife's desertion. The question of domicile has already been debated not only in this court but also in the Court of Appeal, and it has been decided that the wife is domiciled in this country and the husband's objection to the jurisdiction has been overruled. Nevertheless, the husband is still proceeding with his suit in France, not accepting the decision of the English courts with regard to his domicile, but believing that he will be able to persuade the French court to accept his view on that question.

D The present summons asks the court for an injunction in perpetuity. I pointed out to counsel that, on any view, it would be impossible at the present stage to grant an injunction in perpetuity, because at the present moment we do not know whether the wife's claim is or is not well founded. Counsel for the wife recognised that difficulty and said that he was prepared to accept an injunction restraining the husband from pursuing his proceedings in France until the wife obtained a decree in this country, the intention being that, if she succeeded in doing so, he (counsel) would then ask the trial judge to continue the injunction in perpetuity. I do not, however, think it is for me to look so far into the future. The question which I have to determine is whether there should or should not be an injunction restraining the husband from pursuing the French suit until such time as the trial of the suit in this country comes on. I have to ask myself what damage will ensue during that limited time if I do not grant the relief which is asked for.

F It is, I think, now settled that the court will be very slow to impose an injunction on any party seeking to proceed in a foreign country. The most recent pronouncement on the subject to which I have been referred is the decision of the Court of Appeal in *Cohen v. Rothfield* (1). That was a case of a civil action, but in the course of it the authorities were reviewed, both cases where the same plaintiff was pursuing a remedy in two countries and also those in which a plaintiff in one country was defendant in another country. G The matter was summed up by SCRUTTON, L.J., thus ([1919] 1 K.B. 413) :

H "Where it is proposed to stay an action on the ground that another is pending, and the action to be stayed is not in the court asked to make the order, the same result is obtained by restraining the person who is bringing the second action from proceeding with it. But, as the effect is to interfere with proceedings in another jurisdiction, this power should be exercised with great caution to avoid even the appearance of undue interference with another court."

EVE, J., who delivered a judgment to the same effect, said (*ibid.*, 417) :

"The question then arises in what circumstances and upon what principle does the court act in exercising this jurisdiction in cases where, as in this case, it is invoked on the ground that another action between the same parties and for substantially the same relief is already instituted.

Broadly speaking, I think the answer is that the court will exercise the jurisdiction where the circumstances are such as to satisfy it that continued prosecution of both actions would be oppressive or vexatious."

That is to say, I have this jurisdiction, but I am not to exercise it except with great caution and on being satisfied that the continued prosecution of the French action would be oppressive or vexatious, and, I think I should add, would cause serious, if not irreparable, damage to the wife to whom in this instance I am asked to grant this injunction. A

In *Cohen v. Rothfield* (1) SCRUTTON, L.J., drew a distinction between the cases where the same plaintiff is suing in two jurisdictions and those where the plaintiff in one country is the defendant in another, making it clear that in the latter case the courts will lean against interference even more strongly than in the former case. He raised, indeed, a question which had twice previously been raised in similar cases—whether there was any case in which such an order had ever been made. In reply to that inquiry he was referred to *Bushby v. Munday* (2) which was decided in 1821. There an order had been made where a plaintiff in this country was defendant in another country, but, apart from that one old case, no such order had been made up to 1918 when *Cohen v. Rothfield* (1) was decided, and I am informed by counsel that their researches have not revealed any case in which such an order has been made in the last thirty years. I approach this case, therefore, with some degree of caution when I am asked to exercise this very unusual jurisdiction. B

In my judgment, no sufficient case has been made out for making the order that I am asked to make. It appears to me that the course which the wife and her advisers have taken is misconceived. As she has obtained the judgment of the Court of Appeal establishing the English domicile for which she was contending, I should have thought that the next step to take was to set the case down for trial. Had that been done in early November it is not beyond the bounds of possibility that by today we might have been trying the suit instead of discussing what should be done about the French proceedings. Had that course been taken, had the wife proceeded with dispatch, the question which we have been discussing today would be largely academic. Even today, there is no evidence before me that any step in the French proceedings is being contemplated in the immediate or foreseeable future. Notwithstanding the loss of three and a half months' time, I see no reason why, if this case were to be set down at once, it should not be tried and disposed of long before the French proceedings come to fruition—at any rate if the French proceedings proceed at the rate which has been maintained up to now. In those circumstances, it appears to me that the wife is far from proving that in the circumstances it would be oppressive or vexatious to allow the French proceedings to proceed or that a case has been made out for interfering with the right of a party to proceed in a foreign jurisdiction. Bearing in mind the caution which has been enjoined on the court before making an order of this character, I feel that I can only decline to make the order asked for, and the application will, therefore, be dismissed. C D E F G

Application dismissed with costs.

Solicitors: *Gordon, Dadds & Co.* (for the wife); *Roney & Co.* (for the husband).

[Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.]

COLLINS v. HOWARD.

[KING'S BENCH DIVISION (Humphreys, J.), February 2, 3, 11, 1949.]

Damage—Remoteness—Breach of contract—Contract by defendant to form company—Agreement by plaintiff to contribute capital—Sale of shares to provide funds—Contract repudiated by defendant—Shares re-purchased at enhanced cost—Recovery of excess.

A The plaintiff agreed with the defendant that he would provide capital for the formation of a limited company to exploit for building purposes a material which the defendant had invented. To provide the necessary funds, the plaintiff disposed of a block of shares. The defendant subsequently refused to go on with the matter, and the plaintiff thereupon bought an equal number of the same shares. Owing to fluctuations in the market they cost him £245 more than he had received on the sale.

B **HELD:** the sum of £245 was recoverable by the plaintiff from the defendant as damages for breach of contract.

[AS TO REMOTENESS OF DAMAGE IN CONTRACT, see HALSBURY, Hailsham Edn., Vol. 10, pp. 97-102, paras. 122-127; and FOR CASES, see DIGEST, Vol. 17, pp. 96-99, Nos. 115-141.]

C Cases referred to :

- (1) *Flureau v. Thornhill*, (1776), 2 Wm. Bl. 1078; 17 Digest 121, 303.
- (2) *Bain v. Fothergill*, (1874), L.R. 7 H.L. 158; 31 L.T. 387; 39 J.P. 228; 17 Digest 122, 304.

D (3) *Robinson v. Harman*, (1848), 1 Exch. 850; 13 L.T.O.S. 141; 17 Digest 83, 30.

- (4) *Hadley v. Baxendale*, (1854), 9 Exch. 341; 23 L.T.O.S. 69; 17 Digest 93, 101.

ACTION for damages for breach of contract.

E In 1946 the plaintiff, a civil engineer, answered an advertisement inserted in a newspaper by the agents of the defendant, the inventor of "Lignacite," a material for building purposes designed to take the place of concrete. To exploit the invention the defendant was proposing to form a limited company which would have a share capital of £8,500, of which £1,000 would be ordinary shares of £1 each allotted to the defendant and the balance a working capital of £7,500 in 6 per cent. preference shares of £1 each to be subscribed in cash by three directors in equal amounts of £2,500 each. The plaintiff agreed to subscribe £2,500 and two other intending directors, one Cox and one Baynton, agreed to subscribe £1,000 and £1,500 respectively. After consultation with the plaintiff's bank it was agreed that the four parties should form a company to be called Lignacite (South Eastern) Ltd., with a working capital of £5,000 only. This was confirmed by letters of Sept. 3 and 4, 1946, between the plaintiff and the defendant, final terms being settled at a meeting held on Sept. 9, 1946.

G In pursuance of the agreement the three directors providing capital agreed between them to find £2,000 at once, the plaintiff producing £1,000 and Mr. Baynton and Mr. Cox £500 each. To provide this sum the plaintiff disposed of a block of Central Argentine Railway shares which realised £1,042. On Sept. 11 the defendant sent a letter to the plaintiff, which the latter received on Sept. 13, stating that the proposal to form the company with a subscribed capital of £5,000 only was unacceptable to the defendant, and that, unless the plaintiff could arrange for the subscription of the complete nominal capital of £7,500, the defendant was unable to proceed further in the matter. The plaintiff thereupon re-purchased the shares which he had sold, and for them, owing to fluctuations in the market, he had to pay an additional £245.

H **HUMPHREYS, J.**, held that there had been a breach of contract by the defendant, and that the extra cost at which the plaintiff had to re-purchase the shares was recoverable as damages.

Rees-Davies for the plaintiff.

Scott Cairns, K.C., and H. E. G. Bromley for the defendant.

Our note, ante.

Feb. 11. HUMPHREYS, J., stated the facts, found that there had been a concluded contract and there was a breach of that contract, and concluded:—
It is said by counsel for the defendant that the damages claimed are of a kind which the law does not recognise, and that the breach of such a contract as that with which we are concerned here does not sound in damages at all. The damages are put in the statement of claim as expense, loss and damage due to the breach of contract.

As soon as the plaintiff was satisfied that the contract was complete he sold this Argentine railway stock to implement his promise to his co-directors to find £1,000 at once and, eventually, to invest £2,500 in the company. When he received the defendant's letter of Sept. 11 on Friday, Sept. 13, it was too late for him to do anything (the next two days being Saturday and Sunday) until the following Monday, when he decided to buy back the Argentine stock. If he could have got it back at the price at which he had sold he would have suffered no loss except such small expense as he happened to have been put to. Counsel for the defendant argues that the damages claimed are not recoverable because the plaintiff's loss is really due to the fluctuations of the market. A further objection to the claim is that the damage did not arise out of the breach of contract because the plaintiff had sold his shares before there was any breach of contract, and, indeed, before there was any need for him to sell them. "My contract with you," says the defendant, "was to form a company, and you promised that, as soon as the company was registered, you would invest £2,500, but the company was not registered. It would probably have been registered in a comparatively few days, Oct. 1, having been suggested as the time for beginning the venture, but that date had not arrived. Therefore, in selling these shares when the quotation was low, you were very unwise, and it was quite unnecessary. I did not ask you to, and I am not responsible if you made a loss."

Counsel for the defendant relied on, first, *Flowers v. Theobald* (1). That was a case of the sale of land by the defendant to the plaintiff. The defendant could not make out the title, and he offered the plaintiff the choice of either taking the title with all its faults or of having back the deposit he had paid, with interest and costs, but the plaintiff insisted on a further sum for damages in the loss of a good bargain, and the question which the court had to consider was whether he was entitled to those damages. BLACKSTONE, J., said (2 Wm. Bl. 1078):

"These covenants are merely upon condition, frequently expressed, but always implied, that the vendor has a good title. If he has not, the return of the deposit, with interest and costs, is all that can be expected."

The other judges agreed. That is true today in regard to the sale of land. In *MAYNE ON DAMAGES*, 11th ed., p. 227, the learned author, quoting the well-known words of Lord CHANESFORD in *Hill v. Fisherhill* (2 Q. B. 7 H.L. 207), said:

"The rule as to the times within which damages may be recovered upon the breach of a contract for the sale of a real estate must be taken to be without exception. If a person enters into a contract for the sale of a real estate knowing that he has no title to it, not only means of acquiring it, the purchaser cannot recover damages beyond the expenses he has incurred by an action for the breach of the contract: he can only obtain other damages by an action for deceit."

The learned author continues (*ibid.*):

"No doubt there is an exception to the ordinary rule of the contract law, that where a person enters into a contract with a person of sound mind, he is bound to perform it, and he is liable for damages as if the contract had been performed."

That is based on the long case of *Parker v. Lewis*, 10 *Adams & Ellis*, 254. In *Hobbs v. Rowland*, 4 *Adams & Ellis*, 254.

we think the proper rule is such a case as the present is that where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be so assessed upon an inquiry, i.e., according to the usual course of things, from such breach of contract itself.

Then to come now to the case of special circumstances. It is not suggested that there are any special circumstances in the present case, so it is the first rule that applies. In the present case the fact is: Was the action of the plaintiff a reasonable one? Was it reasonable for him, having entered into the contract on Sept. 2 at a price of £1,000 in the only way he could? I think it was extremely reasonable, indeed. I think he was bound to do it, if not under the contract with the defendant at least under his contract with the other two defendants. When on Sept. 12 he received the letter which constituted a breach of contract, what was the reasonable thing for him to do? It seems to me that the reasonable and proper thing for him to do was to take any steps which would secure him the damage which he had suffered, and the way was as simple as that was by going into the market and buying back an equivalent amount of stock. It is true that he made a loss, but if it had happened that the market had gone down instead of going up, he would have been applauded by the defendant for having prevented there being a loss. His position was the same as if this had been a contract for the sale of, e.g., wheat. Supposing the defendant had contracted to deliver in many bushels of wheat to the plaintiff and had failed to do so. The plaintiff, of course, would have gone to go into the market and buy that number of bushels of wheat, and if he had to pay more for them than he would have had to pay to the defendant, the damages would have been the extra amount which he had had to pay. That is exactly what the plaintiff did in this case. The mere fact that there were fluctuations in the market seems to me not to constitute him to say that he did the best reasonable thing he could, and the loss was not his fault. The fault was that of the defendant who failed to implement the promise. The defendant broke his contract and the plaintiff had to do the best he could in the circumstances. For these general reasons I come to the conclusion that the damages he claimed are payable, and, therefore, I give judgment for the plaintiff for £245, with costs.

Judgment for the plaintiff with costs.

Huttings, J. *Rowland v. Woodward & Co.* against the *Huttings & Co.* *Gregory, Rowland & Co.* against the *Huttings & Co.* *Manchester* (for the defendants).

[Reported by F. A. AMES, Esq., Barrister-at-Law.]

*Re A DEBTOR (No. 400 OF 1940). Ex parte THE DEBTOR
v. DODWELL (THE TRUSTEE).*

[CHANCERY DIVISION (Harman, J.), January 31, February 14, 1949.]

Bankruptcy—Control over trustee by bankrupt—Extent—Removal of trustee—Bankruptcy Act, 1914 (c. 59), ss. 80, 105 (1).

A
A bankrupt applied under the Bankruptcy Act, 1914, ss. 80 and 105 (1), for relief against the trustee in bankruptcy, including *inter alia* (a) an injunction restraining the trustee from disposing of any of the property comprised in the estate, (b) an order for his removal from office, (c) inquiries into his remuneration and his costs, charges and expenses in managing the estate, and (d) an order for him to pay in full all creditors other than the Commissioners of Inland Revenue.

B
C
HELD: (i) although the court could in certain circumstances interfere at the instance of a bankrupt to control the actions of the trustee, ss. 80 and 105 (1) of the Act did not, in the absence of fraud, justify interference in the day to day administration of the estate or entitle the bankrupt to question the exercise by the trustee in good faith of his discretion or hold him accountable for an error of judgment. It was for the trustee alone to decide (with the permission of the committee of inspection, under s. 56) when and how to realise the estate, and he was not accountable to the bankrupt, except for the surplus to which the bankrupt was entitled under s. 69 of the Act.

Bird v. Philpott ([1900] 1 Ch. 822; 82 L.T. 110) and *Jarrett v. Barclays Bank, Ltd., Nash v. Jarrett* ([1947] 1 All E.R. 72; [1947] Ch. 187; 176 L.T. 119), *applied*. D

(ii) the bankrupt had no right to insist on the removal of the trustee from office, or to interfere with his remuneration or the costs, charges and expenses incurred by him, unless the trustee was guilty of misconduct in which case the Board of Trade would interfere under s. 95 (2) of the Act.

E
(iii) it was for the trustee alone to settle with the creditors, and the bankrupt had no right to question his decision. The bankrupt's suggestion that one class of creditors should be paid in full while nothing was paid to another class was a negation of the whole object of bankruptcy proceedings.

[AS TO POWERS AND DUTIES OF TRUSTEE IN BANKRUPTCY, see HALSBURY. Hailsham Edn., Vol. 2, pp. 162-172, paras. 215-227; and FOR CASES, see F DIGEST, Vol. 4, pp. 212-214, Nos. 1972-1989.]

Cases referred to:

- (1) *Re Benoist*, [1909] 2 K.B. 784; 101 L.T. 432; 4 Digest 338, 3169.
(2) *Bird v. Philpott*, [1900] 1 Ch. 822; 82 L.T. 110; 4 Digest 500, 4504.
(3) *Re Austin, Ex. p. Sheffield*, (1879), 10 Ch.D. 434; 40 L.T. 15; 4 Digest 500, 4502. G
(4) *Re Leadbitter*, (1878), 10 Ch.D. 388; 39 L.T. 286; 4 Digest 580, 5324.
(5) *Jarrett v. Barclays Bank, Ltd., Nash v. Jarrett*, [1947] 1 All E.R. 72; [1947] Ch. 187; 176 L.T. 119; 2nd Digest Supp.

H
MOTION by the bankrupt, applying under the Bankruptcy Act, 1914, ss. 80 and 105 (1), for the removal of the trustee and appointment of the official receiver in his place and other relief against the trustee. HARMAN, J., held that the relief asked for could not be granted, and dismissed the application. The facts appear in the judgment.

Lindner for the bankrupt.

V. R. Aronson for the trustee in bankruptcy.

Maurice Berkeley for the Inland Revenue.

Our. adv. vult.

Feb. 14. **HARMAN, J.**, read the following judgment. By this motion launched in November, 1948, the bankrupt seeks the following relief against the trustee : (i) an inquiry as to the disposal by the trustee of the contents of the dwelling-house occupied at the date of the bankruptcy by the bankrupt and his wife ; (ii) an injunction restraining the trustee from selling or disposing of any of the property comprised in the bankrupt's estate ; (iii) an order removing the trustee from his office and appointing the official receiver in his place ; (iv) an order that the court give directions that the bankrupt be appointed as general manager of the estate ; (v) an inquiry into the trustee's remuneration and an order of the court fixing it ; (vi) an inquiry into the costs, charges and expenses of the trustee in managing the estate and an order fixing proper charges and disallowing against the estate any excess found to have been charged ; (vii) an order directing the trustee or his substitute to pay all the creditors in full other than the Commissioners of Inland Revenue ; or, by way of alternative, (viii) an order re-vesting all the bankrupt's estate in him, and (ix) such further relief as the court thinks fit. It will be seen that the relief asked does not lack either for boldness or for novelty.

The bankrupt bases his application on the Bankruptcy Act, 1914, ss. 80 and 105 (1) which provide :

" 80. If the bankrupt or any of the creditors, or any other person, is aggrieved by any act or decision of the trustee, he may apply to the court, and the court may confirm, reverse, or modify the act or decision complained of, and make such order in the premises as it thinks just.

105 (1). Subject to the provisions of this Act, every court having jurisdiction in bankruptcy under this Act shall have full power to decide all questions of priorities, and all other questions whatsoever, whether of law or fact, which may arise in any case of bankruptcy coming within the cognisance of the court, or which the court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case . . . "

When the motion first came on, counsel for the trustee immediately took the point by way of *quasi* demurrer that the bankrupt had no *locus standi*. He said that so long as the bankruptcy continued, the bankrupt could not be a " person aggrieved " by any act of the trustee, and that the bankrupt's only right was to take the surplus if eventually there proved to be one, or, if the trustee misconducted himself, to apply to the Board of Trade under s. 95 (2) of the Act. I was not prepared to accept this submission, and, therefore, evidence has been filed on both sides and the matter has been fully argued, but in the upshot I have only read the evidence-in-chief filed by the bankrupt, because it seemed to me, for reasons which will later appear, unnecessary, having read that, to go further. As I have not read the trustee's evidence in answer, I only assume the bankrupt's statements to be true and do not accept them. Counsel for the bankrupt expressly disclaimed any charge of fraud or dishonesty against the trustee, but complained that he was a " bad " trustee, altogether lacking in sympathy for the bankrupt, and, moreover, one who took far too low a view of the bankrupt's right to have a say in the management of the estate. I ought to say in justice to the trustee that his counsel denied the bankrupt's charges and claimed that his evidence refuted them.

This motion, pruned of its more extravagant claims, raises a question of some importance in bankruptcy law, namely, to what extent, if any, can the bankrupt call the trustee in his bankruptcy to account for his management and disposition of the estate. The point, of course, can only arise where the bankrupt can show that there is or will or might (but for the trustee's action or inaction) be a surplus in the trustee's hands after satisfying in full all the claims of the creditors. Where, as in the vast majority of cases, the estate is insolvent, the bankrupt has clearly no interest in it, and it matters not to

him how it is administered, but the bankrupt has a statutory right to any surplus under s. 69 of the Act, and is, therefore, clearly concerned to increase, if he can, its amount.

Bankruptcy has been a part of our law for over a century, and in essence it has preserved the same principle throughout, namely, that the bankrupt is relieved of his debts and freed from the oppression of his creditors, but at a price, which is that he is stripped of all his property, that property vesting in a person who was originally known as the assignee, but who in more recent Acts has been described as the trustee. Under either name this person acts in the same capacity. He is, as the older Act expressed it, the assign of all the bankrupt's property. He is a trustee of it, not for the bankrupt, but for the creditors, and, until the bankruptcy process is worked out, the bankrupt has no further interest in the assigned assets. That is the price he pays for obtaining his discharge and for being freed from the fetters of his debts. It is, in fact, the alternative to languishing indefinitely in the Fleet Prison. It seems to me clear that there must be circumstances in which the court can interfere at the instance of a bankrupt to control the actions of the trustee. This is apparent from the terms of s. 80 itself, and is confirmed by the all-embracing language of s. 105. I need not, I think, attempt to define what these circumstances are. They cannot, I think (in the absence of fraud) justify interference in the day to day administration of the estate, nor can they entitle the bankrupt to question the exercise by the trustee in good faith of his discretion, nor to hold him accountable for an error of judgment. Administration in bankruptcy would be impossible if the trustee must answer at every step to the bankrupt for the exercise of his powers and discretions in the management and realisation of the property.

The whole of the bankrupt's property, as described in s. 38 of the Act, vests in the trustee under ss. 18 and 53, and s. 84 and the following sections show the trustee's duty as to accounts, and, while creditors are given certain rights to call for accounts, no mention is made of the bankrupt. By s. 87 the trustee must file statements of account every year or more often, and these must be audited by the Board of Trade, and it appears to me that these are the limits of the trustee's obligations so far as accounting is concerned. In other words, he is not accountable to the bankrupt except for the surplus. It is the right and duty of the trustee to realise that which vests in him to the best advantage, and it is for him alone to decide (under s. 56), with the consent of the committee of inspection, how best the realisation may be made. With all this, notwithstanding his interest in the surplus (if any), the bankrupt is not concerned and has no right to interfere. In fact, the creditors are not his creditors. He has got rid of them and has nothing more to do with them. This is apparent when one considers the rules, in sched. II to the Act, dealing with the proof of debts. Under r. 24 a proof may be expunged on the application of the trustee, and, under r. 26, on the application of a creditor, but it is only in cases of composition or scheme that the debtor may apply, and this point is illustrated by *Re Benoist* (1).

I find support for the view of the law which I have put forward in *Bird v. Philpott* (2). In that case FARWELL, J., had to consider the right of a bankrupt to assign the surplus in his first bankruptcy, and the question was whether the assignee of the surplus could assert his rights in priority to the trustee in a second bankruptcy. It was held that he could, and FARWELL, J., made the following observations ([1900] 1 Ch. 828):

"As I read the Bankruptcy Act, the trustee takes all the bankrupt's property for an absolute estate in law, but for limited purposes, namely, for the payment of the creditors under that bankruptcy, and that bankruptcy only—payment of principal and interest, and all the costs of the bankruptcy. Subject to that, he is a trustee for the bankrupt of the

surplus. He as a trustee is in a better position than an ordinary trustee to the extent pointed out in *Ex parte Sheffield*, *Re Austin* (3) and *Re Leadbitter* (4), that is to say, the bankrupt has not the ordinary right of a *cestui que trust* to intervene until the surplus has been ascertained to exist, and all the creditors and interest and costs have been paid. He cannot trouble the trustee by taxing the bill of costs or interfere with the administration of the estate in any way, but, subject to that and subject to his non-interference with the administration and with the management of the trustee during the bankruptcy in the due course of the execution of his duty, he can, in my opinion, demand the surplus, and he has a right to the surplus—a right which he can dispose of by will or deed or otherwise during the pendency of the first bankruptcy, even before the surplus is ascertained, although such disposition will of course be ineffectual unless in the event there prove to be a surplus upon which it can operate.”

The Bankruptcy Act referred to by FARWELL, J., was the Act of 1883 which for this purpose is the same as the Act of 1914. Moreover, *Jarrett v. Barclays Bank, Ltd.*, *Nash v. Jarrett* (5) shows that the representative of a bankrupt mortgagor has no *locus standi* to question a sale by the mortgagee during the currency of the bankruptcy, and MORTON, L.J., quoting from the judgment of WYNN-PARRY, J., in the court below, said ([1947] 1 All E.R. 75) :

“‘Upon Mrs. Jarrett being adjudicated bankrupt the whole of her property passed to and vested in the official receiver under the Bankruptcy Act, 1914, s. 53. Thereafter it was only the trustee who could deal with the property ; it was only he who could in any way effectively complain against the mortgagee. The bankrupt could not go behind the trustee.’ The judge then referred to *Re Leadbitter* (4) both in the High Court and in the Court of Appeal and continued : ‘The mere fact that a bankrupt has a future interest in a possible surplus does not mean that he has a present interest, and there is, in my view, nothing but confirmation of this proposition to be found in *Bird v. Philpott* (2) which was cited by Mr. *Fortune* [for the husband of the bankrupt] in favour of his argument ’.”

Before returning to the details of the relief asked, I will state the facts, so far as I have thought it necessary to go into them for the purposes of this motion. For a number of years before the 1939 war the bankrupt had been acquiring and managing house property in and around London, most of it being leasehold, and a good deal of it held on short terms of years. At the outbreak of war, he was the owner of a large number of such properties (between 800 and 1,000), details of which are set out in an exhibit to his affidavit filed on Nov. 29, 1948. Of these properties a substantial part was in mortgage to various mortgagees, but others were free from encumbrances.

The outbreak of war had a disastrous effect on businesses of this character, and it is evident that the bankrupt soon found himself in difficulties. He was, in fact, made bankrupt in November, 1940, on the petition of a creditor having a judgment against him in respect of dilapidations under certain leases. It was clearly impossible in the circumstances of the time to realise an estate of this sort at anything like its proper value, and the trustee found himself obliged to carry on as a business the management of the various properties included in the estate, and he continued to do so throughout the war. The bankrupt obtained his discharge in 1943. No dividend has ever been paid in the bankruptcy owing to difficulties which have arisen in circumstances which I need not here particularise, except to say that the greatest difficulties arose out of the position between the bankrupt and the Inland Revenue in respect of income tax during 1933 to 1939. As a result of carrying on the business, the trustee now has in his hands over £10,000, and he proposes to sell the

unmortgaged part of the estate in order to provide the residue of the money necessary to pay the creditors in full, and it is this proposal which has brought about the present proceedings. None of the secured creditors has proved in the bankruptcy, all of them having elected to stand on their securities. I am told that the claims of the unsecured creditors, apart from the Crown, will amount, with interest, to about £4,000. The claim of the Crown has been admitted by the trustee at a sum in the region of £18,000.

With this premise, I turn to the relief asked for in the notice of motion. As to para. (1), the bankrupt desires, apparently, to re-open a transaction which was concluded in 1941 when the trustee sold the contents of a dwelling-house. It seems to me quite impossible at this distance of time to allow a transaction of this sort to be re-opened even if there was an allegation of unfair dealing, which there is not. The bankrupt is seeking for some ammunition with which to attack the trustee after the lapse of eight years, and this I should not allow even if, consistently with the principle enunciated, I could do so. In my judgment, I clearly could not. It was the duty of the trustee to realise the chattels belonging to or in the apparent possession of the bankrupt, and he alone had the right to do so and to exercise his own judgment in the matter. As to para. (ii), the bankrupt desires to prevent a sale on two grounds: (a) that the trustee has enough money in his hands already. This is clearly nonsense unless the Crown's claim is to be ignored, as the bankrupt says it should be, and, (b) that the season chosen by the trustee is not a favourable one. As to this, it is for the trustee alone to decide when and how to realise the estate, and, in any event, as appears by correspondence exhibited by the bankrupt himself, the trustee has already held his hand since May, 1948, to enable some practical proposal to be made by the bankrupt and nothing whatever has been done. I can grant no relief under this head. As to para. (iii), the bankrupt is labouring under some sense of grievance against the trustee, but he has, in my view, no right whatever to insist on his removal unless, indeed, he can exercise his statutory right under s. 95 (2) of the Act by appealing to the Board of Trade for the trustee's removal under that section. As to para. (iv), there is a power vested in the trustee under s. 57 of the Act, with the consent of the committee of management, to employ the bankrupt in the management of the estate, but it is a long step from this to say that the court will, or, indeed, can, insist on the trustee doing anything of the kind. The bankrupt alleges that his offers to manage the property made in 1941 were rejected in circumstances which gave him personal offence, and that, if he had been employed, the estate would have been better managed. Even if that be all true, the court cannot, and would not, if it could, override the decision of the trustee in a matter of this kind. As to paras. (v) and (vi), I have already pointed out that the bankrupt has no right to interfere in such matters as the trustee's remuneration or the costs, charges and expenses which he incurs unless such payments amount to misconduct in which case the Board of Trade will interfere under s. 95 of the Act. Apart from that, s. 82 shows that it is for the creditors to control the remuneration and costs of the trustee, who is also subject to the scrutiny of the Board of Trade having regard to s. 92 of the Act. As to para. (vii), this is, perhaps, the bankrupt's chief complaint. As I have said, the claims of the ordinary unsecured creditors are comparatively small. The large debt is that to the Crown. This is a debt for income tax going back to 1933, and it has been recently agreed by the trustee with the Inland Revenue after long negotiations. With these the bankrupt is dissatisfied. He complains that his wishes in the matter have been disregarded and that matters ought to have been better managed. Here, again, without going into the merits of the matter, it seems to me that the complaint is an idle one. It is for the trustee and for him alone to settle with the Crown as with any other creditor, and, if in the exercise of his judgment he does so, the bankrupt

has no right whatever to call his decision in question. To suggest that one class of creditors should be paid in full and that nothing be paid to another class is a negation of the whole object of bankruptcy proceedings. This seems to me to be an impudent suggestion. As to para. (viii), this again I characterise as impudence. The bankrupt will regain such surplus as may be left when all the creditors have been paid. He appears, on the face of his own evidence, to have had ample time to put forward some scheme which would save his properties from sale, and he has made no concrete proposals whatever. In the circumstances, I can only dismiss his motion with costs.

Application dismissed with costs.

Solicitors: *Bower, Cotton & Bower* (for the debtor); *J. D. Langton & Passmore* (for the trustee in bankruptcy); *Solicitor of Inland Revenue* (for the Inland Revenue).

[*Reported by H. McL. MORRISON, Esq., Barrister-at-Law.*]

Re BARNATO (deceased). JOEL AND ANOTHER v. SANGES AND OTHERS.

[COURT OF APPEAL (Lord Greene, M.R., Somervell and Cohen, L.JJ.), February 11, 14, 15, 1949.]

Practice—Parties—Crown—Joinder as party—Hypothetical question—Possible liability to estate duty.

By his will a testator bequeathed a fund to trustees to hold for L.A. for life on protective trusts with various remainders over and with power to the trustees, with the consent of L.A., to make certain advances in favour of the issue of L.A. The trustees desired to ascertain whether, if a certain advance were made, they would be liable to account for estate duty in respect thereof which would be payable under the Finance Act, 1940, s. 43, should L.A. die within five years, and they, therefore, issued a summons raising (*inter alia*) that question and joining the Inland Revenue Commissioners as defendants. The commissioners applied under R.S.C., Ord. 16, r. 11, to be struck out as having been improperly joined.

HELD: the question was future and hypothetical, and the trustees could not make the Crown, whether in the person of the Attorney-General or the Inland Revenue Commissioners, respondent to proceedings to decide it, whether those proceedings were begun by originating summons or by writ.

Dyson v. A.-G. ([1911] 1 K.B. 410; 105 L.T. 753), *Esquimalt and Nanaimo Ry. Co. v. Wilson* ([1920] A.C. 358; 122 L.T. 563) and *Re Chamberlain's Settlement* ([1921] 2 Ch. 533), distinguished.

Re Clay ([1919] 1 Ch. 66; 119 L.T. 754), applied.

Decision of HARMAN, J. ([1948] 2 All E.R. 585; [1949] Ch. 21), affirmed.

Dicta of HARMAN, J. ([1948] 2 All E.R. 587; [1949] Ch. 26), with regard to the effect of the *Crown Proceedings Act, 1947*, approved.

[AS TO STRIKING OUT PARTIES, see HALSBURY, Hailsham Edn., Vol. 26, pp. 20, 21, para. 17; and FOR CASES, see DIGEST, Practice, pp. 423-433, Nos. 1190-1288.]

Cases referred to:

(1) *Dyson v. A.-G.*, [1911] 1 K.B. 410; 105 L.T. 753; 11 Digest 524, 292.

(2) *Esquimalt & Nanaimo Ry. Co. v. Wilson*, [1920] A.C. 358; 122 L.T. 563; 11 Digest 527, 317.

(3) *Re Chamberlain's Settlement*, [1921] 2 Ch. 533; 11 Digest 308, 12.

(4) *Pawlett v. A.-G.*, (1667), Hard. 465; 11 Digest 523, 287.

(5) *Re Clay*, [1919] 1 Ch. 66; 119 L.T. 754; 30 Digest 144, 201.

APPEAL from an order of HARMAN, J., dated Sept. 29, 1948, and reported [1948] 2 All E.R. 585, ordering that the Inland Revenue Commissioners be struck out from an originating summons to which, they alleged, they had been improperly joined as defendants. The Court of Appeal dealt generally with the question whether the Crown could be joined in proceedings, whether started by originating summons or by writ, in order to decide future and hypothetical matters such as that of a presumptive claim for estate duty under the Finance Act, 1940, s. 43, and dismissed the appeal. The facts appear in the judgment of COHEN, L.J.

Christie, K.C., and *Hillaby* for the plaintiffs, the trustees of the settled fund. *Jopling* for the first, second and third defendants, issue of L.A., and beneficiaries under the will.

Pennyquick, K.C., and *R. L. Edwards* for the Inland Revenue Commissioners.

LORD GREENE, M.R.: I will ask COHEN, L.J., to give the first judgment.

COHEN, L.J.: This is an appeal from a judgment of HARMAN, J., ordering that the name of the Inland Revenue Commissioners be struck out from this summons, they having been, as the learned judge found, improperly joined as defendants.

The plaintiffs are the trustees of a large legacy settled by the will of the testator. As stated by the learned judge, the limitations of the will are that:

" . . . the fund stands limited in favour of one Lily Asher for a protected life interest, with various remainders over under which the defendants (other than the last defendant) have beneficial interests; in particular, a power of advancement is vested in the plaintiffs as trustees, with the consent of Mrs. Asher, in favour of her children, who are represented here."

The plaintiffs were minded to exercise that power and raise a sum of £100,000 for one of the daughters of Mrs. Asher, but were anxious as to what their position would be if they did so. They feared that they might be liable, if Mrs. Asher died within five years of the date of the advance, to account under the Finance Act, 1894, s. 8, for the duty which would in that event be payable under the Finance Act, 1940, s. 43. Accordingly, they approached the Solicitor of the Inland Revenue Commissioners, and suggested by a letter of Feb. 2, 1948, that they should join the Attorney-General as defendant to a summons which they proposed to issue. To that letter the Solicitor of the Inland Revenue Commissioners replied on Mar. 25:

"Should the proposed advance be made, it would seem that the death of Mrs. Lily Asher would give rise to a claim for estate duty (additional to that on the funds retained by the trustees till her death) in respect of: (1) any sums advanced out of the settled legacy within the five years immediately preceding her death; (2) any sums advanced outside that period of five years in relation to which Mrs. Lily Asher was not excluded or retained any benefit by contract or otherwise; (3) any advances made outside that period of five years which by reason of the protection imposed by the will were not fully effective. The official view is that the proposed plaintiffs to the summons will be accountable for any estate duty payable on the death of Mrs. Lily Asher on any sums advanced notwithstanding that such advanced sums are no longer vested in them."

That the question is hypothetical is plain since no claim for duty can arise at all unless one of the events occurs to which the Solicitor of the Inland Revenue Commissioners refers, and, if it does, the duty will only fall on the

trustees if the beneficiaries to whom the advance is made do not pay it in exoneration of the trustees. Undeterred by this letter, the plaintiffs issued their summons and made the commissioners a party. The Inland Revenue Commissioners were substituted for the Attorney-General in view of the passing of the Crown Proceedings Act, 1947.

The first two questions in the summons are :

- A "1. Whether, with the consent of Lily Asher who is entitled to a protected life interest in the investments and property representing the above-mentioned settled legacy and other property (hereinafter called 'the settled funds'), the plaintiffs, as such trustees as aforesaid, have power under the trusts contained in the said will and second codicil and in the events which have happened to advance a further sum of £100,000 or
- B some other and what less sum out of the settled funds on account of the expectant presumptive or vested share therein of the defendant, Lucy Sanges, in respect whereof a sum of £50,000 has been previously advanced.
- C 2. Whether any such further sum as aforesaid may properly be applied—
- D First in payment of £2,500 to the trustees of a settlement dated Apr. 29, 1931, and made by the defendant, Lucy Sanges, of the first part, Alfonso Sanges, of the second part, and Arthur Cecil Abrahams and the defendant Robert Henry Stewart Edelston Behrend, therein described as Robert Henry Behrend, of the third part, being the balance remaining unpaid of the said appointed sum of £5,000 (free of duty) thereby settled. Secondly, in payment of £47,500 to the trustees of a settlement dated Jan. 20, 1939, and made by the said Lily Asher, of the first part, the said
- E Lucy Sanges, of the second part, and the said Arthur Cecil Abrahams and Robert Henry Behrend, of the third part, being the balance remaining unpaid of the said appointed sum of £95,000 (free of duty) thereby settled. And, thirdly, in payment of any balance to the trustees of the said settlement of Apr. 29, 1931, which contains a covenant by the said Lucy Sanges to settle after acquired property. Or whether any such balance may
- F properly be paid as to £15,000 to the trustees of the said settlement of Apr. 29, 1931, and as to the residue to the trustees of the settlement of Jan. 20, 1939, as accretion to the funds thereby settled to provide for the estate duty which may become payable on the said respective sums of £5,000 and £95,000. Or how otherwise the said further sum may properly or ought to be applied.
- G I agree with the learned judge that these are questions which it is perfectly proper for the plaintiffs to ask, but I also agree with him that neither of them is a question in which the Crown is interested. If the summons were confined to these two questions, there is no doubt that the Inland Revenue Commissioners could not properly be joined as parties, because they are not persons whose rights are sought to be affected within R.S.C., Ord. 55, r. 5, nor would the court have ordered the commissioners to be joined under Ord. 55, r. 6. The plaintiffs, however, added a third question, namely :

- H "If the plaintiffs have power to and do advance any such further sum, whether they will be accountable for any estate duty which may become payable on such further sum on the death of the said Lily Asher, notwithstanding that such further sum is no longer vested in them, and, if so, whether they ought to make any and what provision out of such further sum or otherwise for the possibility that such estate duty may become payable."

The question in the present appeal is whether that question affords a valid ground for joining the Inland Revenue Commissioners as defendants. HARMAN, J., stated in the course of his judgment that the first question which arose was whether proceedings of this nature were available to the subject against

the Crown. The Finance Acts make provision for appeals in respect of estate duty by dissatisfied subjects. Under the Finance Act, 1894, as amended by the Finance (1909-10) Act, 1910, an appeal was by way of petition. A simplified procedure was provided for under the Administration of Justice (Miscellaneous Provisions) Act, 1933, by way of originating summons. As HARMAN, J., pointed out ([1948] 2 All E.R. 587), neither of these methods was available here as they apply only where the Crown's right to estate duty has already accrued. HARMAN, J., went on to consider whether the plaintiffs were entitled to bring the Inland Revenue Commissioners before the court to decide whether in a certain event liability would attach to them if they made the advance. The learned judge said (*ibid.*, 586):

"The plaintiffs, nevertheless, allege that there is a general right in the subject to oblige the Crown to become a defendant to proceedings by way of originating summons not provided for by any statute, and that, in fact, a remedy of this sort has always been open ever since 1894, though never before resorted to. This is a bold claim, and I do not accept it. The summary procedure by way of originating summons is not, in my judgment (unless under the Crown Proceedings Act, 1947, with which I will deal in a moment), available against the Crown for the determination of a question of liability to estate duty except in so far as is provided by s. 3 of the Act of 1933. There may have been cases, for aught I know, where the Crown has been willing to accede to the request of the subject to submit to the jurisdiction of the court for the purpose of deciding such a question of liability, but I do not think that the Crown can be obliged to take this course, and, indeed, it would often be highly inconvenient that the Crown should be made a defendant to proceedings of a domestic character between beneficiaries under a will or settlement simply because the result of the answer to one of them might be supposed to affect some question of liability to estate duty, or, for that matter, to income tax. The plaintiffs justify this claim on the authority of *Dyson v. Attorney-General* (1), where the Court of Appeal held that a declaratory judgment under Ord. 25, r. 5, could be made against the Attorney-General. Those, however, were proceedings by writ, and, in my judgment, the decision in that case does not apply to the summary procedure by originating summons. FARWELL, L.J., in that case pointed out that when the interests of the Crown were only indirectly affected, the old courts of equity, whether the Court of Chancery or the Court of Exchequer, did make declaratory orders which affected the rights of the Crown. Whether the plaintiffs would have been in a better position if they had started the present proceedings by writ I need not determine, but as at present advised it seems to me that there would have been very great difficulties in their way in framing a claim that could not be struck out *in limine*. Moreover, the making of a declaration in such proceedings was always a matter of discretion."

With this conclusion of HARMAN, J., I completely agree, but it would be unsatisfactory to leave the matter resting on the technical point that these proceedings cannot be taken by way of originating summons, for in that event the case might be re-started by way of writ or other proceedings and the point re-argued. We, therefore, invited the plaintiffs to argue on general principles. The MASTER OF THE ROLLS asked counsel for the plaintiffs to cite any case in which a purely future and hypothetical question had come before the courts and the courts had held that they had jurisdiction to consider it. Counsel could not put forward any such case, but founded his argument on *Dyson v. Attorney-General* (1), *Esquimalt and Nanaimo Ry. Co. v. Wilson* (2), and *Re Chamberlain's Settlement* (3). In these cases either the Crown's rights might be affected by the order or the Crown was seeking to exact money or to compel the performance of an act.

In *Dyson v. Attorney-General* (1) the matter arose in this way. Under the Finance (1909-10) Act, 1910, a number of notices had been issued by the Inland Revenue Commissioners requiring the person to whom they were respectively addressed to fill in a form commonly known as "Form No. 4," and notifying the addressee that unless he did so within 30 days of the date of the notice he would be subject to a penalty not exceeding £50. It, therefore, was a case in which the plaintiff found himself in the position that he would have to fill up a form which he contended he was under no liability to complete or subject himself to the risk of incurring a penalty of £50. Accordingly, he asked for a declaration under Ord. 25 that he was under no obligation to comply with the notice or to furnish any of the said particulars. The court came to the conclusion that a declaratory judgment could be made against the Attorney-General representing the Crown, and that the plaintiff was not bound in such a case to proceed by petition of right. It is to be observed, as I have said, that in that case there was an immediate question to be decided between the subject and the Crown, for the Crown were seeking to compel the plaintiff to fill in the form and had threatened him with a penalty if he failed to do so. In those circumstances the court had no hesitation in holding that they had jurisdiction to make the declaration asked. COZENS-HARDY, M.R., referred to some observations in *Pawlett v. Attorney-General* (4), by ATKYNS, B., where the learned Baron said (Hard. 469) :

"The party ought in this case to be relieved against the King, because the King is the fountain and head of justice and equity ; and it shall not be presumed, that he was defective in either. And it would derogate from the King's honour to imagine, that what is equity against a common person, should not be equity against him."

I shall revert to this citation later in this judgment.

In *Esquimalt and Nanaimo Ry. Co. v. Wilson* (2), again the right of the Crown was brought directly into issue because the plaintiff was seeking against the individual defendant a declaration which, if it had been granted, would have had the effect of depriving the Crown of the benefit of certain reservations which it had purported to make from its grant in favour of the individual defendant. In *Re Chamberlain's Settlement* (3), also there was an immediate question at issue. In that case Mr. Houston Chamberlain, who had acquired German nationality during the 1914-18 war, was contending that under English law his change of nationality would not be recognised in war time, and that, therefore, his interest under the testator's will was not subject to the charge created by virtue of art. 297 of the Treaty of Peace with Germany or the Treaty of Peace Order, 1919. If the charge had been created, it would vest in the Custodian of Enemy Property. It is plain that there was an immediate question requiring decision, and that the interests of the Crown were, or might be, affected by the order which the court were being asked to make.

It seems to me that all those cases are very different from the case which we have before us. In the present case, as I see it, there is no immediate question between the plaintiffs and the Crown and no justification for the suggestion that the Crown's rights will be affected if the advance which the plaintiffs are desirous of making to Mrs. Sanges is made. The right of the Crown will remain the same as it was before, that is, a right in a certain event (which may never occur) to make a demand for payment of duty. That right will in no way be affected by any order that is made on questions 1 and 2 of the summons. True, that the trustees, if they make the advance, may not have the money in hand in the trust to meet the demand of the Crown if it is made against them under the Finance Act, 1894, s. 8 (4), and if it be held that the trustees are liable under that section, but the right of the Crown, whatever it is, will be just the same whether or not the advance is made. No order that

the court can make will in any way affect the right of the Crown under the revenue statutes.

Counsel for the plaintiffs and counsel for the beneficiaries submitted that the absence of precedent was not fatal to Mrs. Sanges's claim in the present case. They submitted that the matter came within the principle laid down in the passage I have cited from the judgment of ATKYNS, B., in *Pawlett v. Attorney-General* (4). They said it was contrary to justice and equity that they should be kept in the state of uncertainty in which they are at present as to their possible liability under the Finance Act, 1894, s. 8 (4), but that is a state, I am afraid, which often exists in the minds of the subject under the various taxing statutes. It does not seem to me that the existence of that state of uncertainty can justify us in creating the precedent of compelling the Crown to subject itself to the decision of a purely hypothetical case which can never arise unless Mrs. Asher dies before the expiration of five years or one of the other events referred to in the letter of Mar. 25, 1948, occurs, and which for other reasons may never arise—for instance, as the MASTER OF THE ROLLS suggested in the course of the argument, if Parliament were in the meantime to think fit to alter the law so as to place advances of this kind in the same category as gifts and to leave the burden to rest solely on the recipient. It seems to me that, if such a radical change is to be made as to compel the Crown to submit to anticipatory proceedings of this kind, such a change must be introduced by Act of Parliament and cannot properly be made by judicial decision.

I would add that one of the cases to which the learned judge referred in the court below, the decision in *Re Clay* (5), seems to show that there would be no jurisdiction to make a declaratory order in a case of this kind as between subject and subject. In that case, the plaintiffs sought to obtain the decision of the court whether they were liable under a deed of indemnity to the defendant. No question of construction arose, and the defendant had, in fact, made no claim. All he had done was to reserve his rights, whatever they might be. The effect of the decision is sufficiently summed up in two short passages, the first from the judgment of SWINFEN EADY, M.R., where he said ([1919] 1 Ch. 78):

“And it is not open to a person, certainly to one against whom no claim in fact has been made, to cut the matter short by bringing an action at his own option, and saying: ‘I wish to have it determined that you have no claim whatever against me’.”

The second is from the judgment of EVE, J. (*ibid.*, 79) and is:

“So soon as it was demonstrated that no specific right had been asserted and no claim formulated, the court had, in my opinion, no jurisdiction to deal with the petition in the way in which it had been dealt with.”

In these circumstances, it seems to me clear that neither by originating summons nor by writ can the plaintiffs make the Crown, whether in the person of the Attorney-General or the Inland Revenue Commissioners, respondent to proceedings of the kind which they have now commenced. On this view the question whether, as a result of the passing of the Crown Proceedings Act, 1947, the procedure by originating summons is now available against the Crown in cases where it would not have been available before the passing of that Act ceases to be material, but I will add that I see no reason to differ from the conclusion which HARMAN, J., reached on that point.

There is one other matter I ought to mention. Counsel for the plaintiffs and counsel for the beneficiaries submitted that it was not really a question whether or not this was the type of case in which the court could entertain proceedings against the Crown, but was really a question of discretion. I do not think that is true, but, even if it were true, I am by no means satisfied

that we ought to allow the proceedings to go on if it were abundantly clear as, in my opinion, it is in the present case, that the court would not make a declaration after the case has been heard. I do not, however, express a concluded opinion on that point, since it is not necessary for a decision of this matter. For these reasons, I think that the appeal should be dismissed.

SOMERVELL, L.J. : I agree.

- A LORD GREENE, M.R. :** I agree, and only wish to add a few words. Both counsel for the plaintiffs and counsel for the beneficiaries have argued that the question which they wished the court to decide is not a future question and is not a hypothetical question. First, it was said that the Crown has expressed an opinion that in certain events it will be entitled to make a claim.
- B** That expression of opinion counsel for the plaintiffs wished to lift into the order of things where the Crown makes a claim. The Crown has made no claim, for the simple reason that it is not entitled to make a claim. It will be entitled to make some claim, or it may be it will think itself entitled to make a claim, in the event of the tenant for life dying before the expiration of five years, but the fact that the commissioners have expressed an opinion does not amount
- C** to the same thing as is present in such cases as we have been referred to where an actual instant claim by the Crown was concerned. Secondly, counsel for the beneficiaries emphasised the fact that for the trustees this was a practical, instant question, because, he said, without guidance from the court on this doubtful question, they will be unable to act as they would like to act. Unfortunately, it is not only trustees who may find themselves in that kind
- D** of difficulty owing to the uncertain construction of some taxing Act. Any ordinary subject may find himself in precisely the same difficulty, and if these trustees could ask the court to bring the Crown here and insist on deciding a doubtful question which may or may not arise between them according to events, merely because they want guidance as to the ordering of their affairs, I can see no end to the litigation that would inevitably follow. But the argu-
- E** ment, in my opinion, is fallacious, and for this reason, that, although the trustees at the moment require guidance, the question which it is suggested we ought to decide is one between the trustees and the Crown, and that is a purely hypothetical and future question. The Crown will be able to put forward a claim, rightly or wrongly, in the event of the tenant for life dying before the expiration of five years, and, if we were to decide this here and now
- F** and the tenant for life were to live for more than five years, we should have given a decision binding on the Crown and effective either in favour of or against all other taxpayers on a question which had never arisen on a liability which had never matured. In my opinion, if it is desired that these courts should have power to decide hypothetical questions on the construction of taxing Acts for the guidance of the subjects of the King, that power ought to be given
- G** by legislation and not by this court arrogating it to itself. I agree that the appeal must be dismissed.

Appeal dismissed with costs.

Solicitors : *Wild, Collins & Crosse* (for the plaintiffs); *R. H. Behrend, Kendall, Price & Francis* (for the beneficiaries); *Solicitor of Inland Revenue.*
[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

STEAMSHIP "INDUNA" CO., LTD. v. BRITISH PHOSPHATE COMMISSIONERS. THE LOCH DEE.

[KING'S BENCH DIVISION (Sellers, J.). April 6, 7, 1948, January 27, February 14, 1949.]

Demurrage—Exceptions relieving from liability—Delay due to circumstances unknown to parties—Intervention of constituted authorities—Any cause beyond control of charterers—Order prohibiting night work—Inability to discharge cargo without working at night.

Under the terms of a charterparty a ship was required to discharge cargo in New Zealand at the rate of 1,500 tons a working day of 24 consecutive hours, but lay days were not to count and demurrage was not to accrue during the period of any delay or hindrance in discharging cargo by reason of, *inter alia*, intervention of constituted authorities or from any cause whatsoever beyond the control of the charterers, or from the inability or inefficiency of the ship to discharge. The 1,500 tons a day could not be discharged without working at night and under an order of the Waterfront Control Commission of New Zealand it was, at the time the charterparty was entered into, but unknown to both charterers and shipowners, illegal to work between 9 p.m. and 8 a.m. In consequence, delay was caused in discharging.

HELD : (i) as the delay was due to circumstances which were unknown to both the parties when the charterparty was entered into, the lay days were not to count and demurrage was not to accrue during the period of the delay.

(ii) the words "inability or inefficiency of the ship to discharge" had reference to the structural capacity and equipment of the ship, and, as the ship was capable of discharging 1,500 tons in a working day of 24 consecutive hours, the charterers could not avail themselves of these words in the charterparty.

William Alexander & Sons v. Akt. Dampskibet Hansa ([1920] A.C. 88 ; 122 L.T. 1), *applied*.

Observations of ROWLATT, J., in Ciampa v. British India Steam Navigation Co., Ltd. ([1915] 2 K.B. 779) and *observations of BAILHACHE, J., in France, Fenwick & Co., Ltd. v. Spackman (Philip) & Sons*, (1912) (108 L.T. 372), *distinguished*.

[AS TO EXCEPTIONS RELIEVING CHARTERER FROM DEMURRAGE, see HALSBURY, Hailsham Edn., Vol. 30, pp. 352-357, paras. 532-534 ; and FOR CASES, see DIGEST, Vol. 41, pp. 407-443, Nos. 2532-2777.]

Cases referred to :

- (1) *Ciampa v. British India Steam Navigation Co., Ltd.*, [1915] 2 K.B. 774 ; 20 Com. Cas. 247 ; 41 Digest 413, 2569.
- (2) *France, Fenwick & Co., Ltd. v. Spackman (Philip) & Sons*, (1912), 108 L.T. 371 ; 18 Com. Cas. 52 ; 41 Digest 452, 2836.
- (3) *Alexander (William) & Sons v. Akt. Dampskibet Hansa*, [1920] A.C. 88 ; 122 L.T. 1 ; 25 Com. Cas. 13 ; 41 Digest 540, 3668.
- (4) *Ralli Brothers v. Compania Naviera Sota y Aznar*, [1920] 2 K.B. 287 ; 123 L.T. 375 ; 25 Com. Cas. 227 ; 11 Digest 397, 699.

SPECIAL CASE stated by arbitrator.

The claimants were the owners of the S.S. Loch Dee and they claimed demurrage from the respondents, charterers of the ship, under a charterparty dated Apr. 4, 1946, and amended on May 14, 1946, in respect of the discharge of cargo at a port in New Zealand. By cl. 10 of the charterparty, as amended, the cargo was to be discharged "at the average rate of 1,500 tons per working day of 24

consecutive hours (provided the ship can put it out) Sundays and holidays excepted and weather permitting . . . and in the event of any delay or hindrance in . . . discharging cargo by reason of . . . scarcity of labourers . . . intervention of constituted authorities . . . or from any other cause whatsoever beyond the control of the charterers or from the inability or inefficiency of ship to . . . discharge, the lay days not to count during the period of such delay or hindrance and demurrage not to accrue." By cl. 11 "Demurrage over and above the lay days so calculated to be paid to ship at the rate of 8*d.* per G.R.T. per day or part thereof *pro rata* and despatch money to be paid by owners at the rate of half demurrage per day or part thereof *pro rata* on working time saved in loading or discharging. By cl. 12 "Overtime . . . if ordered by the port controller or his representative, charterers to pay all extra expenses incurred." Unknown to both parties at the date of the charterparty, by an order of the Waterfront Control Commission of New Zealand night work was prohibited, and it was, therefore, impossible for the charterers to discharge the cargo at the rate provided by the charterparty. SELLERS, J., decided that the charterers were not liable for demurrage.

Mocatta and Ellenbogen for the shipowners.

Eustace Roskill for the charterers.

Cur. adv. vult.

Feb. 14. SELLERS, J., read the following judgment: The parties in this case submitted the matters in issue between them to arbitration, and the arbitrator made an award in the form of a Special Case. In the arbitration the shipowners, as owners of the S.S. Loch Dee, claimed demurrage, and the charterers resisted the claim and claimed despatch money. The respective claims depend on the true effect of certain provisions or exceptions of the charterparty and their application to the facts found by the arbitrator.

The Special Case shows that the original charterparty of Apr. 4, 1946, was altered on May 14, 1946, and it was then agreed that the S.S. Loch Dee should discharge at Lyttleton and Dunedin, including Ravensbourne Wharf, New Zealand, the rate of freight to be 99*s.* 6*d.* per ton British sterling, and the rate of discharge to be 1,500 tons per day: all other terms, conditions and exceptions of the charterparty to remain unaltered. In accordance with the charterparty, the vessel loaded at Bona a cargo of phosphate rock. It was established and agreed that there was a saving of time in loading for which £248 0*s.* 3*d.* is due to the charterers. The dispute between the parties is whether the charterers are liable for demurrage in respect of the discharge against which they can set off the despatch money, as the loading and discharging times are admittedly reversible. The original contract provided for discharge in one or two of certain specified Australian ports at the average rate of 750 tons per working day of 24 consecutive hours. The alteration to the New Zealand ports not only increased the rate of freight, but, most surprisingly in view of the facts now known, doubled the rate of discharge. The facts found by the arbitrator in the supplemental award establish that it was not possible for the Loch Dee to have discharged 1,500 tons per day if discharge took place only between 8 a.m. and 5 p.m. There is no express finding, but the clear inference is that it would not have been possible if overtime had been worked to 9 p.m. What was necessary if the vessel was to discharge 1,500 tons in 24 consecutive hours was to work in two shifts, one by day and one by night, as had, apparently, been the practice in the war period. So to do, when the ship arrived at the respective ports of discharge, was illegal. Before me it was agreed that, when the charterparty and the *addendum* were entered into, neither the shipowners nor the charterers knew that an order of the Waterfront Control Commission of New Zealand prohibited work being done between 9 p.m. and 8 a.m., but, in fact, it was so. The order did not make it illegal to discharge 1,500 tons, or any other quantity, in 24 hours, but the prohibition of night work made it

impossible for the ship to discharge at that rate. The vital question which has arisen, therefore, is whether in the circumstances and under the charterparty the lay days are to be held to run notwithstanding the prohibition with regard to night work. The obligation of the charterers was to discharge at the rate of 1,500 tons per working day of 24 consecutive hours (provided the ship could put it out), subject to the stipulated exceptions, or to pay demurrage as provided by cl. 11 of the charterparty.

The charterers relied on the express provision that, in the event of any delay or hindrance in discharging cargo by reason of scarcity of labourers, intervention of constituted authorities, or from any other cause whatsoever beyond the control of the charterers, or from inability or inefficiency of the ship to discharge, the lay days were not to count during the period of such delay or hindrance and demurrage was not to accrue. There was, undoubtedly, delay from the inability to work the ship at night because of the order which prohibited night work at the ports in question, and that delay was due to a cause beyond the control of the charterers. It might also be said to be caused by the intervention of constituted authorities. The original argument that the delay was due to "scarcity of labourers" became immaterial on the new findings of fact and was not further pursued, but was kept open. On behalf of the shipowners it was contended that the exceptions so relied on do not operate to prevent the lay days running, because the exceptions only apply to some exceptional or abnormal circumstances arising or supervening after the making of the contract. The prohibition of night work, it was said, existed at the time the parties made their contract and no night work was the ordinary practice ruling at the port.

I was referred to ROWLATT, J.'s, judgment in *Ciampa v. British India Steam Navigation Co., Ltd.* (1), and, particularly, to the passage where he said ([1915] 2 K.B. 779) :

"I am not deciding that the application of the ordinary law of a country may not in some circumstances constitute a 'restraint of princes,' but I think the facts which bring that law into operation must be facts which have supervened after the ship has started on the voyage in question. When facts exist which show conclusively that the ship was inevitably doomed before the commencement of the voyage to become subject to a restraint, I do not think that there is a 'restraint of princes'."

I was also referred to the observations of BAILHACHE, J., in *France, Fenwick & Co., Ltd. v. Spackman (Philip) & Sons* (2) (108 L.T. 372) :

"If I had not found that the circumstances at the time of the discharge were exceptional I should have acceded to Mr. Roche's argument, that to bring themselves within the exception clause it is not enough for the defendants to say that they were prevented, but they must say that they were prevented by some cause which was exceptional. If a person contracts to discharge in 36 hours unless prevented by some cause beyond his control, and if the cause beyond his control always would prevent the discharge within that time, then, in my opinion, it is not an exception at all, and if in such a case he fails to discharge within the 36 hours he is not within the exceptions clause."

I doubt whether either learned judge was intending to lay down any general principle. The observations were, I think, directed to the facts and circumstances of the respective cases. In *Ciampa v. British India Steam Navigation Co., Ltd.* (1) the shipowners knew of the regulations in force at Marseilles, their ships had frequently been subjected to the process of fumigation there, and the learned judge found that the ship was inevitably doomed before the commencement of the voyage to become subject to a restraint. In neither of those two

cases does any argument appear to have arisen on the position where both contracting parties are ignorant of the existing circumstances which, when the vessel arrived, occasioned delay. In *Ciampa v. British India Steam Navigation Co., Ltd.* (1) the shipowners knew the circumstances. In *France, Fenwick & Co. v. Spackman & Sons* (2) the decision turned on a finding of exceptional circumstances. The authorities establish that the obligation of the charterers

A to pay demurrage after the expiry of the lay days is absolute where lay days and demurrage are stipulated unless the circumstances of the delay are covered by exceptions in the charterparty or arise through the fault of the shipowner or from the loading or unloading being illegal by the law of the place where it has to be performed.

- In the present charterparty the parties have made it clear that lay days
- B are not to count where delay in discharging arises by reason of a cause beyond the charterers' control and demurrage for such period will not accrue. The intention of the parties is clearly expressed. If both parties or one of the parties knew at the time of making the contract of existing circumstances which would or might occasion delay, other considerations would arise, but where neither party knew, as here, I see no reason why effect should not be given to that
- C which they have made clear by their contract. If parties are contracting on the basis of a state of affairs known to them, or which it can be shown they were prepared to accept, then an exception relating to something outside their control would, no doubt, be construed to relate to some circumstances or event not so known or something outside the basis of their bargain, that is something exceptional or abnormal in comparison with the contemplated state of affairs.
- D In the present case the parties contemplated that 1,500 tons could be discharged in a working day of 24 hours. The prohibition upset that basis, and in that sense the circumstances were exceptional and abnormal. In this contract there are exceptions dealing with delay by reason of ice, epidemics, labour or political disturbances. Any one of these might in given circumstances be proved to have existed at the time the contract was made, but, if the circumstances
- E were unknown to the parties, it seems to me that they could be relied on if they existed and caused delay when the vessel arrived for loading or discharge. In recent years regulations have come into operation in our own country restricting and regulating trade over wide spheres of industry, and often with but little publicity. It would restrict the incidence of these exceptions to a very great extent, and would, in my opinion, defeat the obvious intention of the parties,
- F if the exceptions could be rendered ineffective by establishing that, unknown to the parties, the circumstances relied on existed a day or two, or even an hour or two, before the contract was entered into. So far as this contract is concerned, and in the circumstances of this case, I am of opinion that the charterers' contention is right, that the lay days do not count during the period when night work was not performed by reason of the prohibition.
- G The charterers also contended that, by reason of the prohibition, the ship was not able to fulfil her obligation to put out 1,500 tons in 24 consecutive hours and that there was inability or inefficiency of the ship to discharge. I feel that the words are covered by the authority of *Wm. Alexander & Sons v. Akt. Dampskibet Hansa* (3), and that they have reference to the structural capacity and equipment of the ship, and the arbitrator has
- H found that the Loch Dee was capable of discharging 1,500 tons in a working day of 24 consecutive hours. *Ralli Brothers v. Compania Naviera Sota y Aznar* (4) was quoted to support an argument that the illegality of night discharging could be relied on. In my opinion, that case has no application. The contract provided for discharge at the rate of 1,500 tons per working day of 24 hours, and it was not illegal to discharge at that rate if it could have been done. It was conceded at the hearing before me that, in so far as overtime was not worked between 5 p.m. and 9 p.m., the charterers were entitled to

rely on one, at least, of the exceptions, and that the lay days do not count during such period.

The effect of the conclusion at which I have arrived is that the charterers are not liable for any demurrage, but are entitled to despatch money amounting to £248 0s. 3d. on loading, and to a further £58 7s. 1d. on discharging, and are, therefore, entitled to an award for £306 7s. 4d. on the terms indicated in the Special Case.

Judgment for the charterers with costs of setting down and hearing of the Special Case.

Solicitors: *Holman, Fenwick and Willan* (for the shipowners); *Middleton, Lewis & Clarke* (for the charterers).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

*Distinguished. SEL-
LERS v. LONDON COUN-
TIES NEWSPAPERS
[1951] 1 K. B. 784*

CROCKER HORLOCK, LTD. v. B. LANG & CO., LTD. AND OTHERS.

[KING'S BENCH DIVISION (Morris, J.), February 4, 7, 8, 1949.]

Agency—Commission—Commission on all orders and "all repeats"—Right to commission on "repeats" after termination of agency.

By a written agreement contained in letters dated Apr. 20, 1944, the plaintiffs, who were representatives in the London area for the first defendants, a firm of clothing manufacturers, were to receive commission at the rate of "five per cent. on all orders, whether received direct or indirect, and on all repeats . . ." An agreement made simultaneously by the plaintiffs with the second defendants, an associated company of the first defendants, provided for "commission to be 2½ per cent. on all orders received, and on all repeats whether received direct or indirect." On the agreements being determined by the defendants in breach of the contract, the plaintiffs claimed to be entitled to commission on "repeats" received by the defendants after the due date for the determination of the agreements (liability for orders received up to that date being admitted).

HELD: the question in such a case must be one of the construction of the relevant documents, and, on construction, the word "repeats" in the letters meant only repeat orders received during the period of the contract.

[AS TO RIGHT OF AN AGENT TO COMMISSION AFTER TERMINATION OF EMPLOYMENT, see HALSBURY, Hailsham Edn., Vol. 1, pp. 260, 261, para. 434; and FOR CASES, see DIGEST, Vol. 1, pp. 521-523, Nos. 1818-1834.]

Cases referred to:

- (1) *Bilbee v. Hasse & Co.*, (1889), 5 T.L.R. 677; 1 Digest 522, 1820.
- (2) *Levy v. Goldhill & Co.*, [1917] 2 Ch. 297; 117 L.T. 442; 1 Digest 523, 1829.
- (3) *Faulkner v. Cooper & Co., Ltd.*, (1899), 4 Com. Cas. 213; 1 Digest 545, 1978.
- (4) *Weare v. Brimsdown Lead Co.*, (1910), 103 L.T. 429; 1 Digest 522, 1828.
- (5) *Cramb v. Goodwin*, (1919), 35 T.L.R. 477; Digest Supp.
- (6) *British Bank for Foreign Trade, Ltd. v. Novimex, Ltd.*, [1949] 1 All E.R. 155.

ACTION for an account of orders received by the defendants and of commission payable by them to the plaintiffs in respect thereof, for payment of the amount found to be due, and for damages for breach of contract.

The plaintiffs carried on business as representatives in the London area for clothing manufacturers. The first and second defendants were clothing manufacturers carrying on business at Salford, near Manchester. On Apr. 20, 1944, after an interview between Mr. Napier, a representative of the plaintiff company, and the first defendants, the first defendants wrote the following letter to the plaintiffs: "Further to Mr. Napier's interview on the 11th instant, we confirm the arrangement that you represent us for the London area for the wholesale trade. Commission to be five per cent. on all orders, whether received direct or indirect, and on all repeats. Payable on the 20th of each month on all goods actually dispatched and invoiced . . . This provisional agreement to be for a trial period of six months from May 1, 1944, subject to renewal for a further period of, say, three years, should you reach the minimum figure of £1,000 between now and November, 1944 . . ." A letter of the same date from the second defendants made a similar arrangement for representation of the second defendants by the plaintiffs for the retail and store trade. This letter stated: "Commission to be two and a half per cent. on all orders received, and on all repeats whether received direct or indirect." The plaintiffs obtained business in excess of £1,000 in the trial period, and the agreement continued thereafter until the defendants purported to determine it by a notice given on July 1, 1947. The plaintiffs contended that the contract, by providing for payment of commission "on all orders . . . received . . . and on all repeats" entitled them to receive commission on repeat orders received after they had ceased to act as representatives of the defendants. MORRIS, J., held that "repeats" referred only to repeat orders during the period of the agency.

Vaughan, K.C., and *Wiggins* for the plaintiffs.
Glidewell for the defendants.

MORRIS, J., stated the facts and continued: Two main questions emerge for determination by the court. The first, which depends on the construction of the two letters of Apr. 20, 1944, is whether in the period after Nov. 1, 1947, the defendants were, under the agreement contained in those letters, accountable to the plaintiffs for commission in respect of "repeats." If they were so accountable, it is common ground that, the agreement having been repudiated by the defendants, the plaintiffs would be entitled under that head to damages referable to the anticipatory and clearly expressed breach by the defendants of their obligation under the contract. The second matter arises on a submission by the plaintiffs that the defendants were guilty of a clear breach of the contract in giving the notice of July 1, and that, even if the plaintiffs are not entitled to damages referable to repeat orders after Nov. 1, they are entitled to damages for the acknowledged breach of contract and that those damages should have reference to the loss which the plaintiffs have suffered through being prevented from acting as the defendants' representatives during the period from July 1 to the end of October. The defendants submit that, on the construction of the contract, the plaintiffs are not entitled to damages. The defendants acknowledge that there was a breach of contract, but say that no damages flow from that breach, that no damages have been proved, and that the plaintiffs are not entitled to any larger sum than the sum referred to in the amended defence in respect of commission due on orders received prior to Nov. 1, 1947, for the reason that that sum represents all that the plaintiffs would have received had the agreement not been terminated.

I have been greatly assisted by the submissions of learned counsel on either side who have carefully analysed the words of the two letters I have to consider and have referred me to a number of authorities which help on a determination of this question. The defendants base on a true construction of these letters their contention that nothing was payable by the defendants after Oct. 31,

1947, assuming that the agreement then came to an end. On behalf of the plaintiffs it is said that the words "and on all repeats" have reference to the period after Oct. 31, 1947, with the result that any repeat orders given in that period earned commission for the plaintiffs. It is submitted that the agreement ought not to be regarded as an area agreement, but as one rather of a personal character, with the result that the plaintiffs were to have the fruits of their labours in the sense that after the end of the contract, *i.e.*, after Oct. 31, 1947, the plaintiffs would continue to have commission on all "repeats." Counsel for the plaintiffs submits that the words "orders whether received direct or indirect" by themselves cover all the events in regard to commission-earning during the contract period and that the words "and on all repeats" are not needed in reference to that period, but only come into operation in regard to the period after Oct. 31, 1947. Counsel contends that, if an order came from a customer and later that customer wished to have further goods, what the customer would give on the second occasion would be an order just as that which he gave on the first occasion was an order, and so, counsel submits, during the contract period the words "orders whether received direct or indirect" cover all the contingencies. The word "direct," he submits, refers to an order being sent by the plaintiffs, whereas the word "indirect" refers to an order that was not sent directly by them but was the result of an introduction by them.

It has been useful to refer to the authorities, but I agree with what has been said by both learned counsel, that one must remember that the authorities are decisions on particular words used in particular contexts and it would be wrong to seek to derive from any one authority more guidance than it was intended to afford. In *Bilbee v. Hasse & Co.* (1) the words were :

"As regards your commission, we hereby agree to allow you 1½ per cent. upon all orders executed by us and paid for by the customers arising from your introduction."

That case went to the Court of Appeal, as is indicated by a reference to the report in *Levy v. Goldhill* (2) where PETERSON, J., said ([1917] 2 Ch. 300) :

"That case went to the Court of Appeal and the decision was confirmed. As BOWEN, L.J., put it : 'The measure of his'—that is the plaintiff's—'payment was to be calculated not by the work done by him, but by the fruits of that work, and those fruits might very well accrue to the defendant after the determination of the agency'."

In *Levy v. Goldhill* (2) the words were :

"I agree to pay you half profits on receipt of orders (provided the customer is good). Same applies to repeats on any accounts introduced by you."

I was referred also to *Faulkner v. Cooper & Co.* (3), a decision of MATHEW, J., and to the decision in *Weare v. Brimsdown Lead Co., Ltd.* (4). In the latter case the plaintiff was employed by the defendants for twelve months as an agent for the sale of white lead manufactured by them on the terms that he was to receive 2½ per cent. commission on all sales, direct or indirect. In *Cramb v. Goodwin* (5) the words were :

"I accept the terms of £1 per week as salary (or expenses) and 5 per cent. commission on *all* business obtained by me, including repeat orders from *all* firms in the ground allotted to me. . . . To make it more clear, I must have the commission on all accounts I open, including all repeat orders, whether they are actually handed to me or posted on direct to you."

In giving judgment in that case, ATKIN, L.J., is reported (35 T.L.R. 478) as saying that, speaking for himself, very little assistance was to be obtained from

other decisions. He said it was a question of construction of a business document, and he went on :

“The cases referred to were not of much use or guidance unless they were fully reported, setting out the circumstances in which the agreement was made and the terms of the agreement.”

I was also referred to the decision of the Court of Appeal in *British Bank for Foreign Trade, Ltd. v. Novimex, Ltd.* (6).

I have not referred at length to the decisions in the various cases to which I have referred for it seems to me that when one notes the divergent phrases used in the different cases it does become entirely plain that the question is one of construction and that there is always danger in seeking to draw too much guidance from a decision in regard to other words in other contexts.

B Counsel for the defendants drew my attention to the fact that in *Levy v. Goldhill* (2), PETERSON, J., in his judgment, laid emphasis more than once on the difference between cases where the agreement was for a definite, and cases where it was for an indefinite, period. Counsel for the plaintiffs submits that it would be an erroneous test to say that merely because an agreement has a fixed term there cannot be a provision that commission is payable after the end of the term. I think counsel is correct in that submission. Everything must turn on a consideration of the exact words used.

Referring again to the words of the letter of Apr. 20, it is first to be noted that the provision is that commission is to be five per cent. “on all orders.” There is a further provision as to when the commission is to be paid—“on the 20th of each month on all goods actually despatched and invoiced”—

D but the provision is that payment is to be “on all orders.” Then the agreement goes on : “whether received direct or indirect, and on all repeats.” It would be rather a surprising result if the sentence to which I am now referring contemplated, by its first part, the contract period, and by its second part, after the word “indirect”, a period after the end of the contract. It seems to me that this wording denotes that the commission is to be five

E per cent. on all orders, and then, by way of specifying and making clear what orders are referred to, the letter goes on to say that they are orders, whether received directly or indirectly, and all “repeats.” It is to be observed that there is no mention in this letter of introducing a customer. It would have been very easy, if the parties had so wished, to provide that commission was payable at a particular rate on all orders given by a customer introduced,

F but that language is not found. It is cogently submitted by counsel for the plaintiffs that the words “on all repeats” are not really necessary, but it seems to me that those words are put there further to define and fully to clarify the meaning of the word “orders.” A situation might otherwise have arisen in which a customer gave an order and then later sent a repeat order, and some question might have arisen whether commission was payable on the latter.

G To avoid ambiguity those words were put in. If counsel for the plaintiffs is right in his submission as to what these words mean, the result would follow that, if a customer was introduced by the plaintiffs, and gave no order during the contract period, but did give an order after the contract period, no commission would be payable because it would not be a “repeat.” That would seem to me to be rather a surprising result if the intention was to relate the remuneration to orders that resulted from customers introduced by the plaintiffs.

H It is not strictly necessary to decide the question whether this agreement provided for commission on an order that came from the London area irrespective of any work on the part of the plaintiffs, but, as that has been argued and as it may be closely allied to what I have to decide, I think it is desirable to state my view on it. The agreement provides for commission to be five per cent. on all orders, but that still leaves open the question whether the reference is to all orders in the London area or to all orders in the London area

from customers introduced by the plaintiffs. The agreement does not have the words, "from customers introduced by the plaintiffs"; it simply has the words "on all orders." That must have some limitation, but the limitation, as it seems to me, is the limitation of the words "London area," and the agreement, therefore, in my judgment, means that the commission is to be one of five per cent. on all orders coming from the London area during the period of the contract. If the minimum business had not been reached during the six months period, in my judgment, there would have been an end when the six months period terminated, of any obligations on the part of the defendants, save for orders received during the six months.

The letter from the second defendants has a variation of wording. The wording is: "2½ per cent. on all orders received, and on all repeats whether received direct or indirect." Do those words mean that after the first "orders received" everything that is set out is only referable to the period after the end of the contract? If so, there is no mention of orders received directly or indirectly during the contract period. It would hardly be expected that there was a fundamental variation between the intention in these two contracts, and I do not think that it was intended by the variation of wording to have any different result.

For the reasons which I have indicated, my conclusion is that by these agreements the parties provided that the plaintiffs' remuneration was to be five per cent. or 2½ per cent. on all orders, whether received directly or indirectly, and on all repeats, meaning "including all repeats," and that that remuneration was the remuneration payable during the contract period and that the parties have not provided by this contract for any payment after that period came to an end. Being so satisfied, I must award what I think are reasonable, but appropriate, damages. This must be largely a matter of estimate on the basis of the material before me. Doing the best I can, I think that the plaintiffs are entitled to the sums set out in the amended defence, namely, £205 from the second defendants and £334 from the first defendants, but I think in addition to those sums the plaintiffs should have from the second defendants a sum of £140 and from the first defendants a sum of £180.

Judgment for the plaintiffs, with costs.

Solicitors: *Martin & Nicholson* (for the plaintiffs); *Manches & Co.*, agents for *John H. Franks*, Manchester (for the defendants).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

ANDERSON v. THE GUINNESS TRUST.

[KING'S BENCH DIVISION (Hilbery, J.), February 9, 1949.]

Negligence—Landlord and tenant—Defect in surface of courtyard to flats—Wife of tenant injured—Licensee—Liability of landlord.

A. was the tenant of a flat in a block owned by the defendant landlords. A.'s wife, who kept house for him, in crossing the courtyard attached to the premises, tripped over an irregularity in the surface, and was injured.

HELD: the fact that she kept house for A. did not give the wife such a business interest in common with the landlords as to make her an invitee, and she was merely a licensee.

Fairman v. Perpetual Investment Building Society ([1923] A.C. 74; 128 L.T. 386), *applied*.

[AS TO WHAT IS AN INVITEE, see HALSBURY, Hailsham Edn., Vol. 23,

pp. 600-604, paras. 851, 852; and FOR CASES, see DIGEST, Vol. 36, pp. 35-41, Nos. 208-246.]

Cases referred to :

- (1) *Indermaur v. Dames*, (1866), L.R. 1 C.P. 274; Har. & Ruth. 243; 14 L.T. 484; *affmd.*, (1867), L.R. 2 C.P. 311; 16 L.T. 293; 31 J.P. 390; 36 Digest 35, 208.
- A (2) *Addie (R.) & Sons (Collieries), Ltd. v. Dumbreck*, [1929] A.C. 358; 140 L.T. 650; Digest Supp.
- (3) *Fairman v. Perpetual Investment Building Society*, [1923] A.C. 74; 128 L.T. 386; 87 J.P. 21; 36 Digest 37, 213.

ACTION for damages for personal injuries arising from an alleged breach of contractual duty and/or negligence.

- B The plaintiff was the wife of the tenant of one of a block of flats owned by the defendant landlords. While crossing the courtyard attached to the block and other blocks of flats of the same landlords she tripped over an irregularity in the surface and fell, breaking a jug which she was carrying and severely cutting her hand. She contended *inter alia* that she was an invitee of the landlords in the courtyard and was entitled to the discharge by the landlords of their duty to such an invitee as defined in *Indermaur v. Dames* (1).
- C HILBERY, J., held that the plaintiff was a licensee and not an invitee, and, the danger being obvious, she was not entitled to damages.

Pain for the plaintiff.

Humfrey Edmunds for the defendant landlords.

- D HILBERY, J., stated the facts, found that the plaintiff's husband, and not the plaintiff herself, was the tenant of the flat, and continued: What was the plaintiff's position? It is said she was an invitee. I will consider that question first because, as LORD DUNEDIN said in *Addie (R.) & Sons (Collieries), Ltd. v. Dumbreck* (2) ([1929] A.C. 372; 140 L.T. 654), the first duty of the court in such a case as this is to determine into which category a plaintiff ought to be placed. It seems to me that the plaintiff was a part of the family of the tenant and in exactly the same position as that described by LORD ATKINSON in his speech in *Fairman v. Perpetual Investment Building Society* (3) where he was dealing with the very topic of the category in which the family of a tenant should be placed. There was no doubt that the plaintiff was where she was with the permission of the landlords, but what
- F right can she have to be put in any higher category than one there with a permission, that is, as a licensee? It is said that because she was the housekeeper of the tenant she was there on a matter of business interest which she had in common with the landlords, inasmuch as, as housekeeper, she facilitated the life of the tenant in the premises so that he continued to be the better able to pay the rent. That is a subtlety to which I am not prepared to accede.
- G To accept it would, in my judgment, be stretching to a point beyond reason what constitutes a common business interest with the landlords in law. I think the law is too strong, having regard to the case of *Fairman v. Perpetual Investment Building Society* (3), for any such interpretation to be put on the phrase, at any rate, by me. I am satisfied that the plaintiff was a licensee and would have owed to her by the landlords the same duty as any other
- H person who was permitted to go over this courtyard, and, as it has been argued by counsel for the plaintiff that the word "permission" is capable of being interpreted as having another meaning than that of a licence, let me say at once that I use it as equivalent to a licence. The plaintiff was there as a licensee and that was the category into which she should be put having regard to *Fairman v. Perpetual Investment Building Society* (3). She being in that position, the landlords owe a duty not to expose her to a concealed danger, known to them and not discoverable by her using reasonable care for her

own safety. That duty is sometimes summarily expressed by saying that the landlord is under a duty not to permit the existence of a trap. It is impossible to treat this irregularity, which was open and apparent, as anything like a concealed danger. In these circumstances the plaintiff cannot claim in law to be awarded any damages for the injuries she has received, and there must be judgment for the defendants.

Judgment for the defendants with costs.

Solicitors: *L. O. Glenister & Sons* (for the plaintiff); *Berrymans* (for the defendants).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

LAVENDER v. DIAMINTS, LTD.

[COURT OF APPEAL (Tucker and Singleton, L.JJ., and Birkett, J.), February 9, 10, 11, 22, 1949.]

Factory—Safe means of access—Independent contractor—Work outside factory building—Cleaning windows—"Building operation"—Factories Act, 1937 (c. 67), s. 26 (1), s. 107 (1), s. 152 (1).

By s. 26 (1) of the Factories Act, 1937, "There shall, so far as is reasonably practicable, be provided and maintained safe means of access to every place at which any person has at any time to work."

A window cleaner, working as an independent contractor, having inspected a factory, entered into a contract with the occupiers to clean the factory windows. Some of the windows had to be cleaned from the outside, and in order to reach them, the window cleaner climbed on to an asbestos roof. This roof was not strong enough to bear a man's weight unless the weight was distributed, and accordingly, the window cleaner placed his ladder flat on the roof and was walking along it when he fell through the roof and was injured.

HELD: (i) the occupier of a factory owes a duty under s. 26 (1) to an independent contractor working on the factory premises and that duty is not confined to the employees of the occupier.

(ii) the work in question was not a "building operation" within s. 152 (1) of the Act, and, therefore, was not excluded from the operation of s. 26 (1) by s. 107.

(iii) the obligation placed on the occupier under s. 26 (1) was not confined to means of access to places inside the factory building, but extended to work on the outside of the building.

(iv) on the facts, the defendants did not provide and maintain safe means of access to the place at which the window cleaner had to work, and, therefore, the cleaner was entitled to recover damages from the occupier.

Decision of DENNING, J. ([1948] 2 All E.R. 249), reversed.

AS TO SAFE MEANS OF ACCESS, see HALSBURY, 1948 Supp., p. 747; and FOR CASES, see DIGEST Supp., Factories.

FOR THE FACTORIES ACT, 1937, s. 26 (1), see HALSBURY'S STATUTES, Vol. 30, p. 221.]

Cases referred to:

(1) *Whitby v. Burt, Boulton & Hayward, Ltd.*, [1947] 2 All E.R. 324; [1947] K.B. 918; 177 L.T. 556; 2nd Digest Supp.

(2) *Fowler v. Yorkshire Electric Power Co., Ltd.*, [1939] 1 All E.R. 407; 160 L.T. 208; Digest Supp.

APPEAL by the plaintiff from an order of DENNING, J., dated June 11, 1948. The plaintiff, a window cleaner, claimed damages against the defendants, the

occupiers of a factory, for breach of their statutory duty under s. 26 (1) of the Factories Act, 1937, in respect of injuries sustained by him while cleaning the factory windows under a contract between him and the defendants. The learned judge found that, although the defendants were guilty of a breach of duty, the plaintiff's negligence was the decisive cause of the accident, and he gave judgment for the defendants. The Court of Appeal now allowed the appeal. The facts appear in the judgments.

- A *Donald McIntyre* for the plaintiff.
Berryman, K.C., and *Stephen Chapman* for the defendants.

Cur. adv. vult.

Feb. 22. The following judgments were read.

- TUCKER, L.J. :** This is an appeal from a judgment of DENNING, J.,
B in favour of the defendants in an action in which the plaintiff claimed damages for personal injuries suffered by him as a result of falling through a roof consisting of asbestos slates when engaged in cleaning windows at the defendants' factory. The plaintiff was an independent contractor in business on his own account, and, after inspecting the premises in question, he agreed to clean the windows of the factory once a month for 30s. and the office windows twice a
C month for 7s. each time, making £2 4s. a month in all. In his evidence he agreed that he had to provide his own ladders and "tackle." The accident which gives rise to this action happened in November, 1946, on the occasion of his fourth visit for window cleaning purposes.

- The asbestos roofing in question covered part of the ground floor of the factory, and the plaintiff got on to the roof in order to clean some windows on
D the first and second floors which did not open and had to be cleaned from outside. He used his ladder to get to the roof and then pulled it up and put its feet on a plank which he found up there and which had been used for this purpose by the man who had cleaned these windows before the plaintiff obtained this contract. After cleaning the windows he placed the ladder horizontally along the roof and was walking along on the ladder when, according to his
E evidence, the roof gave way beneath him and he fell a distance of 12 to 15 ft. on to some toffee boilers below. The procedure was the same as that which he had adopted without mishap on the three previous occasions. The roofing consisted of asbestos sheets 2 ft. 3ins. wide with a span of 4 ft. 6 ins. between the purlins to which the sheets were riveted. The evidence showed that as a result of experience gained during the war the British standard specification
F now lays down that in the case of asbestos sheets the span between the purlins should not exceed 3 ft. and the London County Council have adopted the same requirement. There are, however, thousands of factories and buildings with roofs of asbestos sheeting with spans exceeding 3 ft. Asbestos is brittle and friable, and, accordingly, anyone having occasion to go on to such a roof should use a plank or planks, or something of the kind, so as to distribute his
G weight more evenly. The plaintiff realised this, and that was why he had placed his ladder flat on the roof and was walking along it.

- DENNING, J., appears to have rejected the plaintiff's evidence that the roof gave way under him while he was walking along the ladder and to have accepted the theory of the defendants' expert that the probability was that he had slipped while walking along the ladder and put his foot through one of the
H asbestos sheets. He held that the defendants were not liable at common law as there was no failure on their part to prevent damage to the plaintiff from unusual danger of which they knew or ought to have known, he taking reasonable care for his own safety, but he found that they were in breach of their statutory duty under s. 26 of the Factories Act, 1937, so far as reasonably practicable to provide and maintain safe means of access to every place at which any person has at any time to work. He said it was not reasonably practicable to expect the defendants to reconstruct their roof,

but they could have ensured safe access by the provision of more planks or ladders. It is clear from his judgment that the learned judge took the view that it was this absence of sufficient planking that made the roof, as a means of access, unsafe and was the cause of the accident. Having thus found the defendants in breach of their statutory duty he went on to deal with the allegations of contributory negligence made against the plaintiff in these words ([1948] 2 All E.R. 251):

"The next question, however, is: How far is the plaintiff responsible? He was not a servant of the defendants. He was an independent contractor working on his own account. The duty of an employer to a servant is much higher than that of an occupier to an independent contractor. The employer owes a duty to his servant to use reasonable care in laying out the work to see that it is safe, and he has a duty to use reasonable care to provide proper plant and appliances for his servants. No such duty rests on the occupier of premises who employs a window cleaner as an independent contractor to clean his windows. In such a case it is the duty of the window cleaner to provide his own plant and appliances and to lay out the work himself so that it is reasonably safe. No occupier ever dreams of taking on himself the responsibility of telling the window cleaner how to do the work or what plant or appliances he should use. So here, although this was a factory, it seems to me that it was the plaintiff's responsibility to lay out the work properly and to provide proper plant and appliances, or, in other words, to see that there were safe means of access to the windows. That responsibility of window cleaners is well-known, and insurances are regularly taken out by them on account of it. In this case, therefore, as between the defendants and the plaintiff, it was the plaintiff and not the defendants, who was responsible for seeing that there were safe means of access. That is borne out by the evidence . . . In my judgment, therefore, although there was a breach of duty by the defendants of s. 26 of the Factories Act, 1937, there was also a breach of duty by the plaintiff in failing so to lay out the work and to provide such plant and appliances that there would be safe means of access to the windows. Having regard to the special responsibility of care and skill which is required of a window cleaner, I hold that he was guilty of negligence, and, indeed, of negligence which was the decisive cause of the accident. If he had provided safe means of access—if he had provided more planks, or even if he had walked along this ladder more carefully and had not slipped—there would have been no accident."

With respect to the learned judge I can find nothing in the evidence to support his view that the plaintiff's failure to provide the planking that might have obviated the accident or the fact that he slipped constituted negligence on his part. There was no evidence that he had expressly agreed to provide planking, nor was there any evidence that it is the custom for window cleaners to bring with them any appliances necessary to render safe any part of the premises on which they have to go in order to clean windows. Nor was there evidence that planking of the kind required is included in the "tackle" which a window cleaner is, no doubt, required to provide. Whatever the contractual duty may have been, nothing short of negligence in the performance of this duty will, in my view, suffice to relieve the occupier of the factory from the consequences of a breach of his statutory duty under s. 26 at the suit of the injured person for whose benefit the duty is imposed. Where a servant of the independent contractor is injured as a result of the failure of the contractor to provide the necessary plant, it is, no doubt, true that the occupier in breach of his statutory duty may be able to recover over from the contractor any damages he has to pay to the injured servant, or in an action in which both the contractor and the occupier are made defendants the contractor may be

ordered to pay the whole or some part of the damages. This was the case in *Whitby v. Burt, Boulton & Hayward, Ltd.* (1). To apply this principle to a case where the injured workman is himself the contractor and where no negligence is proved against him, would, in effect, be to allow the occupier of a factory to contract out of the statute. Assuming a contractual obligation on the part of the plaintiff to provide the necessary "tackle" and assuming that this includes planking where required, I do not think on the facts of this case that his failure to provide it amounted to negligence, and it was not suggested that he was not properly using the appliances which were available.

For these reasons, I am of opinion that the finding of negligence against the plaintiff on the evidence given in this particular case cannot stand, and it is, therefore, unnecessary to consider whether negligence of the kind found by the learned judge would, since the passing of the Law Reform (Contributory Negligence) Act, 1945, necessarily altogether preclude him from recovering any damages. It was contended for the defendants that, even if the learned judge was in error with regard to the plaintiff's negligence, none the less his judgment should stand on the ground that the evidence disclosed no breach of statutory duty on their part. A number of points were taken.

1. It was argued that the occupier of a factory owes no duty under s. 26 (1) of the Factories Act, 1937, to an independent contractor or his servants working on the factory premises. In short that the duty owed is confined to the employees of the occupier. It is true that there appear to be only two reported cases in which an independent contractor or his workmen have brought actions against factory occupiers under the safety provisions of this statute or the corresponding sections in earlier Acts. It is significant that in the first of these cases this point was never taken by the defence, while in the second it is open to some doubt whether it was raised precisely in this form. If so, it was inferentially rejected. The first of these cases is *Fowler v. Yorkshire Electric Power Co., Ltd.* (2), a decision of LAWRENCE, J., in favour of a servant of an independent contractor where, in the judge's view, the real blame for the accident rested on the independent contractor, who was not a party to the action. The second is the previous decision of DENNING, J., in *Whitby's* case (1). A study of ss. 12 to 40, which form Part II of the Act of 1937, satisfies me that this part of the Act has not the limited application contended for by the defendants, but it is sufficient for present purposes to confine my decision to s. 26, the language of which is, I think, clearly designed to include in its protection persons working in a factory whether or not they are directly employed by the occupier.

2. It was contended that the work in question was a "building operation" within the definition contained in s. 152, and, therefore, by s. 107 outside the scope of s. 26. The definition in s. 152 is:

" 'Building operation' means the construction, structural alteration, repair or maintenance of a building (including re-pointing, re-decoration and external cleaning of the structure) . . . but does not include any operation which is a work of engineering construction within the meaning of this Act."

In my view, these words are not apt to include window cleaning which is an operation quite distinct from the well known processes for the external cleansing of structures. Section 26, accordingly, applies to this operation. I should desire to reserve for future consideration whether or not s. 26 applies to building operations carried on in a factory as held by DENNING, J., in *Whitby's* case (1).

3. It was argued that the obligation under s. 26 to provide safe means of access is confined to places inside the factory building and does not extend to work on the outside unconnected with the operations of the factory. This argument is, I think, clearly wrong. A factory for the purposes of the Act by s. 151 includes any premises in which, or within the close or curtilage or

precincts of which, persons are employed, and safe access must be provided to all places within the curtilage or precincts where any person has to work.

4. Finally, it was submitted that this roof was not a place where the plaintiff "had to work." It was said he was not required to work in any particular place, but it was for him to decide where and how he would work. The answer to this is that he had to work at the windows and the duty of the defendants under s. 26 was to provide safe means of access, so far as reasonably practicable, to these windows. The roof and one plank were the only means of access provided, and these have been found to have been unsafe.

For these reasons, I am unable to accept any of the contentions advanced on behalf of the defendants in support of the submission that the evidence disclosed no breach of their statutory duty under s. 26, and on this part of the case I agree with the trial judge. For the reasons stated earlier in this judgment, however, I am of opinion that this appeal succeeds, and that the plaintiff is entitled to judgment. As to damages, the learned judge provisionally assessed the sum at £400. It was contended on behalf of the plaintiff that this sum is inadequate having regard to the evidence. It is sufficient to say that on a review of the evidence I see no reason for not accepting the judge's estimate. I would, accordingly, allow this appeal and enter judgment for the plaintiff for the sum of £400.

SINGLETON, L.J. : This appeal, like several others which have been before the court recently, illustrates the far-reaching effects of the Factories Act, 1937. The plaintiff is a window cleaner, and he was under contract to clean the windows of the defendants' factory at 4, Leathermark Street, S.E.1, from time to time. Some of the windows were made so that they could not be opened, and these windows had to be cleaned outside as well as inside. They were some height above ground level, and, as a ladder could not be put to them, the ordinary way of approach was along the roof of a lean-to structure, part of the factory. The lower part of the roof was glass, but the upper part was of asbestos sheets which were not constructed in a manner sufficient to carry the weight of a man unless the weight was distributed by the use of planks or the like. On the roof there was a plank (6 ft. by 1 ft., we were told) which was used by the plaintiff on which to place his ladder. He used his ladder, flat on the roof, as a means of getting along the roof. He had cleaned the windows about three times before Nov. 9, 1946, on which date he met with an accident. He had finished his work and was making his way along the ladder (which was flat on the roof) with the object of descending from the roof when something happened and he fell. The asbestos roof gave under him, and he went through it and fell on a boiler in the shed below. He was injured. He claimed damages against the defendants, as occupiers of the factory, both for breach of duty under the common law and for breach of statutory duty (s. 26 of the Factories Act, 1937). It is not clear how he came to fall. The judge does not seem to have accepted his account of the accident (which was the only one given to the court), and, indeed, it does not seem a very probable account having regard to the evidence of the expert witnesses. It is more likely that he slipped (as the judge thought) or that he put a foot wrong. It is no easy matter to walk along a ladder flat on a roof which has a slight incline. DENNING, J., rejected the claim for breach of common law duty and in this I am satisfied that he was right.

The questions for the consideration of this court arise under s. 26 (1) of the Act of 1937, which provides :

"There shall, so far as is reasonably practicable, be provided and maintained safe means of access to every place at which any person has at any time to work."

The first question is whether the plaintiff was entitled to recover against the

occupiers of the factory if he sustained injuries through a breach by them of their duty under it. At one stage of the argument I felt considerable doubt on this, but I have arrived at the conclusion that the submission made on behalf of the plaintiff is right. Speaking generally, the earlier Factory Acts were designed for the protection of those employed in the factory, that is, employed by the occupiers. There has been a wide extension in this regard as is shown by later Acts, and, particularly, by an examination of the different safety provisions in Part II of the 1937 Act. Section 26 (1) deals with access to every place at which any person has at any time to work, and sub-s. (2) (under which the claim was also laid) begins with the words "Where any person is to work . . ." In order to fulfil his contract with the defendants the plaintiff had to work at the place at which he met with his injuries, and, accordingly, he would appear to be within the provisions of the section. I think he would have been if he had been working inside the factory, and I cannot see that the case is altered by reason of the fact that he was working outside in order to clean the windows of the factory which could not be opened. This was the view of DENNING, J., and it is in accordance with his decision in *Whitby v. Burt, Boulton & Co.* (1). It also accords with the judgment of LAWRENCE, J., in *Fowler v. Yorkshire Electric Power Co., Ltd.* (2) (though it is right to point out that no such question was raised in that case).

The next question is: Was it established that the defendants were in breach of their duty under s. 26 (1)? Their duty was so far as was reasonably practicable to provide and maintain safe means of access to every place at which the plaintiff had to work. The plaintiff had to clean windows some height above ground, and it might be argued that access to those windows is by means of a ladder, but I do not read the section as meaning that it is the duty of the occupier of the factory to provide a window cleaner with his plant or tackle. The section should be read as imposing on the occupier the duty, as far as is reasonably practicable, of providing him with a safe way to the place at which he has to work with the ordinary plant or tackle which a window cleaner has, including a safe place on which to put his ladder. On the evidence given the normal way of getting to these windows was by the roof of the lean-to. That was the way used by the man who had cleaned the windows before the plaintiff undertook the work, and on the roof was the plank which he had used. There is nothing to show whether or not it was provided by the defendants. This plank was only 6 ft. long, and the length of roof to be traversed by the window cleaner was about 60 ft. So far as was shown it was not possible to get a ladder from the ground to the windows. If this is right, and I think it is, there were no other means of access to the windows in question than by this roof and the roof was not constructed to carry the weight of a man unless there were planks, or the like, to distribute the weight. On these facts it seems to me that it is established that the defendants did not provide or maintain a safe means of access to the place at which the plaintiff had to work, and there was no evidence given on which they can claim any help from the words "so far as is reasonably practicable." Whether the accident happened in the way that the plaintiff described or in the way the judge thought more probable, the plaintiff's injuries were caused by the absence of a safe way along the roof. I do not think it necessary to express any opinion whether the result would have been the same if it had been proved that in such cases it was usual for the window cleaner to take with him all planks, etc., to provide a way across a roof such as this. I emphasise that there was no such evidence, and I repeat that the case concerns a factory and the duty created by statute in relation to persons who have to work in factories.

The remaining question is as to contributory negligence. DENNING, J., having found that there was a breach of duty by the defendants, came to the

conclusion that as between them and the plaintiff, he, the plaintiff, was the man to provide more planks if they were needed and that, as between the parties, the responsibility rested wholly on the window cleaner. I cannot agree with this view. The judge found that the defendants had broken their statutory duty. The evidence did not establish that it was the duty of window cleaners to take all planks necessary to make a roof safe, nor that it was the custom for them to do so, nor was it proved that the defendants contracted on any such basis. The judge added ([1948] 2 All E.R. 251) :

“ If he had provided safe means of access—if he had provided more planks, or even if he had walked along this ladder more carefully and had not slipped—there would have been no accident.”

Having considered the terms of the Law Reform (Contributory Negligence) Act, 1945, DENNING, J., arrived at the conclusion that the plaintiff's responsibility for the damage was the whole share and he gave judgment for the defendants. I find myself unable to agree with this, in view of the fact that the judge had found the defendants to have failed in their statutory duty in a way which must at least have had some bearing on the accident to the plaintiff. Again, there was nothing to show that the plaintiff did not walk along the ladder carefully, and a slip (if he did slip) is not of itself proof of negligence. It was for the defendants to show that the plaintiff was negligent in a way which caused, or which contributed to, the accident, and, in my view, they did not do so. The only evidence they called was that of an expert witness, a surveyor, and his evidence was directed to show that the accident could not have happened in the way the plaintiff said it did. The witness had not inspected the roof until July, 1947, long after it had been repaired. I would allow the appeal and order that judgment be entered for the plaintiff. I see nothing wrong in the provisional estimate of damages at £400, and that is the sum for which judgment should be entered.

BIRKETT, J. : In this appeal the questions for determination arose out of the circumstances in which the plaintiff, Mr. Lavender, was injured when working on the premises of the defendants, Messrs. Diamints, Ltd., in November, 1946.

The plaintiff was a window cleaner by occupation, and he had agreed with the defendants to clean certain windows in their factory at Leathermark Street, in the south east of London. The windows with which this appeal is concerned were windows that did not open, and could not be cleaned from the inside, and because of their position they could not be reached by the ordinary method of using a ladder which rested on the ground. They could be reached by means of a ladder which rested on an asbestos roof of a portion of the factory. This asbestos roof was not of modern construction, and the ladder could not rest on the asbestos roof directly because of the danger of going through the roof. It was necessary to use planking laid along the roof to take the foot of the ladder and to use the ladder itself, laid flat along the roof, to distribute the weight when the window cleaner was moving from one place to another on the roof. When the accident occurred which resulted in the plaintiff being injured, he had completed the cleaning of the windows and had laid his ladder flat along the roof and was walking along it in order to get to the side where he might descend to the ground. He said at the trial before DENNING, J., that it was when he was walking along the ladder, that the asbestos roof gave way and he fell to the floor below, but the learned judge did not accept this account of how the accident occurred and thought it much more likely that the plaintiff stepped off or slipped off the ladder when walking along it and fell through the asbestos roof by standing directly on it. In these circumstances the learned judge held that the defendants were not liable at common law because there had been no failure to perform their common law duty,

but he found that the defendants were in breach of their statutory duty under s. 26 of the Factories Act of 1937. This section laid on the defendants the duty of providing and maintaining, so far as is reasonably practicable, safe means of access to every place at which any person has at any time to work.

A It was submitted on behalf of the defendants that the plaintiff could not take advantage of the provisions of the section because he was not a servant of the defendants and the defendants owed no duty to him in the circumstances of this case. An examination of the precise wording of the section shows that the duty is laid in very wide terms. The safe means of access referred to in the section is to "every place at which any person has at any time to work." I cannot think that it makes the slightest difference whether the place is inside or outside the factory. It is "every place." Neither do I think that "any person" is confined to employees of the defendants and excludes a person like the plaintiff employed to clean the windows. The words "has at any time to work" must be read in their ordinary meaning, and, in my view, the plaintiff, on the day when he met with his accident, was within the terms of the section, and if it was shown that the injuries he sustained arose from a breach of the statutory duty on the part of the defendants, he was entitled to damages. What was the duty of the defendants in the circumstances of this case? The evidence showed that the only means of access to the windows in question was by way of the asbestos roof, and that the roof, as such, was not a safe means of access because of its construction, and also because of the nature of an asbestos roofing. It could only be made a safe means of access if planks or similar things were supplied. DENNING, J., seems to have taken the view that the element of danger was the absence of sufficient or adequate planking to overcome the inherent inadequacy of the roof itself. It seems to me reasonably plain that, if the plaintiff was to clean the windows in question, he had to use this roof, and was, therefore, in a place where he had to work. The duty of the defendants was to provide and maintain, so far as was reasonably practicable, safe means of access to that place, and that safe means of access depended on the provision of adequate planking. This they clearly failed to do. The learned judge then went on to say that the duty of providing the necessary planking, to make the means of access safe, rested on the plaintiff. There was no evidence before the learned judge to show that it was a usual thing for window cleaners in similar circumstances to provide planking, nor that anything was said about it when the plaintiff undertook to clean these particular windows. There was no evidence to show that the window cleaner was under any duty other than to provide the usual and ordinary equipment for his job. In my judgment, the duty of providing and maintaining safe access was on the defendants, and they were clearly in breach of that duty. In that state of affairs I cannot think that the plaintiff should be held to be guilty of negligence because he did not provide the planking; nor do I think that there was any evidence to show that, if he slipped from the ladder on which he was walking when he met with his accident, that was a negligent thing to do.

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H The learned judge has held that despite the breach of statutory duty on the part of the defendants the whole of the responsibility rests on the plaintiff. With this view I am unable to agree, and, in my opinion, the plaintiff is entitled to succeed. The sum of £400 was assessed by the learned judge; and I think the appeal must be allowed, and judgment entered for the plaintiff for £400.

Appeal allowed with costs.

Solicitors: *Hepburns* (for the plaintiff); *L. Bingham & Co.* (for the defendants).

[*Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.*]

HOSKING v. DE HAVILLAND AIRCRAFT CO., LTD. AND OTHERS.

[KING'S BENCH DIVISION (Lewis, J.), February 9, 11, 1949.]

Factory—"Gangway"—"Safe means of access"—*Plank across a duct on factory grounds*—*Plank placed by contractors for use of their own and occupiers' workmen*—*Factories Act, 1937 (c. 67), ss. 25 (1), 26 (1).*

Contractors engaged in carrying out building work on land attached to a factory dug a duct, 3ft. wide and 4ft. deep, for laying pipes, and placed a plank across it for the use of their own workmen and the workmen employed by the occupiers of the factory who had to pass across it to take coal from a coal dump to a boiler used for the factory. While the plaintiff, an inspecting engineer employed by the occupiers, was crossing the plank in the course of his work, it broke and the plaintiff fell into the duct and was injured.

An indemnity clause in the contract between the occupiers and the contractors provided: "The contractor shall be solely liable for and shall indemnify the employer in respect of and shall insure against any liability, loss, claim or proceedings whatsoever arising under any statute (other than the Workmen's Compensation and Employers' Liability Acts) or at common law in respect of personal injury to or the death of any person whomsoever arising out of or in the course of or caused by the execution of the works, unless due to any act or neglect of the employer or of any person for whom the employer is responsible."

HELD: (i) the plank was a "gangway" within the meaning of the Factories Act, 1937, s. 25 (1).

(ii) as the occupiers were carrying on work in the area of the duct and the plank was placed there by the contractors not only for their own use but also for the use of the occupiers' workmen, there was an absolute duty on the occupiers under s. 25 (1) to see that the plank was of sound construction and properly maintained, and under s. 26 (1) to provide, so far as was reasonably practicable, safe means of access, and, therefore, the occupiers were liable to the plaintiff for breaches of their statutory obligations.

Cox v. S. Cutler & Sons, Ltd. & Hampton Court Gas Co. ([1948] 2 All E.R. 665), *distinguished.*

Callaghan v. Fred Kidd & Son (Engineers), Ltd. ([1944] 1 All E.R. 525; [1944] 1 K.B. 560; 170 L.T. 368), *applied.*

(iii) the contractors were liable to the plaintiff at common law as the persons responsible for putting down the plank, and the occupiers were entitled to be indemnified by the contractors in the sum awarded as damages to the plaintiff (*Whitby v. Burt, Boulton & Hayward, Ltd.* ([1947] 2 All E.R. 324; [1947] K.B. 918; 177 L.T. 556), *applied*), notwithstanding the fact that the indemnity clause excluded liability arising from "any act or neglect of the [occupiers] or of any person for whom [they were] responsible."

[FOR THE FACTORIES ACT, 1937, ss. 25 and 26, see HALSBURY'S STATUTES, Vol. 30, pp. 220, 221.]

Cases referred to:

- (1) *Cox v. S. Cutler & Sons, Ltd. & Hampton Court Gas Co.*, [1948] 2 All E.R. 665.
- (2) *Callaghan v. Fred Kidd & Son (Engineers), Ltd.*, [1944] 1 All E.R. 525; [1944] K.B. 560; 170 L.T. 368; 2nd Digest Supp.
- (3) *Whitby v. Burt, Boulton & Hayward, Ltd.*, [1947] 2 All E.R. 324; [1947] K.B. 918; 177 L.T. 556; 111 J.P. 481; 2nd Digest Supp.

ACTION for damages on the ground of negligence and breach of statutory duty.

The plaintiff, William Ernest Hosking, a marine engineer, was employed as an inspecting engineer by the first defendants, de Havilland Aircraft Co., Ltd., occupiers of a factory. On a piece of ground 250 yards away from the nearest premises of the factory, a duct some 3 ft. wide and 4 ft. deep, running roughly north and south, in which it was proposed to lay pipes had been dug by the second defendants, Gee, Walker & Slater, Ltd., who were contractors engaged by the occupiers to carry out building works on the site. On the east side of the duct was a Cochrane boiler, used as a temporary boiler by the occupiers, and on the west of the duct were some coal hoppers in course of erection by the contractors. To the west of the coal hoppers were coal dumps. A plank owned by the contractors had been placed by them across the duct for the use of their own workmen and also to enable coal to be brought from the dumps to the Cochrane boiler by the occupiers' workmen. In the course of his duty as inspecting engineer, the plaintiff went to examine the progress of the work in the area where the contractors were working. He started to cross the plank, but it broke and he was thrown into the duct and received injuries to his back. He recovered from the accident, but later he was dismissed by the occupiers as being redundant, and, as he was 70 years old and suffering from a disability, he was unable to obtain fresh employment. He contended that the plank was a "gangway" within the meaning of the Factories Act, 1937, s. 25 (1), and that, as it was used by the occupiers, they were liable under that section, and also under s. 26 (1) of the Act for failing to provide a safe means of access. By their defence the occupiers denied liability and alleged that the contractors, having made the trench, were liable for the accident. After the contractors had been joined as defendants to the action, the occupiers issued against them a third party notice for indemnity, alleging that the plank was the property of the contractors by whom it had been placed across the duct. The occupiers also alleged that the contract between them and the contractors contained a clause whereby the occupiers were to be indemnified for any accident occurring through the negligence of the contractors. The contractors denied liability. LEWIS, J., found that the plank was the property of the contractors and had been placed across the duct for the use of their own workmen and also for that of the occupiers' workmen. He gave judgment for the plaintiff against both the occupiers and the contractors, and directed that the occupiers should be indemnified by the contractors in the sum awarded as damages and in costs.

Marven Everett for the plaintiff.

John Thompson for the occupiers.

John Royle for the contractors.

Cur. adv. vult.

G Feb. 11. LEWIS, J., stated the facts and continued: The plaintiff contends that the occupiers are responsible under the Factories Act, 1937, s. 25 (1) or s. 26 (1). To succeed under s. 25 (1) the plank in question must be considered to be a "gangway", as counsel for the plaintiff has contended. That sub-section provides:

H "All floors, steps, stairs, passages and gangways shall be of sound construction and properly maintained."

The duty thereby cast on the occupiers of the factory to see that all gangways "shall be of sound construction and properly maintained" is an absolute duty. It is clear that this plank, if it be a gangway, was not of "sound construction" and was not "properly maintained." There is no definition of "gangway" in the Act, and I know not whether the first syllable of the word is of German or Scottish origin, but it seems to me that "gangway"

must mean a way over which one goes, and I think that a plank placed across a duct for the purpose of people crossing it is a "gangway" within the meaning of s. 25 (1) of the Act.

If the plank was, as I find it was, the plank of the contractors, the next question is whether or not the Factories Act, 1937, is sufficiently wide to impose on the occupiers of the factory a liability for something which was put there, not by them, but by independent contractors to facilitate their work. On that point there is authority which would seem to show that if the gangway was placed in position by contractors and was used by, not only their own workmen, but also the workmen employed by the occupiers of the factory, the occupiers were liable under the Factories Act, 1937. That would appear to be the effect of the decision in *Cox v. S. Cutler & Sons, Ltd. & Hampton Court Gas Co.* (1). In that case a gas company had one of its gasholders damaged by enemy action, and it was not then being used for the purpose of making gas. Contractors were employed to reconstruct the gasholder and were given the exclusive possession of the area. A workman employed by the contractors met with an accident while engaged on the reconstruction, and it was held that the gas company were not liable as occupiers of the factory. From that it would seem to follow that, where a gangway such as this, although belonging to the contractors and placed there by them, is for the use of the occupiers of the factory, the occupiers of the factory cannot contend that they are not liable under the Factories Act, 1937, s. 26 (1), which provides :

"There shall, so far as is reasonably practicable, be provided and maintained safe means of access to every place at which any person has at any time to work."

The decision in *Callaghan v. Fred Kidd & Son (Engineers), Ltd.* (2) appears to be clear authority for saying that s. 26 (1) makes it obligatory, "so far as is reasonably practicable," for the factory occupier to provide and maintain safe means of access. In *Cox's* case (1) the gas company were not using or carrying on any work on the premises. In the present case the occupiers were carrying on work in this area because they were using the Cochrane boiler which had been placed there for the purpose of their factory work.

The result, in my view, is that the occupiers are liable, but that by no means concludes the case. The contractors were the persons who put down a rotten plank to be used both by their own people and by those employed by the occupiers, and, in my judgment, they would be responsible to the plaintiff at common law for having caused this accident. The matter does not rest there, because in the third party proceedings (which I am asked to deal with in this action) reliance is placed on an indemnity which is not altogether easy of construction. The indemnity clause is in these terms :

"The contractor shall be solely liable for and shall indemnify the employer in respect of and shall insure against any liability, loss, claim or proceedings whatsoever arising under any statute (other than the Workmen's Compensation and Employers' Liability Acts) or at common law in respect of personal injury to or the death of any person whomsoever arising out of or in the course of or caused by the execution of the works, unless due to any act or neglect of the employer or of any person for whom the employer is responsible."

It is said that the closing sentence of that clause applies in this case, and that, if the occupiers were responsible for the accident because they were in breach of the Factories Act, 1937, then the indemnity does not run against the contractors. On that I need only say that, if such a state of affairs is excluded by the contract, the indemnity would appear to be entirely useless, because one has no right of indemnity against another person unless one is oneself

liable. An indemnity pre-supposes that one has a liability against which someone else indemnifies one. I find it very difficult to make sense out of the indemnity clause if it means that, in circumstances such as the present, the indemnity does not apply. I am, therefore, of opinion that, not only are the contractors, as well as the occupiers, liable to the plaintiff for this accident, but under the third party proceedings for indemnity the occupiers are entitled to recover from the contractors.

- A It is argued by counsel for the plaintiff that, indemnity or no indemnity, if both defendants are liable to his client, the proper method of dealing with this case is under the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6, by which, where there are joint tortfeasors, the court has power to apportion the liability, and the contribution directed may amount to a complete indemnity. I observe that in *Whitby v. Burt, Boulton & Hayward, Ltd.* (3) DENNING, J., on his interpretation of the Factories Act, 1937, s. 26, found that the occupiers were guilty of negligence, and held that there had been a breach of the section. In that case independent contractors were doing repairs to the roof of a factory and, owing to their faulty work, some corrugated iron sheets, which were required for the repairs, collapsed. It was pleaded by the contractors that the use of the corrugated iron sheets was authorised by the occupiers of the factory, as the use of the plank was authorised in this case. In *Whitby's* case (3) the occupiers of the factory contended that, as the work on which the contractors were engaged was a building operation, s. 26 of the Act of 1937 did not apply, because it was not one of the sections specified in s. 107 of the Act which dealt with building operations.
- D DENNING, J., said ([1947] 2 All E.R. 325) :

"It is impossible to extricate building operations within a factory from other operations within a factory. Section 26, in my judgment, applies to this case and the occupiers were responsible for seeing that there was provided and maintained safe means of access."

- E The learned judge held that both defendants were liable. Judgment was entered against both defendants, but the learned judge directed that the occupiers should be indemnified in the sum awarded by the contractors, who should also pay the costs. There was not a specific indemnity there, as there is in this case, and the indemnity was given under the Law Reform (Married Women and Tortfeasors) Act, 1935.

- F In my view, therefore, there must be judgment in this case for the plaintiff. The special damage, it is agreed, amounts to £247 14s., and I propose to award the plaintiff, including that sum of special damage, the sum of £1,500 against both defendants. I make the order under the Law Reform (Married Women and Tortfeasors) Act, 1935, and I say no more in regard to the indemnity clause. The occupiers shall be indemnified in that sum by the contractors, who, as in *Whitby's* case (3), are to pay the costs of the action.

- G Judgment for the plaintiff for £1,500 and costs. First defendants to be indemnified by the second defendants in the sum awarded and costs, including costs of the third party proceedings.

Solicitors : Barlow, Lyde & Gilbert (for the plaintiff) ; Blount, Petre & Co. (for the occupiers) ; William Charles Crocker (for the contractors).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

CUTLER v. WANDSWORTH STADIUM, LTD

[HOUSE OF LORDS (Lord Simonds, Lord du Pareq, Lord 1 Applied. GREEN v. PORTSMOUTH STADIUM, LTD. [1953] 2 All E.R. 102.) of Henryton and Lord Reid), January 24, 25, 26, February 28, 1949.]

Gaming and Wagering—Dog race track where totalisator maintained—Provision of space for bookmakers—Breach of statutory duty—Competence of civil action at suit of injured bookmaker—Betting and Lotteries Act, 1934 (c. 58), s. 11 (2), s. 30 (1). A

Action—Ubi jus, ibi remedium—Breach of statutory duty—Civil action by private person—Bookmaker—Breach by occupier of dog-racing track of duty to provide space for bookmaking—Betting and Lotteries Act, 1934 (c. 58), s. 11 (2), s. 30 (1).

Statutes—Construction—Breach of statutory duty—Civil action by private person—Bookmaker—Breach by occupier of dog-racing track of duty to provide space for bookmaking—Betting and Lotteries Act, 1934 (c. 58), s. 11 (2), s. 30 (1). B

By the Betting and Lotteries Act, 1934, s. 11 (2), so long as a totalisator is being lawfully operated on a licensed dog-racing track, the occupier “(a) shall not . . . exclude any person from the track by reason only that he proposes to carry on bookmaking on the track; and (b) shall take such steps as are necessary to secure that . . . there is available for bookmakers space on the track where they can conveniently carry on bookmaking in connection with dog races run on the track on that day; and every person who contravenes, or fails to comply with, any of the provisions of this sub-section shall be guilty of an offence.” Section 30 (1) imposes substantial penalties, on summary conviction and on conviction on indictment, for a breach of (*inter alia*) s. 11. C D

A bookmaker brought an action against the occupier of a licensed dog-racing track for a breach of his obligation under s. 11 (2).

HELD : on a true construction of the Act of 1934, the obligation imposed by s. 11 (2) on the occupier of a track was intended for the benefit of the public who resorted to the track and not for the benefit of the bookmakers, and a breach of the statutory duty was a public and not a private wrong, and, therefore, since penalties for the breach were provided by s. 30 (1) of the statute, it was to be inferred that the duty under s. 11 (2) was not intended to have the additional sanction of civil liability, and the bookmaker had no right of civil action against the occupier. E

Decision of the COURT OF APPEAL ([1947] 2 All E.R. 815; [1948] 1 K.B. 291), *affirmed*. F

[AS TO ACTION FOR DAMAGES BY PRIVATE PERSON FOR BREACH OF STATUTORY DUTY, see HALSBURY, Hailsham Edn., Vol. 1, pp. 11, 12, paras. 11, 12; and FOR CASES, see DIGEST, Vol. 42, pp. 758-760, Nos. 1849-1858. G

FOR THE BETTING AND LOTTERIES ACT, 1934, see HALSBURY'S STATUTES, Vol. 27, p. 271, *et seq.*]

Cases referred to :

(1) *Doe d. Rochester (Bp.) v. Bridges*, (1831), 1 B. & Ad. 847; 42 Digest 750, 1737.

(2) *Pasmor v. Oswaldtwistle Urban District Council*, [1898] A.C. 387; 78 H L.T. 569; 62 J.P. 628; 42 Digest 752, 1758.

(3) *Butler (or Black) v. Fife Coal Co., Ltd.*, [1912] A.C. 149; 106 L.T. 161; 5 B.W.C.C. 217; 34 Digest 218, 1809.

(4) *Atkinson v. Newcastle Waterworks Co.*, (1877), 2 Ex. D. 441; 36 L.T. 761; 42 J.P. 183; 42 Digest 759, 1850.

(5) *Cowley v. Newmarket Local Board*, [1892] A.C. 345; 67 L.T. 486; 56 J.P. 805; 26 Digest 400, 1251.

- (6) *Groves v. Wimborne (Lord)*, [1898] 2 Q.B. 402; 79 L.T. 284; 42 Digest 759, 1858.
- (7) *Monk v. Warbey*, [1935] 1 K.B. 75; 152 L.T. 194; Digest Supp.
- (8) *Phillips v. Britannia Hygienic Laundry Co.*, [1923] 2 K.B. 832; 129 L.T. 777; 42 Digest 870, 197.
- (9) *Vallance v. Falle*, (1884), 13 Q.B.D. 109; 51 L.T. 158; 48 J.P. 519; 41 Digest 253, 943.

A

APPEAL by the plaintiff from a decision of the Court of Appeal (LORD GREENE, M.R., SOMERVELL, L.J., and SINGLETON, J.), dated Dec. 1, 1947, and reported [1947] 2 All E.R. 815, allowing an appeal by the defendants from a decision of OLIVER, J., dated Oct. 30, 1946, and reported on a preliminary point of law at [1946] 2 All E.R. 187.

B

The plaintiff, a bookmaker, brought an action against the defendants, the occupiers of a licensed dog-racing track, for breach of their statutory duty, under the Betting and Lotteries Act, 1934, s. 11 (2), not to exclude bookmakers from the track and to secure that space was available on the track for bookmaking purposes. OLIVER, J., gave judgment for the plaintiff and awarded him £150 damages, a declaration, and an injunction against the defendants. The defendants' appeal from this decision was allowed by the Court of Appeal on the ground that, assuming that the defendants had committed a breach of s. 11 (2), the plaintiff had no right of civil action against them. The decision of the Court of Appeal on this preliminary point was now upheld by the House of Lords.

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Pritt, K.C., *Platts Mills*, and *Patrick O'Connor* for the appellant.
Sir Valentine Holmes, K.C., *Paget, K.C.*, and *Peter Bristow* for the respondents.

The House took time for consideration.

Feb. 28. The following opinions were read.

E

LORD SIMONDS : My Lords, this appeal, which is brought from an order of the Court of Appeal setting aside a judgment given by OLIVER, J., in favour of the appellant, can be determined on a preliminary point, and your Lordships need not be troubled by a detailed narration of the facts which occupied the time of the learned trial judge for many days. The single question, which your Lordships decide, is whether on the true construction of the Betting and Lotteries Act, 1934, the appellant has, on the assumption, which for this purpose I make, that the respondents have committed a breach of s. 11 (2) (b) of the Act, a right of civil action against them. This question was answered in the affirmative by OLIVER, J., in the negative by the Court of Appeal.

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The appellant is a bookmaker, who, before the proceedings which gave rise to this appeal, carried on the business of bookmaking on a part of a greyhound racing track known as the Wandsworth Stadium which is occupied by the respondents. I do not think it necessary to state any further details about the track or the manner in which the appellant and his fellow bookmakers carried on their business. For I am content to assume, without expressing any opinion about it, that the respondents have committed a breach of their statutory obligations. Before the passing of the Act of 1934 betting by means of the "totalisator" (a mechanical application of the *pari-mutuel*) on dog-racing tracks was illegal and betting on such tracks was carried on by the public with bookmakers only. Thus, bookmakers, though they had no absolute right of entry on any such tracks, had a monopoly of betting on the track if they were not excluded, and they were not likely to be excluded. It was otherwise with horse racecourses. For by the Racecourse Betting Act, 1928, the use of

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totalisators on such courses had already been legalised. It was in these circumstances that the Act of 1934 was passed. Its full title may be recalled :

"An Act to amend the law with respect to betting on tracks where sporting events take place, including the law with respect to totalisators on horse racecourses ; to authorise, subject to restrictions, the establishment of totalisators on dog racecourses ; to prohibit betting on tracks with young persons and *pari mutuel* betting except by authorised totalisators ; to amend the law with respect to lotteries and certain prize competitions ; and for purposes connected with the matters aforesaid."

It is, as its title suggests, an Act which in various respects regulates the conduct of racecourses, and, in particular, authorises or restricts, as the case may be, the means and methods of betting on such courses. There is nothing in it to suggest that it is the charter of bookmakers.

Part I of the Act which is headed "Betting" consists of the first twenty sections. By s. 1 the number of days in any year on which betting by way of bookmaking or by means of a totalisator may take place on any track is limited. Contravention of this section is an offence under the Act. By s. 2 it is provided that bookmaking shall not be carried on on any track unless the occupier of the track is the holder of a licence in force under that Part of the Act authorising the provision of betting facilities on that track. To this section there are certain provisos which I need not mention. Here, too, contravention is an offence under the Act. By s. 3 it is provided that no *pari-mutuel* or pool betting business shall be carried on on any track except as therein provided. Again, contravention is an offence under the Act. Section 4 prescribes the number of races and the period of hours on and in which betting by way of bookmaking or by means of a totalisator may take place. Once more contravention is an offence. I can pass over the other sections and come to s. 11, and, as it is the section on which the appellant founds his claim, I will state it in full :

"11 (1) Notwithstanding any enactment or rule of law to the contrary, it shall be lawful on any licensed track being a dog racecourse for the occupier of the track or any person authorised by him in writing (a) to set up and keep a totalisator, whether in a building or not ; and (b) on any appointed day, while the public are admitted to the track for the purpose of attending dog races and no other sporting events are taking place on the track, to operate a totalisator so set up, but only for effecting with persons resorting to the track betting transactions on dog races run on that track on that day ; and for any person to effect betting transactions by means of a totalisator lawfully operated. (2) The occupier of a licensed track (a) shall not, so long as a totalisator is being lawfully operated on the track, exclude any person from the track by reason only that he proposes to carry on bookmaking on the track ; and (b) shall take such steps as are necessary to secure that, so long as a totalisator is being lawfully operated on the track, there is available for bookmakers space on the track where they can conveniently carry on bookmaking in connection with dog races run on the track on that day ; and every person who contravenes, or fails to comply with, any of the provisions of this sub-section shall be guilty of an offence."

Section 12 enacts (with certain provisos) that nothing in the Betting Act, 1853, shall apply to anything done on any licensed track by a bookmaker on any day on which bookmaking may be lawfully carried on on that track, and s. 13 prescribes the maximum charges for admission that may be made by the occupier of a licensed track to a bookmaker or his assistant. Section 14 prohibits the occupier of a licensed track and the other persons therein mentioned from engaging directly or indirectly in bookmaking on that track.

Contravention is made an offence under the Act. Section 16 enables the licensing authority to revoke a licence in respect of a track in its area (*inter alia*) if the holder of the licence, or, where the holder is a corporate body, any director or the manager thereof, is convicted of any offence under Pt. I of the Act or under sched. I to the Act or of any offence involving fraud or dishonesty. By s. 17 it is provided that nothing in that Part of the Act shall be construed as requiring the occupier of a licensed track to permit betting thereon at any time at which no totalisator is being operated on that track. Section 18 deals with the powers of the Racecourse Betting Control Board under the Racecourse Betting Act, 1928, and is not strictly germane to these proceedings. Section 20 includes a number of definitions, including a very wide definition of "bookmaker."

That ends Pt. I. I need not refer to Pt. II. Part III contains the penalty clauses in ss. 29 and 30. Section 29 is :

"Where a person convicted of an offence under this Act is a body corporate, every person who at the date of the commission of the offence was a director or officer of the body corporate shall also be deemed to be guilty of that offence unless he proves that the offence was committed without his knowledge."

Section 30 (1) is :

"A person guilty of an offence under ss. 1, 2, 3 or 11, or under any section contained in Pt. II, of this Act shall be liable (a) on summary conviction, to a fine not exceeding £100, and in the case of a second or any subsequent conviction for an offence under the same section, to imprisonment for a term not exceeding three months or to a fine not exceeding £200 or to both such imprisonment and such fine ; or (b) on conviction on indictment, to a fine not exceeding £500, and in the case of a second or any subsequent conviction for an offence under the same section, to imprisonment for a term not exceeding one year or to a fine not exceeding £750 or to both such imprisonment and such fine."

As I have already indicated, the question on this appeal arises on s. 11 (2) (b) of the Act. The appellant being, as he alleged, illegally deprived of his rights under this sub-section, on May 31, 1944, issued his writ against the respondents. He claimed a number of declarations of his rights, an injunction restraining the respondents from excluding him from their track, a mandatory order requiring them to secure for him on their track a space where he could conveniently carry on bookmaking on days on which dog races were run, and damages. After various interlocutory proceedings to which I need not refer, OLIVER, J., having already by way of preliminary judgment decided that the appellant had a right of action, on Oct. 30, 1946, made an order whereby he declared that a certain area being part of the respondents' track was "space within the meaning of s. 11 (2) (b) of the Betting and Lotteries Act, 1934," and granted an injunction restraining the respondents, so long as a totalisator was being operated on the track, from excluding the appellant from the track by reason only of the fact that he proposed to carry on bookmaking thereon, and further awarded him £150 by way of damages. From this judgment the respondents appealed to the Court of Appeal (LORD GREENE, M.R., SOMERVELL, L.J., and SINGLETON, J.), which unanimously reversed it, holding that, even if the respondents had committed a breach of their statutory obligation in that they had not made available for the appellant a space on the track where he could conveniently carry on bookmaking, yet the appellant had not a cause of action against the respondents.

My Lords, in my opinion, the judgment of the Court of Appeal was clearly right. It is, I think, true that it is often a difficult question whether, where a statutory obligation is placed on A., B., who conceives himself to be damnified

by A.'s breach of it, has a right of action against him. But on the present case I cannot entertain any doubt. I do not propose to try to formulate any rules by reference to which such a question can infallibly be answered. The only rule which in all circumstances is valid is that the answer must depend on a consideration of the whole Act and the circumstances, including the pre-existing law, in which it was enacted. But that there are indications which point with more or less force to the one answer or the other is clear from authorities which, even where they do not bind, will have great weight with the House. For instance, if a statutory duty is prescribed, but no remedy by way of penalty or otherwise for its breach is imposed, it can be assumed that a right of civil action accrues to the person who is damnified by the breach. For, if it were not so, the statute would be but a pious aspiration. But, as LORD TENTERDEN, C.J., said (1 B. & Ad. 859) in *Doe d. Rochester (Bp.) v. Bridges* (1):

" . . . where an Act creates an obligation, and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner."

This passage was cited with approval by the EARL OF HALSBURY, L.C. ([1898] A.C. 394) in *Pasmore v. Oswaldtwistle Urban District Council* (2). But this general rule is subject to exceptions. It may be that, though a specific remedy is provided by the Act, yet the person injured has a personal right of action in addition. I cannot state that proposition more happily, or, indeed, more favourably to the appellant, than in the words of LORD KINNEAR ([1912] A.C. 165) in *Black v. Fife Coal Co., Ltd.* (3):

"If the duty be established, I do not think there is any serious question as to the civil liability. There is no reasonable ground for maintaining that a proceeding by way of penalty is the only remedy allowed by the statute. The principle explained by LORD CAIRNS in *Atkinson v. Newcastle Waterworks Co.* (4) and by LORD HERSCHELL in *Cowley v. Newmarket Local Board* (5) solves the question. We are to consider the scope and purpose of the statute and in particular for whose benefit it is intended: Now the object of the present statute is plain. It was intended to compel mine owners to make due provision for the safety of the men working in their mines, and the persons for whose benefit all these rules are to be enforced are the persons exposed to danger. But when a duty of this kind is imposed for the benefit of particular persons, there arises at common law a correlative right in those persons who may be injured by its contravention."

An earlier and a later example of the application of this principle will be found in *Groves v. Lord Wimborne* (6) and *Monk v. Warbey* (7), in the former of which cases the Act in question was described by A. L. SMITH, L.J., ([1898] 2 Q.B. 406) as:

" . . . a public Act passed in favour of the workers in factories and workshops to compel their employers to do certain things for their protection and benefit."

But, my Lords, beyond the single fact that the performance by the respondents of their statutory duty will redound to the advantage of certain bookmakers, of whom the appellant may be one, I see neither in this Act nor in its attendant circumstances any element which takes this case out of the general rule which I have taken from LORD TENTERDEN's judgment in *Doe v. Bridges* (1). It was urged that the rule had no application where the statutory remedy was by way of criminal proceedings for a penalty, but I see no ground for this distinction. The implication is, if anything, in the opposite direction. For the sanction of criminal proceedings emphasises that this statutory obligation, like many others which the Act contains, is imposed for the public benefit

and that the breach of it is a public, not a private, wrong. Then it was said that the obligation imposed by s. 11 on the occupier of a track was intended for the benefit of bookmakers, and, to make this argument more cogent, it was contended that only ss. 11, 12, 13 and 14 of the Act together with ss. 29 and 30 need be looked at in order to get that purview of the Act which the authorities prescribe. From this I dissent. Part II may, perhaps, be ignored, but Pt. I and Pt. III must clearly be read as a whole. So reading it, I have no doubt that the primary intention of the Act was to regulate in certain respects the conduct of race tracks and, in particular, the conduct of betting operations thereon. If in consequence of those regulations being observed some bookmakers will be benefited, that does not mean that the Act was passed for the benefit of bookmakers in the sense in which it was said of a Factory Act that it was passed in favour of the workmen in factories. I agree with SOMERVELL, L.J., that, where an Act regulates the way in which a place of amusement is to be managed, the interests of the public who resort to it may be expected to be the primary consideration of the legislature. If from the work of regulation any class of persons derives an advantage, that does not spring from the primary purpose and intention of the Act.

Then it was urged that the penalty provided by the Act was inadequate—an argument which was of weight in such cases as *Groves v. Wimborne* (6), but here has no validity. I see no ground for thinking that, if the respondents fail to observe their statutory duties, including those prescribed by s. 11, they will not be adequately penalised. On the contrary, the penalties are severe and, further, conviction of an offence may lead to the disastrous result of the licence being revoked. Further and weighty reasons, from which I do not dissent, were given by the learned MASTER OF THE ROLLS and the other members of the court and will be given by some of your Lordships for thinking that the appellant had not established his right. I do not need to say more than that this appeal cannot succeed and move that it be dismissed with costs.

LORD DU PARCQ : My Lords, the question whether the imposition of a duty by a particular statute impliedly gives a right of action to a person injured by reason of a breach of that duty frequently demands the attention of legal practitioners and of the courts. In recent years it has arisen (to name a few instances) with reference to the Road Traffic Act, 1930, the Food and Drugs (Adulteration) Act, 1928, and orders made under the Locomotives on Highways Act, 1896. When the point is argued at the Bar, *Doe v. Bridges* (1), which was decided in 1831, is commonly taken as a starting-point, and for the last quarter of a century the debate has normally turned on the question whether the case before the court falls within the decision in *Groves v. Lord Wimborne* (6) or that in *Phillips v. Britannia Hygienic Laundry Co.* (8).¹¹ To a person unversed in the science, or art, of legislation it may well seem strange that Parliament has not by now made it a rule to state explicitly what its intention is in a matter which is often of no little importance, instead of leaving it to the courts to discover, by a careful examination and analysis of what is expressly said, what that intention may be supposed probably to be.¹² There are, no doubt, reasons which inhibit the legislature from revealing its intention in plain words. I do not know, and must not speculate, what those reasons may be. I trust, however, that it will not be thought impertinent, in any sense of that word, to suggest respectfully that those who are responsible for framing legislation might consider whether the traditional practice, which obscures, if it does not conceal, the intention which Parliament has, or must be presumed to have, might not safely be abandoned.

The questions which this traditional legislative reticence so often brings before the courts are sometimes difficult, but that raised by the present appeal seems to me, assisted as I have been by the convincing judgments of the Court of Appeal, to be comparatively simple. This being so, and as I understand that

all those of your Lordships who heard the arguments are in agreement with the Court of Appeal, I will confine my observations to a single point. I agree with those who say, as was said by STEPHEN, J., (13 Q.B.D. 112) in *Vallance v. Falle* (9) that "the best way of finding out the meaning of a statute is to read it and see what it means," and I do not regret, any more than I understand the learned MASTER OF THE ROLLS to regret, the fact that, as he said in the present case ([1947] 2 All E.R. 816), so-called rules of construction "have fallen into some disfavour." It must be recognised, however, that the courts have laid down, not, indeed, rigid rules, but principles which have been found to afford some guidance when it is sought to ascertain the intention of Parliament. In *Phillips v. Britannia Hygienic Laundry Co.* (8), BANKES, L.J., cited ([1923] 2 K.B. 838) a well-known passage from the speech of LORD MACNAGHTEN in *Pasmore v. Oswaldtwistle Urban District Council* (2), in which that noble and learned Lord, referring to the statement of LORD TENTERDEN, C.J. (1 B. & Ad. 859) in *Doe v. Bridges* (1), spoke of the "general rule" that :

" . . . where an Act creates an obligation, and enforces the performance in a specified manner . . . that performance cannot be enforced in any other manner."

LORD MACNAGHTEN, said ([1898] A.C. 397) :

"Whether the general rule is to prevail, or an exception to the general rule is to be admitted, must depend on the scope and language of the Act which creates the obligation and on considerations of policy and convenience."

In my opinion, BANKES, L.J., rightly applied this principle in *Phillips's* case (8). I do not agree with the submission of counsel for the appellant that it is heretical to regard criminal proceedings which may be followed by fine and imprisonment as a "specified manner" of enforcing a duty. I think that it is both orthodox and right so to regard them.

Now, the law having been thus stated and, as I believe, correctly stated in the Court of Appeal in 1923, the Act with which your Lordships are at present concerned was passed eleven years later. During that intervening period the *dictum* of LORD TENTERDEN had, I think, been consistently followed in the sense in which it was understood by BANKES, L.J. It is, therefore, legitimate to assume that those who were engaged in drafting the Betting and Lotteries Act, 1934, had in mind the principle of construction which had thus been laid down. It was not thought fit to break with tradition and to state explicitly in the Act whether or not an aggrieved bookmaker was to have a right of civil action, but Parliament must be taken to have known that, if it preferred to avoid the crudity of a blunt statement and to leave its intention in that regard to be inferred by the courts, the "general rule" would prevail unless the "scope and language" of the Act established the exception. It cannot be supposed that the draftsman was blind to the principles which the courts have laid down for their own guidance when it becomes necessary for them to fill in such gaps as Parliament may choose to leave in its enactments. There is an inevitable interaction between the methods of parliamentary drafting and the principles of judicial interpretation. I do not find in the present case any indication that Parliament sought to manifest an intention that an exception to the general rule should be created. On the contrary, whether the question is approached with, or without, such guidance as principles of construction can afford, I am clearly of opinion, in agreement with the Court of Appeal, that the language of the Act points to the opposite conclusion. I would, therefore, dismiss this appeal.

LORD NORMAND : My Lords, I find myself in close agreement with the judgments in the Court of Appeal. In particular, I respectfully agree with the MASTER OF THE ROLLS that the proper approach to the case is to consider

whether, on a true construction of the statute as a whole, a right of action by an individual aggrieved by the breach of one of the statutory duties ought to be implied. It would be superfluous for me to examine point by point the ground already covered by the judgments under review, but there are two topics on which, out of respect to the argument addressed to the House, I wish to add some observations.

A The first question is whether the appellant has succeeded in showing that he is a member of a group of persons who have an interest and right to enforce the duty imposed on the respondents by s. 11 (2). Obviously, the duty operates in a general way in favour of bookmakers, and bookmakers have an interest to enforce it, but the appellant did not maintain that a right to enforce it is given indiscriminately to all bookmakers as defined in s. 20 (1). It would, indeed, have been impossible, in view of the width of the definition, to maintain that every bookmaker within it has a right to compel by civil action the licensees of every racing track to take such steps as are necessary to secure that, so long as a totalisator is being lawfully operated on the track, there is available for him and other bookmakers space on the track where they can conveniently carry on bookmaking in connection with dog races run on the track on that day. The claim put forward was that the members of the group of bookmakers who had been in regular attendance at each dog racing track when the Act came into force had an individual right to enforce the performance of the duty at that track. What was to happen when a new dog racing track was commenced after the passing of the Act, or whether new members of a group were to have the right, were questions left imperfectly clarified in the argument, but this, at least, is certain, that no ingenuity can wrest from the language of the Act an implied reference to these alleged groups as the beneficiaries of the statutory duty. If it had been the intention of the legislature to confer a right of action on the members of the several groups of bookmakers, one for each racing track, it would not have omitted all reference to the groups and to their right as associated with a particular track. The vagueness of the appellant's case at this point tells strongly against it.

E The other matter with which I wish to deal concerns the penalties provided by the statute. If there is no penalty and no other special means of enforcement provided by the statute, it may be presumed that those who have an interest to enforce one of the statutory duties have an individual right of action. Otherwise the duty might never be performed, but, if there is a penalty clause, the right to a civil action must be established by a consideration of the scope and purpose of the statute as a whole. The inference that there is a concurrent right of civil action is easily drawn when the predominant purpose is manifestly the protection of a class of workmen by imposing on their employers the duty of taking special measures to secure their safety. The penalties provided by the Act apply when a breach of the duty occurs, but each workman has a right to sue for damages if he is injured in consequence of the breach. In *Black v. Fife Coal Co., Ltd.* (3), LORD KINNEAR was considering a statute of that type (the Coal Mines Regulation Act, 1887). He said ([1912] A.C. 165) :

H "There is no reasonable ground for maintaining that a proceeding by way of penalty is the only remedy allowed by the statute. The principle explained by LORD CAIRNS in *Atkinson v. Newcastle Waterworks Co.* (4), and by LORD HERSHELL in *Cowley v. Newmarket Local Board* (5) solves the question. We are to consider the scope and purpose of the statute and in particular for whose benefit it is intended. Now the object of the present statute is plain. It was intended to compel mine owners to make due provision for the safety of the men working in their mines, and the persons for whose benefit all these rules are to be enforced are the persons exposed to danger. But when a duty of this kind is imposed for the benefit of particular persons, there arises at common law a correlative right in

those persons who may be injured by its contravention. Therefore, I think it is quite impossible to hold that the penalty clause detracts in any way from the *prima facie* right of the persons for whose benefit the statutory enactment has been passed to enforce the civil liability."

The present case, however, is concerned with a statute very different in scope, purpose and character from the Coal Mines Regulation Act, 1887.

I have already dealt with the uncertainty about the persons who are to benefit by s. 11 (2). It has also to be noted that the statute has not the single general object of safeguarding the livelihood of bookmakers. Its objects are complex, as its title shows, and they include the regulation of racing tracks, the regulation of betting at racing tracks, the authorisation of the establishment of totalisators at dog racing tracks, and the amendment of the law relating to lotteries and certain prize competitions. The overriding purpose is the benefit of the community, but there is also a general purpose to benefit the members of the public who attend racing tracks or take part in betting. The interest of bookmakers under s. 11 is incidental and is not one of the general purposes of the statute. The whole structure of the statute is less homogeneous than that of the Coal Mines Regulation Act, 1887, and similar Acts, and this is reflected in the relevant penalty clause itself. Section 30 prescribes one scale of penalties for offences under ss. 1, 2, 3 and 11 and any section of Pt. II of the Act. These penalties are by no means negligible in themselves, for they authorise the courts to impose substantial fines and to imprison on conviction for a second or subsequent offence for a period which may be as much as six months. Their deterrent effect is, however, very much increased by the provisions of s. 29, under which a director or officer of a body corporate may be deemed guilty of an offence of which the body corporate is convicted, and still more by the power given in ss. 7 (1) (b) and 16 (1) (d) to withhold or revoke the licence required for the operation of a racing track if the applicant or licensee has been convicted of a contravention of the provisions regulating racing tracks and betting on them. The penalties, therefore, are an unusually effective sanction for the enforcement of the sections of the Act to which they relate, and stand in no need of aid from civil proceedings. There is another consideration of some importance. A single scale of fines and imprisonment covers the breach not only of the duties under s. 11 but also of a number of other duties in the performance of which neither bookmakers nor any other group of persons has a particular interest. The duty under s. 11 is certainly not more important than some of these and it is fair to infer that that particular duty was not intended to have the additional sanction of civil liability. Lastly, if civil proceedings at the instance of an individual bookmaker are competent, there is no provision that a judgment of the civil courts that s. 11 (2) has been contravened may be a cause for withholding or forfeiting a licence; and it might result that bookmakers would always resort to civil proceedings and would never initiate criminal proceedings, because it is contrary to their interest to have the number of racing tracks diminished. It is reasonably certain that that is not what the legislature intended. I would dismiss the appeal.

LORD MORTON OF HENRYTON: My Lords, I have had the privilege of reading in print the speeches which have just been delivered. I agree with them and I also agree with the suggestion made in the course of his speech by my noble and learned friend, LORD DU PARCQ. In these circumstances, I do not desire to add any observations of my own. I agree that this appeal should be dismissed.

LORD REID: My Lords, I need not re-state the facts of this case and I shall not discuss the authorities. I think that this case can be decided without calling in aid any legal presumption. The case turns on the interpretation of

the Betting and Lotteries Act, 1934, and, in particular, on s. 11 (2) of that Act, and I find it unnecessary to go beyond the words of the Act and the circumstances in which it was passed so far as these are relevant to be taken into account in determining the intention of the legislature. The appellant founded on these circumstances and I shall state them as favourably to the appellant as I think they can be stated. The position before the Act was passed was that no bookmaker had any legal right to be admitted to any dog racing track or to be allowed to carry on his business there, but, in fact, occupiers of such tracks welcomed the presence of bookmakers. It was in their interest to do so. The growing popularity of this form of entertainment largely arose from the fact that there were ample facilities for members of the public who resorted to these tracks to make bets there during the meetings. It was illegal before the Act was passed for a totalisator to be operated on a dog racing track, and, unless bookmakers were allowed to carry on business there, it was practically impossible to provide the facilities for betting which attracted large numbers of people to the tracks. One of the purposes of the Act was to authorise occupiers of these tracks to operate their own totalisators, and it was obvious that this would put into their hands a powerful and probably highly profitable new instrument. It is in evidence that the respondents' totalisator has earned for them in one year a gross profit of nearly £200,000. Probably profits of this magnitude were not anticipated, but, if even a moderate part of this profit was thought likely, there was plainly need for regulation and the Act contains elaborate provisions for this purpose. In particular, it must have been obvious that occupiers would no longer have the same interest to admit bookmakers. Indeed, their interest might well be to exclude them or greatly to restrict their operations, because by doing so occupiers might well think that they could increase the volume of business of their totalisators and so increase their own profits. It must have been to avoid a situation of that kind that s. 11 (2) was enacted. That sub-section enacts:

“The occupier of a licensed track (a) shall not, so long as a totalisator is being lawfully operated on the track, exclude any person from the track by reason only that he proposes to carry on bookmaking on the track; and (b) shall take such steps as are necessary to secure that, so long as a totalisator is being lawfully operated on the track, there is available for bookmakers space on the track where they can conveniently carry on bookmaking in connection with dog races run on the track on that day; and every person who contravenes, or fails to comply with, any of the provisions of this sub-section shall be guilty of an offence.”

For whose benefit was this sub-section intended? The appellant's case is that it was primarily, if not solely, for the benefit of bookmakers. I do not think so. I think that it was primarily intended for the protection of those members of the public who might wish to bet on these tracks. Its effect is to prevent the totalisator from having a monopoly and to afford to the public such protection as can be given by making provision for competitive facilities for betting. I am prepared to assume in the appellant's favour that it may also have been an object of the legislature to give some protection to bookmakers (although this is by no means obvious), but it does not follow that to achieve such protection every individual bookmaker must have rights against the occupier of the track which he can enforce by civil action. Broadly speaking, the facilities which the Act requires for bookmakers are similar to the facilities which, in fact, they enjoyed before the Act was passed. I see no reason to infer from the Act, read as a whole, or from the circumstances founded on by the appellant, that the enjoyment of these facilities required or was intended to have any further protection than that afforded by the track occupier's liability to prosecution if he failed to comply with the statutory provisions.

I think, however, that the clearest indication of the intention of the legis-

lature is to be found in the terms of s. 11 (2) itself. I find it extremely difficult to reconcile the nature of the provisions of this sub-section with an intention to confer on individual bookmakers rights which each could enforce by civil action. If the legislature had intended to create such rights, I would expect to find them capable of reasonably precise definition, but counsel for the appellant were unable to suggest such definition and I am equally unable to do so. At first sight s. 11 (2) (a) might seem to confer on every bookmaker an unqualified right to demand admission, but counsel for the appellant admitted that this cannot be maintained. It cannot have been intended that the occupier must admit as many bookmakers as may present themselves on any occasion, whether there is room for them or not, and, if an unreasonably large number seek admittance, there is nothing in the Act to indicate who is to be admitted and who may be refused. This omission is not surprising if the obligation on the occupier is only a general obligation to admit an adequate number of bookmakers, but it is, in my view, a clear indication that no further obligation was intended to be imposed. If s. 11 (2) (a) does not create any civil right in favour of individual bookmakers, I find it difficult to suppose that s. 11 (2) (b) creates such a right. The occupier is required to take such steps as are necessary to secure "that there is available for bookmakers space on the track where they can conveniently carry on bookmaking." This cannot mean that space must be provided on every occasion for as many bookmakers as wish to carry on business on that occasion. It cannot mean that, after the allotted space is fully occupied, an individual bookmaker who cannot find room there can demand further space where he can conveniently carry on business. The occupier must provide a space which is adequate in all the circumstances and which is in a convenient situation, but if he does that he has fulfilled his statutory obligation. He is not required by anything in the Act to find a place for each bookmaker who presents himself. If the Act does not give to an individual bookmaker a right to demand a place for himself, I find nothing to suggest that it gives him any other right enforceable by civil action. The sanction of prosecution appears to me to be appropriate and sufficient for the general obligation imposed by the sub-section. I, therefore, agree that the appellant has no right to sue in respect of a breach by the respondents of their obligations under s. 11 (2) of the Act and that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors: *Seifert, Sedley & Co.* (for the appellant); *Wilkinson, Howlett & Co.* (for the respondents).

[*Reported by C. St.J. NICHOLSON, Esq., Barrister-at-Law.*]

GEORGE v. TOMPSON'S TRUSTEE.

[CHANCERY DIVISION (Wynn-Parry, J.), February 25, 1949.]

Bankruptcy—Effect on previous transaction—Attachment of debt—Completion—Garnishee order—Payment into court—Order for payment out—Payment delayed through administrative difficulty—Receiving order before payment received by creditor—Bankruptcy Act, 1914 (c. 59), s. 40 (2).

The Bankruptcy Act, 1914, s. 40, provides: "(1) Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due to him, he shall not be entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor, unless he has completed the execution or attachment before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor. (2) For the purposes of this Act, an execution against goods is completed by seizure and sale; an attachment

of a debt is completed by receipt of the debt ; and an execution against land is completed by seizure, or, in the case of an equitable interest, by the appointment of a receiver."

On Feb. 17, 1948, the plaintiff obtained judgment against T. for £38 and costs. T. made no payment, and on Feb. 24, 1948, the plaintiff issued a garnishee summons against G., in respect of a debt owed by G. to T., for payment of the amount of the judgment debt and the costs of the summons. On Feb. 28, 1948, G. paid the sum into the county court. On Mar. 1, 1948, the plaintiff, by letter, asked T. to consent to payment out to the plaintiff, and, receiving no reply, applied on Mar. 18, 1948, to the county court for payment out. An order was made in his favour on the same day, and the plaintiff immediately asked the office of the county court to pay the money to him. He was told that it was not the practice to make payments on court days, and he was unable to obtain the money. The plaintiff's request was repeated on Mar. 19, 1948, but he was told that the county court banking account was not in funds and it was necessary to wait until the account had been supplied with funds by the Lord Chancellor's office. On Mar. 23, 1948, the plaintiff made a further application for payment, but the county court office had not received the expected remittance and the payment could not be made. Later on the same day, the plaintiff was informed by the county court office that a receiving order had been made against T. and instructions had been given by the official receiver that the money should be retained in court. This was the first intimation that the plaintiff had received of a bankruptcy petition or the commission of an act of bankruptcy by T. against whom a receiving order had, in fact, been made on Mar. 19, 1948.

HELD : section 40 (2) was exhaustive in its definition of what constituted the completion of the attachment of a debt, and, therefore, as the plaintiff had not received the debt, attachment was not complete, and the plaintiff was not entitled to retain the benefit of the attachment against the trustee in bankruptcy.

Re Fairley ([1922] 2 Ch. 791), distinguished.

Butler v. Wearing (1885) (17 Q.B.D. 182), explained.

Re Trehearne, Ex parte Ealing Local Board, (1890) (63 L.T. 798), and *Ex p. Pillers. Re Curtoys* (1881) (17 Ch.D. 653 ; 44 L.T. 691), applied.

[AS TO COMPLETION OF ATTACHMENT OF A DEBT, see HALSBURY, Hailsham Edn., Vol. 2, p. 358, para. 482 ; and FOR CASES, see DIGEST, Vol. 5, pp. 809-815, Nos. 6903-6933.]

Cases referred to :

(1) *Re Fairley*, [1922] 2 Ch. 791 ; 21 Digest 521, 961.

(2) *Re Ford, Ex parte Official Receiver*, [1900] 1 Q.B. 264 ; 81 L.T. 648 ; 5 Digest 812, 6918.

(3) *Butler v. Wearing*, (1885), 17 Q.B.D. 182 ; 3 Morr. 5 ; 5 Digest 813, 6924.

(4) *Ex parte Joselyne. Re Watt*, (1878), 8 Ch.D. 327 ; 38 L.T. 661 ; 4 Digest 356, 3336.

(5) *Ex parte Pillers. Re Curtoys*, (1881), 17 Ch.D. 653 ; 44 L.T. 691 ; 5 Digest 827, 7019.

(6) *Re Trehearne, Ex parte Ealing Local Board*, (1890), 63 L.T. 798 ; 4 Digest 357, 3341.

ADJOURNED SUMMONS to determine whether the plaintiff had completed the attachment of a debt for the purposes and within the meaning of s. 40 (1) and (2) of the Bankruptcy Act, 1914. WYNN-PARRY, J., held that the attachment was not complete. The facts are set out in the headnote.

F. H. Lawton for the plaintiff.
Curtis-Raleigh for the defendant.

WYNN-PARRY, J. : The question I have to determine is whether the plaintiff, who had obtained a garnishee order in respect of a sum of money which was paid into the county court, had, by reason of having obtained an order absolute, attached the debt, the subject of the order, so as to be able to retain the benefit of that sum against the trustee in bankruptcy of the debtor. A

The Bankruptcy Act, 1914, s. 40, provides :

“(1) Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due to him, he shall not be entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor, unless he has completed the execution or attachment before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor. (2) For the purposes of this Act, an execution against goods is completed by seizure and sale ; an attachment of a debt is completed by receipt of the debt ; and an execution against land is completed by seizure, or, in the case of an equitable interest, by the appointment of a receiver.” B C

By s. 41 (1) it is provided :

“Where any goods of a debtor are taken in execution, and before the sale thereof, or the completion of the execution by the receipt or recovery of the full amount of the levy, notice is served on the sheriff that a receiving order has been made against the debtor, the sheriff shall, on request, deliver the goods and any money seized or received in part satisfaction of the execution to the official receiver.” D

Before leaving the Bankruptcy Act, 1914, I observe that in the definition section there is no definition of “execution” or “attachment.”

Section 40 and the sections corresponding to it in the earlier Acts have been the subject of consideration by the courts in a number of cases. In *Re Fairley* (1) E the facts were that :

“On Jan. 14, 1921, the sheriff, in executing a writ of *fiери facias* for £144, levied on the debtor's goods, but on Jan. 29 being paid £72 on account of the debt in addition to costs, fees and possession money, he withdrew by arrangement reserving a right of re-entry for the £72 balance. He retained the £72 received on account for fourteen days and then paid it to the execution creditors. On Mar. 16 the sheriff made a second levy, but on being paid £53 on account of the debt in addition to fees and possession money, he again withdrew reserving a right of re-entry for the £19 balance. After retaining the £53 for fourteen days he paid it to the execution creditors. On Apr. 26 the sheriff made a third levy, but the goods seized being found on interpleader to belong to a third party, he finally withdrew and made a return of *nulla bona* on May 2. On Sept. 8 a petition in bankruptcy based on an act of bankruptcy of Aug. 19 was presented. A receiving order was made on Sept. 29 followed by an adjudication on Oct. 1 and an order for summary administration on Oct. 3.” F G H

On those facts it was held by the Divisional Court, consisting of ASTBURY and P. O. LAWRENCE, JJ., that the execution was completed under the Bankruptcy Act, 1914, ss. 40 and 41, by the return of *nulla bona* on May 2, and the trustee had no right to the two amounts realised by that completed execution. In his judgment ASTBURY, J., said ([1922] 2 Ch. 795) :

“The question raised by the trustee, and in regard to which the learned

judge below gave judgment in his favour, was whether he was entitled to recover the £125 paid to the appellants. The trustee contends that his right to recover this money arises under s. 40 of the Bankruptcy Act, 1914. The trustee suggests that unless there is a sale following a seizure the execution cannot be completed within the meaning of that section. That is plainly inaccurate, as in the very next section (41) 'receipt or recovery of the full amount of the levy' is described as a completion of the execution. It is plain therefore that in s. 40 the definition, or so-called definition, in sub-s. (2), is not an exhaustive definition, but a mere description of one of many ways in which an execution can be completed. Now the main and substantive object of s. 40 is to prevent a judgment creditor retaining the benefit of a partially finished execution if a bankruptcy intervenes, and it enacts that unless the execution is completed it shall not be good as against the trustee. The trustee's contention pushed to its logical conclusion would lead to an absurd result. If an execution had been issued nineteen years before a bankruptcy, and the execution creditor had been paid the greater part of his money by arrangement and the sheriff had retired but without any seizure and sale the moneys could have been recovered in the long subsequent bankruptcy. I do not believe that that is the meaning of the section at all."

ASTBURY, J., proceeded to consider certain decisions which had been relied on by the trustee in support of the contention on which he had just expressed an adverse comment. One of those decisions was *Re Ford, Ex parte Official Receiver* (2) in which :

"Execution having been issued upon a judgment for £80 and costs, the sheriff on Dec. 31, 1898, levied under a writ of *fiери facias*. On Jan. 5, 1899, the debtor, under an arrangement with the solicitors of the execution creditors, paid the solicitors a sum of £40 on account, and gave to the sheriff authority to re-enter under the writ of *fiери facias* upon default in payment of any of the instalments of the balance at the agreed dates for payment. The sheriff thereupon withdrew. On Jan. 14 a receiving order was made against the debtor on his own petition ; at that date the sheriff had not re-entered under the writ of *fiери facias*. Held, that the execution had not been completed as to the £40 at the date of the receiving order, that the execution creditors were therefore not entitled to retain the benefit of the execution, and that the trustee in bankruptcy was entitled to the £40 as part of the debtor's estate."

As to this case, ASTBURY, J., said ([1922] 2 Ch. 797) :

"I do not see how it could possibly have been held otherwise. The sheriff withdrew under a distinct arrangement that he could go in again, and before he had re-entered, before the debt was paid off or the execution terminated, the bankruptcy supervened."

ASTBURY, J. (*ibid.*), then quotes from the judgment of CHANNELL, J., in *Re Ford* (2) where he said ([1900] 1 Q.B. 268) :

"If there has been only a partial execution, a levy and no subsequent completion, the intention of the Act apparently is that the other creditors may step in and insist on having the whole of the debtor's estate rateably divided. The test seems to be whether or no the execution has been partial only—that is, whether or no a partial benefit has been obtained from it ; if the execution is in that sense incomplete, the general body of creditors are entitled to have the property distributed rateably . . . It seems that if the execution creditor gets a partial benefit (here he got £40 on account) but retains anything in the nature of an incomplete execution, then he cannot retain the partial benefit which he has already received. If the respondents in the present case had accepted the £40 in full satis-

fraction of the debt and had not claimed a right to re-enter at some subsequent time and go on with the execution, then I think they might have retained the £40."

The judgment in *Re Ford* (2) proceeded on the basis that at the date of the bankruptcy the execution was incomplete, and, as I read the rest of the authorities which come within the purview of the examination made by ASTBURY, J., the same may be said of them. In *Re Fairley* (1) the Divisional Court only had to consider the phrase in s. 40 "an execution against goods" of the debtor, and, as regards that, ASTBURY, J., plainly expressed the view that the definition in sub-s. (2) was not an exhaustive definition, but, as I read his judgment, he does not seek to distinguish between the quality of the definition of "an execution against goods" and the quality of the definition of "an attachment of a debt" in the same sub-section. Indeed, it is a little difficult to say why one should come to the conclusion that the sub-section should be so construed as to attach a different quality to the two definitions in it. In my view, sub-s. (2) contains definitions which *prima facie* are not exhaustive, but are merely by way of example.

In regard to that, however, I have to consider certain of the earlier cases, particularly *Butler v. Wearing* (3), in which the facts were as follows :

"A creditor having obtained a garnishee order in respect of a debt due to the judgment debtor, a third person intervened claiming that the debt was due to her ; and the garnishee, under an order of the court, paid the amount into court to abide further order. A receiving order having been subsequently made against the judgment debtor, the third person withdrew her claim. *Held*, that there had been no 'receipt of the debt' by the creditor within the meaning of s. 45 of the Bankruptcy Act, 1883, so as to entitle him to retain it against the judgment debtor's trustee in bankruptcy."

MANISTY, J., in his judgment, said (17 Q.B.D. 185) :

"As regarded garnishee orders the decisions seem to me to have been conflicting. I think that the decision in *Ex parte Joselyne, Re Watt* (4), is difficult to reconcile with the subsequent decision in *Ex parte Pillers, Re Curtoys* (5), where the Court of Appeal held that the garnishor was not entitled to the protection of s. 95 (3) of the Act of 1869 unless he had obtained actual payment of the attached debt before the order of adjudication. If it were necessary for me to decide the question, I think I should adopt the statement of the law which is given by LUSH, L.J., in that case. He says (17 Ch.D. 666) : 'The intention was that so long as the execution remained only a security for the debt, it was not to be protected. Something more must have been done ; there must have been an actual conversion of the security into money. And I think we must find some equivalent for that in the case of an attachment under a garnishee order. What is the equivalent ? The security must have been realised before there can be any protection. How can the garnishor realise the debt which he has attached ? The debt cannot be sold, and he can only realise it by obtaining payment of it from the garnishee, either voluntarily or by means of an execution upon his goods. Till that has been done I think there is no protection. It is true the words "executed by seizure and sale" have no application. But I think they do show what was the meaning of the legislature clearly enough to enable us to apply the principle, and if, for want of apt words in the section, we were to say it does not apply to a garnishee order, we should be incurring the censure which is implied in the maxim, "*qui haeret in litera haeret in cortice*." I am of opinion that the only equivalent for an actual sale of goods which will satisfy the words of the Act in the case of a garnishee order is an actual

receipt of the attached debt by the garnishor. Till that has been done the attachment is only a security, and it is not protected by s. 95'."

MANISTY, J., continued :

- A "Now that being the view which, were it necessary, I should be prepared to adopt, I come to the consideration of the Bankruptcy Act of 1883. Section 45, in effect, enacts that where a creditor has attached any debt due to him, he shall not be entitled to retain the benefit of the attachment against the trustee in bankruptcy of the debtor unless he has completed the attachment before the date of the receiving order and before notice of the presentation of any bankruptcy petition. Sub-section (2) defines what is meant by 'completing an attachment.' For the purpose of the Act 'an attachment of a debt is completed by receipt of the debt.'
- B The question is what is meant by the words 'receipt of the debt'? Is it, as LUSH, L.J., said in *Ex parte Pillers. Re Curtoys* (5), an actual receipt by the garnishor, or will some kind of constructive receipt, as when the money is paid into court subject to further order, satisfy those words?"

Having dealt with the argument which had been addressed on that point, he said (*ibid.*, 187) :

- C "The Act means what it says, that the attachment must be completed by receipt of the debt. I think that the doctrine of title by relation cannot be applied. The intention of the legislature was to get rid of all the questions which might have arisen before the Act was passed, and to put the law upon a very simple and plain foundation. A judgment creditor having attached a debt does not become entitled to retain it unless he has received the debt before the bankruptcy of the debtor. I am therefore of opinion that in this case the trustee is entitled to judgment."
- D

It is plain that because of the facts in that case it was not necessary for the purposes of the decision of MANISTY, J., that he should hold that in no event could anything short of receipt of the money be sufficient. There the garnishee proceedings had not been completed, and on its facts the case is *in pari materia* with *Re Ford* (2) and the other cases reviewed by ASTBURY, J., in *Re Fairley* (1). That case, however, was treated by CAVE, J., in *Re Trehearne* (6), as a direct authority that there must be an actual receipt and that a constructive receipt would not do, and it appears from the examination of *Ex parte Pillers, Re Curtoys* (5) that the view of the Court of Appeal was that the test was not whether there had been a garnishee order absolute or not, but whether the garnishee proceedings had resulted in actual payment before the receiving order.

- F It, therefore, appears to me that although there reside in the defendant in the present case, as is frankly admitted by his counsel, no merits at all, and although the plaintiff had taken every step which lay within his power to make the attachment complete and the circumstance that at the date of the bankruptcy he was not in receipt of the money was due entirely to some breakdown in the administration of the court, I should not be justified, in view of the weight of authority, in holding that s. 40 (2) is not necessarily exhaustive in its definition and that on the question of attachment anything short of receipt of the money is sufficient to allow the garnishee to keep the fruits of his judgment. On the authorities as they stand and with the greatest reluctance I feel bound to come to the conclusion that the question in this summons will have to be answered by saying that the plaintiff had not completed the attachment of the sum in question.
- G
- H

Declaration accordingly with costs.

Solicitors : *Deacons & Pritchards*, agents for *Hawkins, Ferrier & Newnes*, Kings Lynn (for the plaintiff) ; *Bowkers* (for the defendant).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

TURNER v. BAKER.

[COURT OF APPEAL (Lord Merriman, P., Asquith, L.J. and Vaisey, J.), February 14, 15, 16, 17, 1949.]

Rent Restriction—"Separate dwelling"—*Unfurnished tenancy*—*Sub-letting of one room, furnished, with use, in common with tenant, of kitchen*—*Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), s. 16 (1).*

The tenant of a dwelling-house to which the Rent Restrictions Acts applied sub-let one room furnished and allowed the sub-tenants to share with her the use of the kitchen. In an action by the landlord for possession of the whole premises, or, alternatively, of the part let furnished, it was contended for the landlord that the house was no longer within the protection of the Rent Restrictions Acts as it was no longer "let as a separate dwelling" within the meaning of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 16 (1).

Held: (i) the time when the landlord sought to obtain possession was the material time for determining the status of the house for the purpose of the Rent Restrictions Acts.

Prout v. Hunter ([1924] 2 K.B. 736; 132 L.T. 193), *applied*.

(ii) by reason of the agreement to share the use of the kitchen, the letting to the sub-tenants amounted to a sharing of the house (*Neale v. Del Soto* ([1945] 1 All E.R. 191; [1945] 1 K.B. 144; 172 L.T. 65), *applied*), and, in consequence, the house was no longer, either in part or in whole, "let as a separate dwelling" within the meaning of s. 16 (1) of the Act of 1933, and, therefore, it was not within the protection of the Rent Restrictions Acts, and the landlord was entitled to an order for possession. Whether or not the landlord was a party to the sharing agreement, or whether that agreement was merely between the tenant and sub-tenant, was immaterial.

[AS TO "SEPARATE DWELLING," see HALSBURY, Hailsham Edn., Vol. 20, pp. 312-315, paras. 369, 370; and FOR CASES, see DIGEST, Vol. 31, p. 557, Nos. 7044-7048, and 2nd Digest Supp.]

Cases referred to :

- (1) *Prout v. Hunter*, [1924] 2 K.B. 736; 132 L.T. 193; 31 Digest 557, 7040.
- (2) *Wright v. Arnold*, [1946] 2 All E.R. 616; [1947] K.B. 280; 176 L.T. 45; 2nd Digest Supp.
- (3) *Leslie & Co. v. Cumming*, [1926] 2 K.B. 417; 135 L.T. 443; 31 Digest 557, 7041.
- (4) *Barrell v. Fordree*, [1932] A.C. 676; 96 J.P. 278; *sub nom. Fordree v. Barrell*, 147 L.T. 206; Digest Supp.
- (5) *Neale v. Del Soto*, [1945] 1 All E.R. 191; [1945] K.B. 144; 172 L.T. 65; 2nd Digest Supp.
- (6) *Llewellyn v. Hinson*, [1948] 2 All E.R. 95; [1948] 2 K.B. 385.
- (7) *Sharpe v. Nicholls*, [1945] 2 All E.R. 55; [1945] K.B. 382; 172 L.T. 363; 2nd Digest Supp.
- (8) *Cole v. Harris*, [1945] 2 All E.R. 146; [1945] K.B. 474; 173 L.T. 50; 2nd Digest Supp.
- (9) *Kenyon v. Walker*, *Stevenson v. Kenyon*, [1946] 2 All E.R. 595; 2nd Digest Supp.
- (10) *Haskins v. Lewis*, [1931] 2 K.B. 1; 144 L.T. 378; 95 J.P. 57; Digest Supp.

APPEAL by the tenant from an order of His Honour JUDGE SIR GERALD HURST, K.C., made at Croydon County Court, and dated July 14, 1948, granting to the landlord possession of certain premises. The tenant had sub-let one room furnished and allowed the sub-tenants to share the use of the kitchen, and the learned judge held that the premises were no longer within the protection

of the Rent Restrictions Acts. The Court of Appeal now dismissed the appeal. The facts appear in the judgment of LORD MERRIMAN, P.

Carulfield for the tenant.

Michael Hoare for the landlord.

LORD MERRIMAN, P.: This is a tenant's appeal from a judgment given by His Honour JUDGE HURST, on July 14, 1948, granting to the landlord possession, in two months, of certain premises at 22, Inwood Avenue, Old Coulsdon, Surrey. By way of preface, I wish to point out that here we are not concerned with that part of the Rent Restrictions Acts which deals with restrictions on rents during the currency of the tenancy, but solely with the restriction on the right of the landlord to obtain possession. For example, we are not concerned in the circumstances of this case with the kind of question raised by the Furnished Houses (Rent Control) Act, 1946, s. 2, concerning the effect of a sharing of premises on the revision of rent by a tribunal.

With regard to this question of possession, the first point to decide is : What was the status of the premises—I am designedly using a neutral word—or the relevant part of the premises when the landlord sued for possession, as he did, on June 15, 1948 ? For the first proposition *Prout v. Hunter* (1) is the authority. In that case the landlord had let to a tenant an unfurnished house, the tenant had let it furnished to a sub-tenant—it was common ground that the house was a dwelling-house to which the Act applied when let unfurnished—and, in relation to the questions thereby raised, BANKES, L.J., said ([1924] 2 K.B. 740) :

“The tenant, without going into occupation of it herself, furnished the flat and sublet it at a rent which included payment for the use of the furniture. The landlord, having given the tenant notice to quit, contends that inasmuch as the flat was, at the time when he gave the notice to quit and at the time when that notice expired, let as a furnished flat, the Act did not apply, and that he is therefore entitled to recover possession on the expiry of the notice. The tenant, on the other hand, contends that a house which is once within the Act is always within the Act, and that as it applied at the time of the letting to her it has not ceased to apply, and the landlord is consequently not entitled to possession.”

The learned judge then referred to the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (2), proviso (i) to which deals with the question of a furnished house and is :

“ . . . this Act shall not, save as otherwise expressly provided, apply to a dwelling-house *bona fide* let at a rent which includes payments in respect of . . . ”

inter alia, the use of furniture. I would observe that, as regards post-1939 tenancies, substantially the same words are enacted in s. 3 (2) (b) of the Rent and Mortgage Interest Restrictions Act, 1939. BANKES, L.J., said (*ibid.*, 741) :

“It is argued that in s. 12 (2), the statute is dealing with the status of the house rather than with the rights of the particular party to the litigation. The Act is not to apply to a dwelling-house which is let furnished. But at what time is its status of a furnished house to be considered ? It would seem that the material time is when the landlord seeks to obtain possession. If at that time the status of the house is that of a house let as a furnished house it is immaterial that at some earlier date its status was that of an unfurnished house. In my opinion that is the true construction to put upon this difficult statute for the purpose of determining this particular question.”

I do not think it is necessary to read any passages from the other judgments, as it is quite plain that there was no dissent from that point of view, and, as I shall have occasion to show, there is other authority to the same effect.

In relation to the question what was the status of these premises on June 15, 1948, the material facts are as follows. Before Feb. 14, 1948, the premises, meaning in this connection the whole house, had been let by the landlord to the tenant's husband—and as from Jan. 6, 1948, she succeeded to his tenancy as his widow—on a weekly tenancy which admittedly brought the house within the definition of a "dwelling-house", as defined by the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 16 (1), as follows :

" ' Dwelling-house ' has the same meaning as in the principal Acts, that is to say, a house let as a separate dwelling or a part of a house being a part so let."

The Increase of Rent and Mortgage Interest (Restrictions) Act, 1938, s. 7 (1), reads :

" If any question arises in any proceedings whether the principal Acts apply to a dwelling-house, it shall be deemed to be a dwelling-house to which those Acts apply unless the contrary is shown."

I think it is well to observe, however, that, in spite of the apparent generality of s. 7 (1) of the Act of 1938, it is settled by authority, by which this court is bound, that that presumption only arises where it is first established that the premises are a "dwelling-house" as defined. That is to say, the *onus* of establishing that proposition rests on the tenant who asserts that there is some restriction on possession or claims the protection of the Rent Restrictions Acts. The authority for that is *Wright v. Arnold* (2) and it is only necessary to read one sentence from the judgment of MORTON, L.J. Referring to s. 7 (1) of the Act of 1938, MORTON, L.J., said ([1947] K.B. 285 ; [1946] 2 All E.R. 620) :

" However, I do not think that the sub-section has such a far-reaching effect as that "

—namely, as to throw on the landlord the whole *onus* of proving that the premises in question were not a "dwelling-house" He continued :

" It seems to me that it can only apply where it is first established that the premises as to which the question arises are 'a dwelling-house.' That, I think, means a dwelling-house within the definition contained in the Act."

To return to the facts, on Feb. 14, 1948, the tenant sub-let a "furnished bed-sitting room, use of kitchen," at a rent of 35s. per week. The tenant's own evidence was :

" I live at 22, Inwood Avenue. Tenant of the plaintiff since Jan. 6, 1948, when my husband died. I took Setters [the sub-tenants] into the house. They had nowhere to go on marriage so I offered them to live with me. I was sorry for them. I had had no one before. I said : ' Come and live with me and share home, pay 35s. a week and so much for gas, use of bathroom and kitchen.' We have meals together and we get our own rations each."

I agree that this last sentence is only what happened *ex post facto*, and, therefore, is not strictly relevant in interpreting the agreement, but that is how, in fact, it worked out. The evidence continued :

" No written agreement . . . We cook together and on occasions eat together. They have the run of the place."

In March, 1948, the landlord gave the tenant notice to quit expiring on Mar. 29, 1948. On June 15, 1948, in the Croydon County Court, the landlord claimed possession of the whole premises, or, in the alternative, of the part let furnished. As I have already shown, it is plainly established by *Prout v. Hunter* (1) that the status not only of the whole but of the part let furnished falls to be determined as at that date. The next step on that statement of the facts is to examine what the position is at common law—which I should have thought,

until I heard an argument to the contrary this morning, was as clear and uncontroversial a matter as possible. Without referring to any of the authorities which were cited this morning, because they all seemed to be remarkably remote from this point, I should have thought that it was indisputable, first, that the letting of premises furnished, or, secondly, that the letting of premises whether furnished or unfurnished—coupling with the corporeal premises the right to share communal facilities with the landlord, or it may be with other tenants, or it may be with both, and whether by way of a grant of an easement or as appurtenant to the corporeal premises—was a well recognised form of letting at common law, and, consequently, that the tenant could get a declaration of his right to use, or an injunction against the withdrawal of the right to use, the facilities which were included, whether by way of easement or as appurtenances or the like.

- A
- B By proviso (i) to s. 12 (2) of the Act of 1920, however, a dwelling-house which is *bona fide* let at a rent which includes payments in respect of the use of furniture or of attendance is excluded from the Act. I need not refer again to the corresponding section of the Act of 1939, because I think that from a passage in the evidence it is clear that this bungalow comes within the earlier Act. It is true that *Prout v. Hunter* (1) dealt with the status of a whole house
- C being let furnished at the material date, but *Leslie & Co., Ltd. v. Cumming* (3) seems to me to be important on the same point, *i.e.*, in determining the status of the premises at the moment when the landlord obtains possession. In that case it was decided that, although the premises might, by reason of their becoming furnished premises, have lost their status within the Rent Restrictions Acts at some time after the original letting, they might, nevertheless, regain that status before the material date. ROCHE, J., after referring to *Prout v. Hunter* (1), said ([1926] 2 K.B. 422) :
- D

“In that case the whole of the demised premises had been let furnished, and were in the occupation of the person who had so taken them at the date of the writ. In the present case, so far as the whole of the demised premises are concerned, they had been let furnished to [two sub-tenants] but their terms of occupation had ended long before the date of the proceedings.”

The learned judge held that that made the whole difference.

- E
- F *Barrell and Fordree* (4) decided that, if the tenant sub-let part of the premises furnished, with exclusive possession of that part, the combined effect of s. 12 (2) of the Act of 1920 and proviso (i) thereto is that the landlord can recover possession of that part as distinct from recovering possession of the whole of the premises contained in the demise. I should say, however, that the emphasis on the words “exclusive possession” of the room in question was really directed to the question whether it could be truly said that part of the premises in question was let as a “separate dwelling,” or, to use a later definition [in s. 16 (1) of the Act of 1933] “part of a house being a part so let,” and was not directed
- G to the question whether, to the exclusive possession of that part, there was added the right to share other parts of the whole premises. I say that because I think it is plain from the careful collection of authorities that have been laid before us that that was a subject which at that time had not attracted much attention either in the House of Lords or in any lower court.
- H I now come to the question which was decided in *Neale v. Del Soto* (5), the headnote to which is as follows ([1945] K.B. 144) :

“By an oral agreement a tenant was let two unfurnished rooms in a seven-roomed house, together with the use jointly with the landlord of the garage, kitchen, bathroom, lavatory, coal-house, and conservatory. Held, that there was really a sharing of the house, each party having the exclusive use of some rooms and the two parties together having the use in common of other rooms, and was, therefore, not a letting of the two

rooms as a separate dwelling within the meaning of s. 12 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920."

With regard to those facts, MORTON, L.J., said ([1945] K.B. 147; [1945] 1 All E.R. 193) :

"Were the two rooms in question in the present case a part of a house *let as a separate dwelling*? In my view, they were not. What was let was the two rooms together with the use, in common with the landlord, of the garage, kitchen, bathroom, lavatory, coal-house and conservatory, and it would be a misuse of language, to my mind, to say that the two rooms, and nothing more, were *let as a separate dwelling*. The real substance of the matter was that there was a sharing of the house. Each party had the exclusive use of some rooms and the two parties together had the use in common of other rooms."

Throughout the extract which I have just cited, I particularly emphasise the words "*let as a separate dwelling*."

In *Llewellyn v. Hinson* (6) it was decided that if, by the agreement of tenancy between the landlord and the tenant, the landlord parted with two distinct things, (i) the exclusive possession of one or more living rooms, and (ii) the user jointly with someone else of one or more other living rooms, it was immaterial whether the someone else was the landlord or another tenant, or tenants, or some other occupier. So far, the matter is clear and unambiguous, and I would only venture to say in passing that it is a matter of surprise that the point should first have arisen in 1945, although in the intervening years between 1920 and 1945 landlords did not lack vigilant and astute guardians of their interests. It is idle to speculate whether this is because landlords, their advisers, and the courts alike were so blind that the point, which was staring everyone in the face in the definition section, entirely escaped their attention, or because no one was bold enough to suggest that the quality of community extended beyond that part of the premises which was shared to that part of which exclusive possession was granted. Only the House of Lords, as regards the past, and, perhaps, Parliament, as regards the future, can solve this question. This court is clearly bound by the decision.

I must confess I am puzzled as regards subsequent development of the principle by the decisions on what are "living rooms," the sharing of which prevents the letting from being a "*letting as a separate dwelling*." In *Llewellyn v. Hinson* (6) and in *Neale v. Del Soto* (5), it was the kitchen, and not the bathroom or lavatory with which the kitchen was coupled, which was the living room. In *Sharpe v. Nicholls* (7) it was the kitchen, and, as MORTON, L.J., euphemistically observed ([1945] 2 All E.R. 59), "the rooms which are sometimes referred to as the 'usual offices'," which were said to be the living rooms. In *Cole v. Harris* (8) MORTON, L.J., said ([1945] 2 All E.R. 152) :

"To my mind a kitchen is fairly described as a 'living room,' and thus nobody who shares a kitchen can be said to be tenant of a part of a house *let as a separate dwelling*."

He gave as a reason that the kitchen was often the principal living room where the occupants spent the greater part of the day because it was the warmest part of the house. Yet the same case is authority for the proposition that the bathroom and the W.C., with the use of the garden for drying clothes which may possibly have been washed in the bathroom, are not living rooms. Yet again in *Kenyon v. Walker, Stevenson v. Kenyon* (9) although the bathroom and the W.C. were not held to be living rooms, the right to use a kitchen expressly for cooking purposes only—thus excluding the family user on which so much stress was laid in *Cole v. Harris* (8)—was held to be the sharing of a living room, and this in spite of the fact that, because friction over the cooking had arisen, the landlord had installed a separate cooker in one of the tenants'

premises. Happily, it is unnecessary to resolve this puzzle, because in this case the use of the kitchen is plainly unrestricted, and is, therefore, directly covered by at least three decisions of this court.

- From that line of authorities counsel for the tenant developed a line of argument which ran as follows. (i) He said that it followed from the decision of *Llewellyn v. Hinson* (6) that an agreement between landlord and tenant for what I will call a "shared letting" within the decision in *Neale v. Del Soto* (5) did not create a "dwelling-house" within the meaning of the Act, and it was immaterial whether the agreed sharing was a sharing between landlord and tenant or between tenant and tenant, provided always that the landlord was a party to the agreement of sharing. (ii) If, subsequent to the tenancy agreement, the tenant, unilaterally as between himself and the landlord, created by a sub-tenancy a sharing of part of the premises between himself and the sub-tenant, that fact, while it enabled him, the tenant, to say that the premises so shared were not a "dwelling-house" within the meaning of the Act—and, therefore, to recover them as against the sub-tenant—did not enable the landlord so to do as against either the tenant or the sub-tenant. (iii) If the tenant created a sub-tenancy in respect of a furnished tenement, then (a) if the whole of the sub-tenancy was in the exclusive possession of the sub-tenant, the landlord could recover that part by the combined effect of s. 12 (2) of the Act of 1920 and proviso (i) thereto and the authority of *Barrell v. Fordree* (4), but (b) if the sub-tenement was both furnished and shared, though the tenant could recover from the sub-tenant, the landlord could not recover against either, because proviso (i) to s. 12 (2) of the Act of 1920 does not operate apart from sub-s. (2), the premises, by reason of the sharing, not being a dwelling-house let at a rent which includes the use of furniture. I am bound to say that this last point seemed to me to produce the curious result—at any rate, as regards the furnished part of the premises—that, whereas a sub-letting furnished enables the landlord to recover at common law either the whole premises or that part of the premises which is so sub-let, as the case may be, and whereas the sharing of a material part of the premises so that they are not "let as a separate dwelling" enables the landlord to recover at common law the whole, or part, as the case may be, so shared, the combination of these two circumstances in relation to a furnished sub-letting deprives the landlord not only of his common law rights, by some process of cancellation, but also of any other rights he may happen to have under the Rent Restrictions Acts, because these Acts have ceased to apply to the premises at all. I must say that it sounds very like a *reductio ad absurdum*, but it was seriously argued that the absurdity of any conclusion on these Acts is no criterion of that conclusion being wrong. The apparent absurdity, however, at least tempts one to examine the argument a little closely.
- I, therefore, go back to the first step in the argument. It is clear that in relation to a furnished sub-letting the unilateral act of the tenant as between himself and the landlord can change the status. That appears from *Prout v. Hunter* (1), but it also appears, taking it even more generally, from the judgment of GREER, L.J., in *Haskins v. Lewis* (10), the particular point in which is immaterial for my present purpose, as it was in connection with the use of part of business premises. GREER, L.J., speaking in quite general terms, said ([1931] 2 K.B. 15) :

"As I view this case it turns on these considerations. Since the decision of this court in *Prout v. Hunter* (1) the law is that something that the tenant has done, and with which the landlord has had nothing to do, may alter the status of the premises so as to take them out of the protection of the Acts. It seems to me that it follows from that that if the whole of the premises were let by the tenant as business premises he would have so

altered the status of the premises that the Act did not apply to them. Whether by reason of another provision of the Act it would apply again to the premises if they afterwards again became a dwelling-house, it is unnecessary to decide."

I may say, in passing, that *Leslie & Co. v. Cumming* (3) decides that, in appropriate circumstances, premises may go in and out of the Act from time to time. GREER, L.J., continued ([1931] 2 K.B. 16) :

"At any rate the tenant in possession may alter the status of the premises so as to deprive the occupier for the time being of the benefit of the provisions of the Act with which we are dealing."

The judgments in *Llewellyn v. Hinson* (6) must be read, like all other judgments, in relation to the subject-matter which was being dealt with. In that case the landlord himself had, in fact, made the agreement, but there is not one word from beginning to end of the judgments which even hints at a decision that the landlord's being a party to the sharing agreement is essential in order to reverse the process of the Rent Restrictions Acts. Fundamentally, the argument is reduced to a single sentence in *Kenyon v. Walker, Stevenson v. Kenyon* (9). Counsel for the landlord showed that that case and that particular sentence had nothing whatever to do with the point in the present case. In *Kenyon v. Walker, Stevenson v. Kenyon* (9) the tenant sought to recover possession from the sub-tenant in the first of two actions on the ground that as between himself and the sub-tenant he had created, by the right to use the kitchen, a sharing agreement, and it was held that he was so entitled. Therefore, it followed that the sub-tenant's premises were not a "dwelling-house" to which the Acts applied. In the other action the landlord sought to recover as against the tenant on the ground that the tenant was alleged to be over-charging rent to the sub-tenant within the meaning of s. 4 of the Act of 1933. In the circumstances it is a little curious that the landlord entered into an alliance with the sub-tenant. It was a natural alliance in the sense that I infer, though it is not expressly stated, that both of them—through the same counsel and the same solicitor—desired to prove as against the tenant that the tenant was over-charging rent to the sub-tenant. In order to do so, however, under s. 4 of the Act of 1933, it was essential to prove that the premises were a dwelling-house within the meaning of the Act to which the sharing agreement, if established, was absolutely fatal. The alliance was unnatural inasmuch as the landlord's real cause of action was, or should have been, an action for possession against both the tenant and the sub-tenant on the ground that they had entered into this sharing agreement. There is nothing whatever to show that any such case was raised. Indeed, the facts laid before the learned county court judge were inconsistent with that, and ASQUITH, L.J., who was a member of the Court of Appeal in that case, has made it plain to us that no such question was ever raised in the appeal. Accordingly, MORTON, L.J., when dealing in his judgment with Stevenson's claim, *i.e.*, the landlord's claim against the tenant, said ([1946] 2 All E.R. 599) :

"The result is that, in my view, there was at all material times a sharing of this house between Kenyon [the tenant], on the one hand, and Mrs. Walker [the sub-tenant] and her mother, who lived with her, on the other. If that is the right view, no other point arises on either of these appeals."

The learned Lord Justice then comes to the only sentence which deals with the claim of the landlord against the tenant :

"Stevenson cannot recover possession against Kenyon because the case does not come within s. 4 of the Act of 1933 . . ."

That is because the finding in the sentence before prevented the house from being a "dwelling-house" within the meaning of the Act, so that the words in s. 4 (1) that an order or judgment for the recovery of possession of a dwelling-

house to which the Acts apply may be made or given if the court is satisfied that the rent charged for any sub-let part is excessive, could not possibly apply. MORTON, L.J., continued (*ibid.*):

- “ . . . and Kenyon can recover possession as against Mrs. Walker and Mrs. Springer because the arrangement they came to is not protected by the Rent Restrictions Act. Thus, the judge was right in refusing possession to Stevenson and granting it to Kenyon, and this appeal fails.”
- A That has nothing whatever to do with this case, and, once it is understood that there is no authority to the contrary, and that the whole of this case, built round that one sentence in *Stevenson v. Kenyon* (9) collapses, the way is open to the simple proposition that the grant of a right to share a house in which the grantor has the sole interest diminishes the grantor's interest to the extent of the grant, and, if the thing shared is of such a nature as to prevent the part of the premises in respect of which the right is granted from being “let as a separate dwelling” in the hands of the grantee, the corresponding diminution of the rights retained by the grantor must inevitably have the same result in respect of any part of the premises affected thereby. Moreover, this result has at least the merit of making sense instead of nonsense of the authorities. After all, the landlord's reversion, as such, remains unaffected by the Rent Restrictions Acts. All that the Rent Acts do is to impose restrictions on his immediate enjoyment of it. So, although the restrictions are less harsh to the landlord, does the Courts (Emergency Powers) Act, 1943. The point as regards a furnished sub-let is contained in every Rent Restrictions Act from 1920 onwards. The point as regards a sharing agreement was settled, certainly, as regards the use of a kitchen in 1945, and this agreement was made in February, 1948. What ground of complaint has the tenant, if, of her own volition, she makes arrangements which divest both herself and her tenancy of the protection of the Rent Restrictions Acts, and so reduce the restrictions imposed on the landlord to those appropriate to an ordinary ejection action? That, and nothing else, is precisely the effect of the learned judge's judgment in this case. In my opinion, this appeal fails.

- ASQUITH, L.J.: I am of the same opinion. It has taken a long and complex argument to reach the real point to which the case narrowed down. That point is whether at the material time this house was let as a separate dwelling, and, therefore, protected by the Rent Restrictions Acts from orders for possession, notwithstanding that at that time part of the house was the subject-matter of what is familiar in these courts as a “sharing agreement” between the tenant and the sub-tenant. For the reasons given by my Lord, I agree that the answer to that question is “No,” and that it is immaterial whether the landlord was a party to or privy to the sharing agreement or whether that agreement was purely a matter between the tenant and sub-tenant. In either case, it is not possible to say that at the material time this house was let as a separate dwelling, because part of it was not separately let. Accordingly, neither in part nor in whole is the house protected, and the order for possession should be affirmed.

- VAISEY, J.: I agree in the result arrived at by my Lords, and I entirely agree with the reasons enunciated by them. If I were to add some reasons of my own, I might easily, by inadvertence, add to the already existing complexity of the reported decisions without serving any useful purpose. I, therefore, content myself with saying that the judgment of the learned county court judge in this case was, in my view, correct, and I agree that this appeal should be dismissed.

Appeal dismissed with costs.

Solicitors: *Beaumont, Son & Rigden* (for the tenant); *Clutton, Moore & Lavington*, agents for *A. Rawlance*, Croydon (for the landlord).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

Re BETTS (deceased). BURRELL v. BETTS AND OTHERS.

[CHANCERY DIVISION (Roxburgh, J.), February 10, 11, 1949.]

Will—"Goodwill of my business and stock and plant"—*Inclusion of freehold premises*—"Debts due to me in respect of said business"—*Sum standing to credit of banking account.*

The testator, by his will dated Nov. 17, 1944, appointed his wife and the plaintiff executors and trustees of the will, and, after giving some pecuniary legacies, made the following bequest: "I bequeath to my wife the said H.J.B. and my brother J.H.B. in equal shares . . . the goodwill of my business . . . together with the stock utensils in trade vehicles and plant connected therewith [and] the debts due to me in respect of the said business . . ." At the death of the testator on Mar. 10, 1945, he was possessed of, *inter alia*, (a) a freehold property used by the testator for the purpose of his business and for residential purposes; and (b) £1,286 standing to the credit of his business account at the bank.

HELD: (i) in the absence of strong indication to the contrary in the will itself, a gift of an incorporeal asset such as goodwill, coupled with the gift of a number of corporeal assets, could not be construed so as to include freehold premises, and, therefore, the property did not pass.

Blake v. Shaw (1860) (John. 732; 2 L.T. 84), *applied*.

(ii) the sum standing to the credit of the testator's business account at his death, was not a debt due in respect of the said business, the reference to "debts" in the will being primarily to trade debtors.

[AS TO WHAT IS INCLUDED IN A BEQUEST OF A TESTATOR'S "BUSINESS," see HALSBURY, Hailsham Edn., Vol. 34, pp. 246, 247, para. 298; and FOR CASES, see DIGEST, Vol. 44, pp. 692-694, Nos. 5333-5350.]

Case referred to:

(1) *Blake v. Shaw*, (1860), John. 732; 2 L.T. 84; 44 Digest 693, 5346.

ADJOURNED SUMMONS to determine whether, in the administration of the estate of the testator, the property bequeathed to the testator's wife and brother in equal shares, included the whole or part of the following, *inter alia*: (a) The freehold property known as Goldlay House, Baddow Road, Chelmsford, in the county of Essex, in which the testator was at his death carrying on the business of yeast merchant and bakers' sundriesman; (b) The sum of £1,286 11s. 9d. being the amount which at the date of the death of the testator was standing to the credit of the business account (designated "Stephen Betts") of the testator at the Chelmsford branch of the Westminster Bank, Ltd.

By cl. 3 of his will dated Nov. 17, 1944, the testator bequeathed "to my wife the said Harriett Jessie Betts and my brother John Henry Betts in equal shares and free from all death duties the goodwill of my business of yeast merchant and bakers' sundriesman together with the stock utensils in trade vehicles and plant connected therewith the debts due to me in respect of the said business and the sum of one thousand pounds." ROXBURGH, J., held that neither the property nor the bank balance passed under the bequest.

Baden Fuller for the plaintiff, one of the executors of the will.

R. L. Stone for the first defendant, H.J.B., widow, and one of the executors.

Hillaby for the second defendant, J.H.B., brother of the testator.

L. R. Norris for the remaining defendants, nephews and nieces of the testator.

ROXBURGH, J.: The testator, Stephen Betts, by his will dated Nov. 17, 1944, after appointing his wife, the defendant, Harriett Jessie Betts, and the plaintiff, Frederick George Burrell, executors and trustees thereof and giving some pecuniary legacies, by cl. 3 made the following bequest:

"I bequeath to my wife the said Harriett Jessie Betts and my brother John Henry Betts in equal shares and free from all death duties the goodwill of my business of yeast merchant and bakers' sundriesman together with the stock utensils in trade vehicles and plant connected therewith the debts due to me in respect of the said business and the sum of £1,000."

- A At the date of his death on Mar. 10, 1945, the testator was entitled to a freehold property known as Goldlay House, Baddow Road, Chelmsford. The evidence shows that the top floor of the house had been converted into a self-contained flat in which the testator had lived with his wife, while the remainder was used for business purposes, having been specially adapted for such purposes and possessing proper outbuildings for garaging the vehicles and for storing heavy stock and refrigerators. Plans had been made for making alterations and building another warehouse.

- B The first question I have to decide is whether the bequest in cl. 3 included this property. In the light of what was said in *Blake v. Shaw* (1), I think that a strong context would have to be found in the will before it could be held that a gift of an incorporeal asset such as goodwill, coupled with the gift of a number of corporeal assets, could be construed so as to include freehold premises. There being no such context here, the freehold did not pass under the bequest.

- C The next matter which I have to decide is whether or not the bequest includes the sum of £1,286 11s. 9d., being the amount which at the date of the death of the testator was standing to the credit of the business account (designated 'Stephen Betts') of the testator at the Chelmsford branch of the Westminster Bank, Ltd., the question being, in particular, whether it falls within the words of the bequest "the debts due to me in respect of the said business." The evidence about the account is this :

- E "The testator kept his accounts at the Chelmsford branch of the Westminster Bank, Ltd. The one which he used for the purpose of his business was entitled 'Stephen Betts', the other which he used for his private and domestic purposes was entitled 'Stephen Betts Private Account' and cheques were drawn on such accounts accordingly. At the date of his death, the amount standing to the credit of his business account was £1,286 11s. 9d., and this item is shown on the balance sheet for Mar. 10, 1945. No items passed by the testator through his account, 'Stephen Betts Private Account,' are dealt with in the said accounts exhibited hereto, and, so far as I am aware, such account was never referred by the testator to a professional accountant."

- F I pause to observe that it is nowhere said that no money ever went into this business account which was not directly derived from the business. I have been asked to draw that inference, but I do not see any reason for doing so. In my judgment, and I am told there is no authority on this point, it is not possible to say that the sum standing to the credit of this account at the death of the testator was "a debt due to me in respect of the said business." I think that reference is intended to be primarily to trade debtors.

- G Solicitors : *Candler, Sykes & Dore*, agents for *Leonard Gray & Co.*, Chelmsford (for the plaintiff and all defendants except the second); *Kennedy, Ponsonby & Prideaux*, agents for *Hilliard & Ward*, Chelmsford (for the second defendant).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

WOLFE v. HOGAN.

[COURT OF APPEAL (Bucknill, Evershed and Denning, L.JJ.), February 17, 1949.]

Rent Restriction—" Dwelling "—Contemplated user—Premises let for business purposes—Tenant living on premises—No knowledge by landlord—Costs—County Court or High Court scale—Proceedings arising out of Rent Acts—Decision that Rent Acts did not apply—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 12 (2), s. 17 (2).

In 1939 the tenant negotiated with N., the lessee of premises, to take, as N.'s sub-tenant, a sub-tenancy of one large room in the premises divided into two by folding doors and one small room. The main room was a shop and the tenant intended to carry on business there, but there was no express covenant by the tenant that she would not use the premises as a dwelling-house. During the period of air-raids in the vicinity during the war N. assented to the tenant's sleeping in the demised rooms. In 1942 the freeholders sold the premises and N.'s lease terminated, but by implication the existing position as regards the tenant was continued by the new landlord, and the tenant continued to live on the premises and also to conduct her business there. It was not proved that either N. or the new landlord knew that the premises were being regularly used as a dwelling. In an action by the landlord for possession of the rooms let to the tenant :

HELD : according to the terms of the letting, the user of the rooms contemplated was as a shop, and, in the absence of proof that the landlord knew that the tenant was using the rooms as a dwelling-house and agreed to that user, the contemplated user, and not the actual user of the premises, was the essential factor, and, therefore, the demised rooms were let as a shop and not " let as a separate dwelling " within s. 12 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and the landlord was entitled to possession.

Dictum of SALTER, J., in *Gidden v. Mills* ([1925] 2 K.B. 722 ; 134 L.T. 22), *disapproved*, and *dictum* of BANKES, L.J., in *Epsom Grand Stand Association, Ltd. v. Clarke* ([1919] W.N. 171), *criticised*.

Per DENNING, L.J. : A house or part of a house originally let for business purposes does not become let for dwelling purposes by the acceptance of rent after a change of user unless it can be inferred from the acceptance of rent that the landlord has affirmatively consented to the change of user.

On the question of costs, *held*, as the tenant had failed to establish that the premises were a dwelling-house within the Rent Restrictions Acts, s. 17 (2) of the Act of 1920, which applied only to proceedings in respect of a dwelling-house to which the Acts applied, was inapplicable, and costs were, therefore, not limited to the county court scale.

[AS TO CHANGE OF USER, see HALSBURY, Hailsham Edn., Vol. 20, pp. 315, 316, para. 371 ; and FOR CASES, see DIGEST, Vol. 31, pp. 557-559, Nos. 7042-7067.]

Cases referred to :

- (1) *Gidden v. Mills*, [1925] 2 K.B. 713 ; 134 L.T. 21 ; 31 Digest 559, 7063.
- (2) *Barrett v. Hardy Brothers (Alnwick), Ltd.*, [1925] 2 K.B. 220 ; 133 L.T. 249 ; 31 Digest 561, 7090.
- (3) *Epsom Grand Stand Assocn., Ltd. v. Clarke*, [1919] W.N. 170 ; 31 Digest 581, 7296.
- (4) *Alexander v. Adams*, 1936 S.L.T. (Sh. Ct.) 32.
- (5) *Dumpor's Case*, (1603), 4 Co. Rep. 119b ; *sub nom. Dumper v. Syms*, Cro. Eliz. 815 ; 31 Digest 393, 5392.

- (6) *Norman v. Simpson*, [1946] 1 All E.R. 74; [1946] K.B. 158; 174 L.T. 279; 2nd Digest Supp.
- (7) *Watson v. Saunders-Roe, Ltd.*, [1947] K.B. 437; 176 L.T. 521; 2nd Digest Supp.
- (8) *Oak Property Co., Ltd. v. Chapman*, [1947] 2 All E.R. 1; [1947] K.B. 886; 177 L.T. 364; 2nd Digest Supp.
- A (9) *Russoff v. Lipovitch*, [1925] 1 K.B. 628; 132 L.T. 789; 31 Digest 585, 7343.

APPEAL by the tenant from a judgment of STABLE, J., dated Oct. 27, 1948, granting to the landlord an order for possession of rooms forming part of premises known as No. 15, Anderson Street, Chelsea. The Court of Appeal dismissed the appeal. The facts appear in the judgment of EVERSLED, L.J.

- B *S. Magnus* for the tenant.
L. R. Miller for the landlord.

BUCKNILL, L.J.: I will ask EVERSLED, L.J., to give the first judgment.

- C EVERSLED, L.J.: This is an appeal from a judgment of STABLE, J., relating to certain premises at 15, Anderson Street, Chelsea. The action is for possession, the plaintiff being the freehold owner of the house No. 15, Anderson Street, and the defendant, Miss Hogan, being the tenant of certain rooms on the ground floor. The substantial, and, indeed, the only, point in the appeal is whether the tenant can successfully resist an order for possession of the rooms by relying on the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. That she seeks to do by asserting that these rooms are, within the familiar language of s. 12 (2) of that Act, "let as a separate dwelling." The whole point turns on whether, on the facts of the case as found by the judge, the tenant can establish that proposition.
- D

- No. 15, Anderson Street, Chelsea, as an entity, is, undoubtedly, what one would describe as an ordinary house. The tenant's connection with it arose in August, 1939, when she negotiated with one Noller, then the lessee of the whole of the premises, and, as a result, became a sub-tenant of Noller of the rooms in question. It is important to observe exactly what was the subject-matter of that sub-tenancy. It consisted of what was, structurally, one large room divided into two by means of folding doors. Behind that—i.e., farther from the street—there was another room. It has been described by many names, including "a kind of out shed," but I gather that it is a brick built edifice of very small dimensions, an appendage attached to the main subject of the demise, namely, the room divided, as I have said, by folding doors. The learned judge, in his judgment, said:
- E
- F

- "I believe Mr. Noller when he tells me that Miss Hogan approached him and asked him if he would let her the shop."
- G

- I pause there to observe that that main room, divided as I have stated, was physically a shop in the sense that it contained a considerable number of articles of furniture and what is called "junk," in which Mr. Noller himself was a dealer elsewhere. It is plain that the tenant's main idea was to carry on a business as an antique or "junk" dealer in this shop. The learned judge continued:
- H

"I am satisfied that there was no express covenant by Miss Hogan that she would not use the premises as a dwelling-house. I do not think that that matter was expressly and specifically mentioned, but I am satisfied that the whole of the negotiations proceeded on the footing that what Miss Hogan was taking was this composite room to use it as an antique shop. I accept Mr. Noller's evidence that she told him that she was living at a flat near by, and I am satisfied that if Miss Hogan had

told Mr. Noller that she contemplated . . . using these premises as a dwelling, he would have refused to let her the premises."

The reason for that appears from the next paragraph :

"Mr Noller explained to me that there was no water laid on to the room, and there was no sanitary convenience whatever, but he was able to arrange with the tenants of the flat or maisonette immediately above this room that Miss Hogan could have the use of their lavatory and bath-room, which was on a half-way floor."

The privilege of using this bathroom and lavatory was a privilege merely, arranged by Mr. Noller, and, *qua* tenant, the tenant had a right only to the subject of the demise, namely, the composite room and the small room behind. The result is that we must approach this case as though there was here a contract in express terms for the letting by Mr. Noller to the tenant of premises described as a shop, but without any express covenant or prohibition in regard to the manner of user. To conclude the facts, when London was being exposed to the so-called "blitz," the tenant asked Mr. Noller whether he would have any objection to her sleeping on the premises, and he, feeling, that she might be in a difficulty in going home in the air raids, assented to that request. In 1942, the superior landlords, the owners of the freehold, parted with the freehold to the plaintiff, and the lease to Noller came to an end. Strictly as a matter of law, the sub-tenancy died with it, but in practice the existing position was continued by necessary implication between the freehold owner and the tenant. The freehold owner, who is now the landlord, beyond doubt has accepted Miss Hogan as a tenant, and the tenant must be treated as having continued as tenant of the landlord on the terms of the original contract of letting.

Beyond doubt the tenant has, for some time at any rate, lived, in the ordinary acceptance of that word, on these premises as well as conducting her business there. It is suggested that that fact was well known at all material times not only to Mr. Noller, but to the present landlord. If the facts were that the landlord of Miss Hogan, with full knowledge of what she was doing, had continued to accept her as a tenant, *prima facie* it would be impossible for him to deny that there had come into existence a letting of a dwelling-house, but, in my view, that does not arise. I cannot find any sufficient ground for saying that there was here proved such full knowledge of what the tenant was doing as would have justified the court in saying that there must be treated as having come into existence a letting as a dwelling-house by the assent, actual or implied, of the two parties to the letting.

That being so, the question at issue has narrowed itself down to a point not free from difficulty and interest. The learned judge treated the contract as being merely a letting of premises described as a shop and came to the conclusion that there should be implied in the contract a covenant against user otherwise than as a shop. I confess I find difficulty in accepting the view that one should, in a case of this kind, imply a restrictive covenant of that nature. No doubt these lettings are very informal and it is legitimate to try to extract from the simple and informal transaction what the real intention was, but I think it would need more than we have here to justify a conclusion that there was an implied covenant of which the tenant could be said to be in breach. On the other hand, from the terms of the contract, as I have stated it, it seems to me plain that, at the time of the letting, the user contemplated by the language that was employed was a user as a shop and not as a dwelling-house. That was the user, in fact, contemplated by the landlord, and (whatever may have been hidden in the tenant's mind) it was the user which, from the language used, the landlord might fairly assume was contemplated also by the tenant.

I turn to the terms of s. 12 (2) of the Act of 1920 : " This Act shall apply to a house or a part of a house let as a separate dwelling." " Let as a separate dwelling " must refer to the subject of a contract of letting as a separate dwelling. If it is to be shown that premises come within that definition, *prima facie*, at any rate, as it seems to me, it must be shown that the two parties to the contract have let, on the one hand, and taken, on the other hand, the premises in question as a separate dwelling. That may be shown either by the terms of the bargain or, where one party has altered the user with the full knowledge of the other, by that other party accepting the changed position, so that there must again be implied a mutual consensus of the two parties to the contract in regard to the use. The vital fact here is that, though the tenant has used these premises for some time as a dwelling, the other party to the contract has had no full knowledge of that fact and for his part has not intended or contemplated any such user.

That, however, is not an end of the matter, because the argument of counsel for the tenant is that there is here no implied covenant—and I assume that part of his argument as I have said in his favour—and that, therefore, he is entitled to base himself on the decision in *Gidden v. Mills* (1). He says that the right statement of the relevant law is that if by the terms of the lease itself there is no prohibition against user as a dwelling-house, then the question : Are these premises let as a dwelling ? must be answered by reference to the fact of user at the time when the proceedings are taken, although that user may be quite unknown to the other party to the contract. *Gidden v. Mills* (1) came before SALTER and GREER, J.J., sitting as a Divisional Court. The subject-matter there in question was described in the relevant lease as follows : " All that piece of ground . . . with the coachhouse and stable erected thereon which said described premises are now known as No. 6 Galen Place, Bloomsbury." Then there followed certain restrictive covenants. One was that no sale by auction should take place on the premises, and there was a fairly elaborate covenant against users of a particular kind as " for a madhouse, billiard room, or public concert, music or ballroom, shooting gallery, or as or for a brothel, or as or for a foundry, hospital, infirmary," and there are set out various other types of use and occupation which were barred. That, undoubtedly, left it free for the tenant to use the premises in any other way he liked, and he was given a very large realm of choice. I further observe that there was no letting for a purpose which was in terms contemplated at the time. At the relevant date, namely, when the action came to be tried, the premises were used in part as a garage and in part as a dwelling for the tenant's chauffeur, and the question was whether they were within the Act at all. The actual decision is unimportant for the present case, but the passage on which SALTER, J., founded himself has been greatly relied on by counsel for the tenant and I must read it. SALTER, J., said ([1925] 2 K.B. 722) :

" Where premises are let to a tenant on such terms that he is free to use them as a dwelling-house, or not, as he pleases, it is impossible to say from the terms of the tenancy whether the premises are ' let as a dwelling,' or not. In such a case regard must be had to the user which is being made of the premises by the tenant or sub-tenant then in occupation at the time when possession is sought to be obtained. If they are being used as a dwelling they are ' let as a dwelling,' and no order in ejectment can be made except in circumstances which do not exist here. It must, I think, be added by way of qualification that the user as a dwelling must not be a breach of any contract on which the plaintiff in ejectment is entitled to rely. A tenant cannot deprive his landlord of his common law rights by breaking the contract of tenancy."

Counsel submits that that passage means that, unless there is a prohibition as to user, the user in fact at the material time is the decisive thing.

I have come to the conclusion that that is not a complete statement of the law. We have been referred to several cases, but I do not find any other case which throws any greater light on the present point than the one I have read, save certain observations by BANKES, L.J., and SCRUTTON, L.J., which are set out by the editors of LAW NOTES in RENT AND MORTGAGE INTEREST RESTRICTIONS, 21st edn., and I think it may be convenient if I read a short passage from that book. On p. 109 the authors cite this observation from the judgment of SCRUTTON, L.J., in *Barrett v. Hardy Brothers (Alnwick), Ltd.* (2) ([1925] 2 K.B. 227):

"The important matter is the rights under the lease, not the *de facto* user."

Then comes a quotation from the judgment of BANKES, L.J., in *Epsom Grand Stand Assocn., Ltd. v. Clarke* (3) ([1919] W.N. 171):

"If an agreement were to let premises as a barn, the tenant, even though he lived there, could not be heard to say that they were let as a dwelling-house."

On p. 110 the learned editors refer to *Gidden v. Mills* (1), and they seem to indicate some doubt whether the principle as stated by GREER, J. (by which I think is meant the same one as counsel for the tenant has cited from SALTER, J.'s judgment) is now accepted as correct, and they indicate a preference, as I follow it, for the statement of BANKES, L.J. Observations of that kind must always be read in the light of the particular cases then before the judges. I hope I shall not be thought guilty of any disrespect to BANKES, L.J., if I observe that the statement quoted from his judgment would seem to be incomplete in so far as there is no mention of the bearing of the question whether the user by the tenant is one which is or is not known to or accepted by the landlord. I think that the matter is more accurately stated by Mr. MEGARRY in his book on the RENT ACTS, 4th edn., and adopt as part of my judgment the brief summary of the position which I find on p. 19 of the book:

"Where the terms of the tenancy provide for or contemplate the use of the premises for some particular purpose, that purpose is the essential factor, not the nature of the premises or the actual use made of them. Thus, if the premises are let for business purposes, the tenant cannot claim that they have been converted into a dwelling-house merely because somebody lives on the premises."

Then he refers to the two passages from the judgments of SCRUTTON, L.J., and BANKES, L.J., and says (*ibid.*, 20):

"If, however, the tenancy agreement contemplates no specified use, then the actual use at the time when possession is sought by the landlord must be considered."

Various instances are given. I may add that in such a case, the lease being quite silent, plainly one cannot get any help from the terms of the lease whether the premises were or were not let as a dwelling, and one has to find the answer to the question by reference to the facts as they have occurred.

Again I wish to make it quite plain that I am saying nothing which should be taken as indicating that, if a tenant does change the user and creates a dwelling-house out of what was formerly a shop, and if that fact is fully known to and accepted by the other party to the contract (whether or not there is a prohibition), the result may not very well be that there will then be inferred a contract to let as a dwelling-house, although it may be a different contract in essentials from the contract which was originally made and expressed. As I have already said, that does not arise here. What does arise here is plainly a contemplation, according to the terms of the letting, of user as a

shop. Nothing has since occurred which has altered that position in fact, and, in my judgment, the result is that, as the learned judge concluded, though, perhaps, on somewhat different grounds, the tenant has failed to establish her case that the premises come within the protection of the Rent Acts. There is no English case, so far as we know, which is a direct authority where there is a mere "contemplation" inferred from the term of a lease as opposed to an express prohibition, but Mr. MEGARRY cites the decision of Sheriff C. H. BROWN, K.C., and Sheriff-Substitute ORR, K.C., in Scotland in *Alexander v. Adams* (4). I think it may possibly be said that the sheriff-substitute construed the terms of the letting (which were simply that the landlord let a particular shop, so described, to the tenant) as containing something like a prohibition against any other user, but I do not think that the sheriff on appeal did found himself on any finding of an implied prohibition. Therefore, I agree with the decision of the sheriff, which I think is in conformity with the intention of the Act and the meaning of the relevant sub-section. For these reasons, I think that this appeal fails.

BUCKNILL, L.J. : I will ask DENNING, L.J., to give his judgment next.

DENNING, L.J. : In determining whether a house or part of a house is "let as a dwelling" within the meaning of the Rent Acts, it is necessary to look at the purpose of the letting. If the lease contains an express provision as to the purpose of the letting, it is not necessary to look further, but, if there is no express provision, it is open to the court to look at the circumstances of the letting. If the house is constructed for use as a dwelling-house, it is reasonable to infer that the purpose was to let it as a dwelling, but if, on the other hand, it is constructed for use as a lock-up shop, the reasonable inference is that it was let for business purposes. If the position were neutral, it would be proper to look at the actual user. It is not a question of implied terms. It is a question of the purpose for which the premises were let.

These premises were let in 1939 by the head lessee to the tenant, and, on the facts, there was ample material on which the judge could find that the purpose of the letting was for use as a shop. At the beginning of the tenancy, therefore, the premises were not within the Act.

The point that has arisen in the course of the argument is : What is the effect of the tenant changing the use she made of the premises ? She changed it from use for business purposes into use for partly business and partly dwelling purposes. During the air raids in 1940 she started to sleep on the premises and she has continued to sleep there and use a part for dwelling purposes. When the notice to quit was given in 1947, she was for all practical purposes permanently residing in the back part of the room. What is the effect of that ? In my opinion, it does not give the tenant the protection of the Act. A house or a part of a house originally let for business purposes does not become let for dwelling purposes unless it can be inferred from the acceptance of rent or otherwise that the landlord has affirmatively consented to the change of user.

Let me illustrate that from the common law doctrine as to waiver of forfeiture. A breach of covenant not to use premises in a particular way is a continuing breach. Any acceptance of rent by the landlord after knowledge only waives the breaches up to the time of the acceptance of rent. It does not waive the continuance of the breach thereafter and, notwithstanding his previous acceptance of rent, the landlord can still proceed for forfeiture on that account. Indeed, in the case of a continuing breach the acceptance of rent after knowledge is only a bar to a claim for forfeiture if it goes on for so long or is accepted in such circumstances that it can be inferred that the landlord has not merely waived the breach but has also affirmatively consented to the tenant continuing to use the premises as he has done : see notes to *Dumpro's* case (5) in SMITH'S LEADING CASES, 12th ed., vol. 1, pp. 48 and 49.

A breach of covenant not to sublet, however, is not a continuing breach, at all events so long as the under-lease cannot be determined. It is a single breach which can be waived by acceptance of rent with knowledge. Accordingly, it has been held that, if a contractual tenant sublets without consent in breach of covenant, it may become a lawful subletting by acceptance of rent with knowledge : see *Norman v. Simpson* (6) and *Watson v. Saunders-Roe, Ltd.* (7) ; but I would point out that in the later case of *Oak Property Co. v. Chapman* (8), where a statutory tenant sublet without consent, this court held that the mere acceptance of rent after knowledge was not by itself sufficient and said that there must be conduct by the landlord equivalent to a consent by him to the continuance of the state of affairs created by the tenant in order that the subletting should become a lawful subletting. By parity of reasoning in this case, the mere acceptance of rent by the landlord, although it went on for some time—indeed, for four or five years—was not itself any assent to the change of user. From the very earliest times in 1942 there were letters of protest which clearly negatived any assent. The acceptance of rent has no effect in a case of this kind so as to alter the premises into controlled premises unless it can properly be inferred that the landlord has assented to the change of user and to the premises becoming let in whole or in part as a dwelling-house. That cannot be inferred here. I agree that this appeal should be dismissed.

BUCKNILL, L.J. : I also agree.

Counsel for the tenant then contended that, as the main question raised by the defence rested on the Rent Restrictions Acts, the proceedings should have been remitted to the county court, and, therefore, the landlord was not entitled to recover costs in the High Court. He relied on s. 17 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and various cases, in support of this contention.

BUCKNILL, L.J. : In my judgment, the learned judge was quite right in the conclusion that he came to, that s. 17 (2) of the Act of 1920 did not apply to this case. In my opinion, for s. 17 (2) to apply it must be established that the proceedings are in respect of a dwelling-house to which the Rent Acts apply. The tenant here has failed to establish that these premises were a dwelling-house. ATKIN, L.J., in *Russoff v. Lipovitch* (9) said on the point as to how far s. 17 (2) does apply ([1925] 1 K.B. 640) :

“The result appears to me to be that the legislature intentionally increased the jurisdiction of the county court so as to allow of its dealing with all questions relating to the recovery of possession of houses to which the Rent Restrictions Act applies.”

This was not a question relating to the recovery of the possession of a house to which the Rent Restrictions Acts applied. It related to the recovery of the possession of a shop. For these reasons, I think the learned judge was right.

EVERSHED, L.J. : I agree.

DENNING, L.J. : I agree.

Appeal dismissed with costs.

Solicitors : *Frederick Wills & Co.* (for the tenant) ; *Barnes & Butler* (for the landlord).

[Reported by C. N. BEATTIE, Esq., Barrister-at-Law.]

Re WELLSTED'S WILL TRUSTS. WELLSTED *v.* HANSON.

[COURT OF APPEAL (Lord Greene, M.R., Somervell and Cohen, L.J.J.), February 15, 16, 17, 1949.]

Trustee—Trustee for sale—Sale of realty—Power to apply proceeds in purchase of realty—Law of Property Act, 1925 (c. 20), s. 28 (1) (as amended by the Law of Property (Amendment) Act, 1926 (c. 11), s. 7 and sched.)—Settled Land Act, 1925 (c. 18), s. 73 (1).

The Law of Property Act, 1925, s. 28 (1), as amended by the Law of Property (Amendment) Act, 1926, s. 7 and sched., provides: "Trustees for sale shall, in relation to land or to manorial incidents and to the proceeds of sale, have all the powers of a tenant for life and the trustees of a settlement under the Settled Land Act, 1925, including in relation to the land the powers of management conferred by that Act during a minority: and where by statute settled land is or becomes vested in the trustees of the settlement upon the statutory trusts, such trustees and their successors in office shall also have all the additional or larger powers (if any) conferred by the settlement on the tenant for life, statutory owner, or trustees of the settlement, and (subject to any express trust to the contrary) all capital money arising under the said powers shall, unless paid or applied for any purpose authorised by the Settled Land Act, 1925, be applicable in the same manner as if the money represented proceeds of sale arising under the trust for sale. All land acquired under this subsection shall be conveyed to the trustees on trust for sale."

By his will, dated Aug. 18, 1915, a testator, who died on Dec. 9, 1920, gave his residuary estate to trustees on trust for sale and conversion, with power to postpone such sale and conversion, and out of the proceeds thereof to pay his funeral and testamentary expenses, debts and certain legacies. He directed that the residue should be invested, with power to his trustees to vary such investments, and that his trustees should stand possessed of the said residue and the investments for the time being representing the same on certain trusts for his widow and issue. At the date of his death, the testator's residuary estate included real property to the value of £91,000. From time to time, both before and after Jan. 1, 1926, part of the realty was sold and the proceeds invested in trustee securities. The trustees also had in hand at the date of this summons money being proceeds of the sale of realty awaiting investment. It was proposed to sell further realty, to realise some of the securities representing the proceeds of sale of realty, and to apply those sums, together with the money in hand, in the purchase of realty.

Held: (i) the powers given by s. 28 (1) included all the powers of application conferred by the Settled Land Act, 1925, s. 73, both as to investment and as to administration, and the trustees were, therefore, permitted to acquire land as an investment.

(ii) proceeds of sale of the trust realty remained "proceeds of sale" within the meaning of s. 28 (1) so long as they could be traced.

Decision of VAISEY, J. ([1948] 2 All E.R. 209; [1948] Ch. 610), *reversed*.

[FOR THE LAW OF PROPERTY ACT, 1925, s. 28, see HALSBURY'S STATUTES, Vol. 15, pp. 203-207.]

Case referred to:

(1) *Re Wakeman*, [1945] 1 All E.R. 421; [1945] Ch. 177; 172 L.T. 226; 2nd Digest Supp.

APPEAL by defendants from an order of VAISEY, J., dated June 14, 1948, reported [1948] 2 All E.R. 209, declaring that the trustees for sale under the testator's will had no power to apply in the purchase of realty the proceeds

of the sale of land constituting the trust property. The Court of Appeal now allowed the appeal. The facts appear in the judgment of LORD GREENE, M.R., and in the headnote.

Pascoe Hayward, K.C., and *Hesketh* for the first and second defendants (daughter and grandson of the testator, interested in the residuary trust funds), the appellants.

Wilfrid Hunt for the plaintiffs (trustees of the will), respondents.

Jennings, K.C., and *Geoffrey Cross* for the third defendant (infant grandson of the testator interested in the residuary trust funds), respondent.

LORD GREENE, M.R. : This appeal raises some interesting questions as to the powers of trustees under trusts of land settled in trust for sale. Those questions depend for their solution on the true construction and effect of s. 28 of the Law of Property Act, 1925, a section which, notoriously, has given rise to considerable doubts and difficulties.

The plaintiffs are the trustees of the will of the testator, William Henry Wellsted, under which certain land was settled in trust for sale. The will contained no investment clause. The trustees have in their hands certain moneys, and they expect to have certain other moneys in the future. Those moneys were in part derived from sales of portions of the land, and one sum was derived from a receipt under the War Damage Act, 1943. The trustees also have certain investments representing the earlier proceeds of sale of other parts of the land.

The questions for our decision fall under two heads. The question of the war damage receipt is not raised in this court, because it is conceded that the language of the section with which we have to deal is not wide enough to cover that receipt, but we have to deal with the actual money which the trustees have in hand, and that would cover any other sums which they might receive on some future sale of other parts of the land. We have also to consider the investments which they hold. The trustees are anxious, at the wish of the tenant for life, to invest money in the purchase of land, and the question is whether they can do it, either so far as concerns the actual cash which they hold or as regards the proceeds of the investments which they might sell for the purpose? As the question of this power of investment in land concerned those interested in capital, VAISEY, J., required the addition as a defendant of the infant defendant to represent capital and in order that the argument against conceding these powers to the trustees might be presented to the court. VAISEY, J., held that neither of those two classes of property, the cash in hand or the proceeds of investments, were applicable in the purchase of land by way of investment.

The Law of Property Act, 1925, s. 28, is derived from the Law of Property Act, 1922, sched. IV. Under the previous legislation land held on trust for sale was dealt with in the Settled Land Acts, and, speaking broadly, to a certain extent and for certain purposes the statutory provisions relating to land held otherwise than on trust for sale were made applicable to land held on trust for sale. Broadly speaking, the way in which that was done was that land held on trust for sale was deemed to be settled land, but the powers in relation to it on that basis were subject to special provisions. In the Law of Property Act, 1922, a new departure was made in relation to land held on trust for sale. It was no longer by definition made settled land for the purpose of the Settled Land Acts. The method adopted was to confer on the trustees for sale certain powers under the Settled Land Acts. The Law of Property Act, 1925, was a consolidating Act, and it dealt with those provisions of the Act of 1922 which were conceived as ordinary property or conveyancing matters. The matters in the Act of 1922 which were properly thought of as settled land matters were embodied in the consolidating Settled Land Act, 1925, but the provision in sched. IV, to the Act of 1922, to which I have referred, was

brought in to s. 28 of the Law of Property Act, 1925, with an addition introduced by the Law of Property Act, 1924. One subsequent addition was made, to which I will refer.

Two observations appear to me to have some relevance to the question which we have to decide. First, the matter of land held on trust for sale is, so to speak, lifted out altogether from the settled land legislation and inserted in the property legislation. In this property legislation it is dealt with in s. 28 of the Law of Property Act, 1925, and, by reference, certain Settled Land Act powers and provisions are imported into the section. Secondly, under the old scheme, while land held on trust for sale was treated as an integral part of the settled land legislation, there was an express provision in the Settled Land Act, 1882, s. 63, forbidding the investment of capital moneys in land. Such an investment was permissible in cases which fell strictly under the Settled Land Acts when the statutory powers had been exercised and capital moneys arose from sale, or whatever it might be, and under the Settled Land Act, 1882, itself those moneys could be invested in land, but where moneys arose under a trust for sale there was an express prohibition against any such investment. Under the new scheme no such express prohibition appears. It is said that that is to be explained by the fact that the whole scheme is now different from that under the old legislation. It is true that the scheme is different, but, nevertheless, I should have thought that, in view of the language used in s. 28 of the Act of 1925—language which is, to say the least of it, ambiguous whether or not the power to invest in land is imported—Parliament, having before it the old prohibition against investment in land contained in the scheme which it was re-placing by this new scheme, would, if it had intended that prohibition to persist in the new scheme, have said so in terms. That is only, so to speak, a *prima facie* view, and could not in any way override the language of the Act if on its true construction such an investment is prohibited, but it is a circumstance which is not to be entirely disregarded, although the weight to be given to it is of a limited nature.

Section 28 (1) of the Law of Property Act, 1925, provides :

“Trustees for sale shall, in relation to land or to manorial incidents and to the proceeds of sale, have all the powers of a tenant for life and the trustees of a settlement under the Settled Land Act, 1925 . . .”

There are one or two things to notice about that. First, the trustees are to have the powers in relation to three subject-matters—(i) land, (ii) introduced by the alternative “or” is manorial incidents, and (iii) introduced by the word “and” is proceeds of sale. It is clear, and I think it is common ground, that the phrase “the proceeds of sale” in that context means the proceeds of a sale for which the trustees are trustees for sale. In other words, if the trustees in the exercise of the trust for sale receive certain proceeds, those proceeds are to be the subject-matter of the powers in question. At this stage I must refer to one argument, because I do not accept it. It is said that the opening words of s. 28 (1) must be construed as meaning that trustees for sale are to have, in relation to land and also “in relation to land with regard to the proceeds,” the powers set out. That would limit the powers to powers in respect of what I may call the administration of land, and not extend them to the application of the proceeds at large. That is a construction which I do not find myself able to accept. It involves writing into the sub-section words which are not there. The words, so far as they affect the proceeds of sale, are as follows : “Trustees for sale shall, in relation . . . to the proceeds of sale, have all the powers of a tenant for life,” and I cannot paraphrase that by saying that when the section says “the proceeds of sale” it really means the proceeds of sale in some limited relationship or to some limited extent. It appears to me that the phrase is quite unqualified. It is to be observed that the powers given are “all the powers of a tenant for life.” I do not think it

is an exaggeration to say that the word "all" in a statute is extremely recalcitrant, and if the meaning is to be cut down so as to exclude certain things which might otherwise be included by it, that must be done in the clearest possible language. The proper way of construing a word like "all" is to say that it means "all" and does not mean "some" unless one finds a compelling context which forces one to place some limitation on the word. It is important that I should mention at this stage that what the trustees are to have under the section is "all the powers of a tenant for life and the trustees of a settlement." Emphasis in the argument is laid on the word "powers," and it is pointed out that there is a well-known distinction which every lawyer will recognise between a power and a trust.

Proceeding with the section, the next sentence is :

" . . . including in relation to the land the powers of management conferred by that Act during a minority . . . "

It was suggested, but not with much force, that the presence of an express reference to that threw some light on the intention of the earlier words and indicated that they did not confer the power to invest in land. I do not find in those words any particular guidance which need delay me. Then there comes this passage, which was inserted by amendment by the Law of Property (Amendment) Act, 1926, s. 7 and sched. :

" . . . and where by statute settled land is or becomes vested in the trustees of the settlement upon the statutory trusts, such trustees and their successors in office shall also have all the additional or larger powers (if any) conferred by the settlement on the tenant for life, statutory owner, or trustees of the settlement."

It is right, I think, in construing the section, to remember that that was put in by amendment, and that in the section in its original form the words ran straight on into the following phrase :

" . . . and (subject to any express trust to the contrary) all capital money arising under the said powers shall, unless paid or applied for any purpose authorised by the Settled Land Act, 1925, be applicable in the same manner as if the money represented proceeds of sale arising under the trust for sale."

I call attention to the insertion of that paragraph by way of amendment for the reason that when the following words refer to "capital money arising under the said powers," the phrase "the said powers" must relate back to the powers—I call them the Settled Land Act powers—which were conferred on the trustees by the opening words of the sub-section. That is not disputed. The reference, therefore, to "capital money" relates to capital money arising when the said powers are exercised, and a distinction is drawn—obviously, to my mind—between the proceeds of sale mentioned at the beginning of the section, which clearly refer to proceeds of the trust for sale, on the one hand, and the capital moneys arising under the imported Settled Land Act powers, on the other hand. Obviously Parliament realised that the trustees, having regard to the grant of those Settled Land Act powers, might have in their hands moneys of a capital nature which would not fall within the description of "proceeds of sale," because they would have arisen, not by an exercise of the trust for sale, but by an exercise of one of the Settled Land Act powers, and it seems to me that the object of those words was to enable such moneys to be dealt with.

The next sentence in the sub-section is :

"All land acquired under this sub-section shall be conveyed to the trustees on trust for sale."

That sentence did not appear in sched. IV to the Act of 1922, which to that

extent, from the conveyancer's point of view, so to speak, was very defective, because it was essential in connection with such matters as conversion to know what the status of any land acquired under the new powers was to be. Was it to be land, or was it to be personalty? The effect of the introduction of that sentence was to give it the status of personalty, the same status as was originally possessed by the land originally settled on trust for sale.

A That is the form in which the relevant parts of the legislation stand. VAISEY, J., had to consider two arguments intended to establish that under these words the trustees had no power to purchase land by way of investment. The Settled Land Act powers to purchase land are to be found in s. 73 (1), para. (xi) of the Settled Land Act, 1925. That sub-section sets out, under 21 heads, the manner in which capital moneys arising under the Settled Land Act are to be applied, and I will read two of them. Paragraph (i) is purely an investment paragraph, referring to investment in government securities or other trust securities. Paragraph (xi) is a power to purchase land, which does not use the word "investment" at all. It provides:

B "In purchase of land in fee simple, or of leasehold land held for sixty years or more unexpired at the time of purchase, subject or not to any exception or reservation . . ."

C There are numberless other provisions under which the capital moneys may be applied, and I think it is fair to say that if s. 73 were to be excluded from the matters imported by the Law of Property Act, 1925, s. 28, the scope of the operation of s. 28 would be limited to an absurd degree.

D The first argument addressed to us was that s. 73 of the Settled Land Act, 1925, is excluded *in toto*. That argument was not pressed with any enthusiasm, because it was realised that not only had VAISEY, J., rejected it, but also that the acceptance of it would hamstring the beneficial object of s. 28. It was founded on the words of s. 28 (1) that trustees for sale are to have "all the powers of a tenant for life and the trustees of a settlement," and it was pointed out that s. 73 does not in terms confer powers, but imposes obligations. It

E says: "Capital money . . . shall, when received, be invested or otherwise applied wholly in one, or partly in one and partly in another or others, of the following modes," and that, it is said, is not properly described as a "power." It is said that that is a statutory obligation compelling the application of capital money in one or other of the manners indicated, but it is to be observed that under the Settled Land Act the choice of the object to which among those particular objects the money is to be applied lies with the tenant for life. It is the tenant for life who has the power to direct the application by the trustees of the capital moneys in one or other of these authorised manners, and, if the tenant for life gives no such direction, it is the trustees themselves who have a discretion as to which of those objects shall be the one to which the money is to be applied. It seems to me that, quite apart from the general overriding

G argument that the exclusion of s. 73 would operate in a ridiculous manner, the discretionary power of the trustees, or of the tenant for life if he is the person exercising it—under s. 28 it would be the trustees who would be exercising it—is a discretionary power of choice among a number of statutory objects which may properly be described as a "power," and if the draftsman of s. 28 had wished to draw a distinction between the sort of power which H the trustees have under s. 73 and "powers" in the strict sense, I can only wonder why he did not do so. He has used language that appears to me, on a fair construction, in the context and having regard to the subject-matter, to cover s. 73. That, as I say, was the view taken by VAISEY, J., and I respectfully agree with it.

The second argument presented to VAISEY, J., which was the main argument presented to us, was that s. 28 on its true construction is selective, that is to say, only some of the powers mentioned in s. 73 are imported by the words

of reference in s. 28. At the outset, I repeat that once you say that the matters mentioned in the Settled Land Act, 1925, s. 73, can properly be described as "powers," you are met by the recalcitrant word "all" for s. 28 gives, not some of the powers, because it makes no selection among the powers, but "all the powers," and it would require, to my mind, the strongest context to limit the powers conferred to a selected number among the powers. Next, it is said that when you look at s. 73 of the Settled Land Act, 1925, you find that two classes of powers—and I am calling them "powers" for this purpose—are comprised in it, and that the two classes are quite distinct—purely investment powers and powers in relation to what I may describe as administration-of-settled-land powers, meaning by that phrase sales, leases, and all the things that tenants for life generally deal with. It is said (and this is what VAISEY, J., held) that, although s. 73 is included, it is only included for the limited purpose and to the limited extent of the non-investment powers contained in it. That argument is buttressed by a number of special arguments on certain words, but before referring to them, I would call attention to one or two matters on the construction of s. 73 itself, because for the purpose of meeting this argument it is necessary to examine this contention that s. 73 is dealing with two distinct classes of power. It is to be noted that in the opening words of sub-s. (1) the matters to be dealt with in the following parts of s. 73 are described by these words: "Capital money . . . shall . . . be invested or otherwise applied wholly in one, or partly in one and partly in another or others, of the following modes." The words "or otherwise applied" must imply that investment is treated as a method of application. In other words, the section is going to indicate the permitted methods of application, one of which is investment. Looking at the various heads in s. 73, the word "investment" appears in para. (i) in reference to investment in trust securities. That is the only place in which the word occurs, and in the paragraph which deals with the purchase of land the word "investment" does not appear.

I have no doubt that land may be bought for a purpose connected with settled land, or it may be bought as an investment, or it may be bought partly as one and partly as the other, or it may be bought by trustees, the tenant for life directing the purchase, with no particular ideas one way or the other. A neighbouring farm, for instance, may be bought for the benefit of the settled land, or it may be bought as an independent acquisition having benefits and merits of its own by way of investment. It may be very difficult, in relation to a particular transaction, to say whether it ought to be dubbed an investment or a Settled Land Act transaction. That difficulty appears in other paragraphs of s. 73, for instance, para. (ii)—"In discharge, purchase, or redemption of incumbrances affecting the whole estate." It may well be that, if the money were available, it might be thought desirable to clear the estate of an incumbrance, regarding that operation as something done for the benefit of the estate. On the other hand, an incumbrance on the estate may be acquired without any eye to the benefit or otherwise of the settled land as such, but simply as an investment. If the charge was allowed to merge and disappear, it might be easier to say: "This must have been bought for the benefit of the settled land," but there is nothing to compel trustees who buy an incumbrance on the inheritance to allow it to merge in the inheritance, and they may keep it alive for such purposes as they may find convenient in the future, including a pure investment purpose. There are other paragraphs which clearly cover both pure investment purposes, pure Settled Land Act purposes, mixed purposes, or uncertain purposes where nobody has really tried to decide what is the character of the operation in question. I say that merely to show that the idea that s. 73 itself provides a guide to the dividing line between investment purposes and settled land purposes does not survive an examination

of the section itself. There is no such clear line of demarcation to be found in the section, except possibly with regard to the one case of investment in trustee securities, which is defined as such.

A It seems to me, therefore, that, so far as my consideration has gone, there is no context sufficient to cut down the meaning of the word "all" in s. 28, and that to take the view which commended itself to VAISEY, J. (and with which with all respect I am venturing to differ), really involves putting a gloss on the section, and saying that by the word "all" the legislature meant "all the administrative or settled land powers conferred by s. 73, to the exclusion of all other powers conferred by that section." I do not find myself able to take that view. There are other words in s. 28 (1) which form one of the bases of the argument :

B " . . . all capital money arising under the said powers shall, unless paid or applied for any purpose authorised by the Settled Land Act, 1925, be applicable in the same manner as if the money represented proceeds of sale arising under the trust for sale."

C It is said that it is highly unlikely that the legislature would have provided for a different application, or for the right to make a different application, of the actual proceeds of sale arising under the trust for sale and capital money arising under the exercises of the imported Settled Land Act powers. That argument I appreciate, but it is then said that the words "unless paid or applied for any purpose authorised by the Settled Land Act, 1925," according to their true construction in that context, must exclude investments. The words "paid or applied for any purpose," it is said, are not apt to describe the

D operation of investment, and the expression contemplates, therefore, that the payment or application will be exclusive of investment, and, as the ambit of this part of the sub-section ought not to be treated as being different from the ambit of the first part of the sub-section, it must follow that in the first part of the sub-section the powers are similarly limited so as to exclude investment. In my view, the argument breaks down at the outset, because the words

E "paid or applied for any purpose" appear to me to be amply capable of application, not merely to what I have described as a Settled Land Act purpose, but also to an investment purpose, and I link up that observation with the actual language of s. 73 of the Settled Land Act, 1925, itself, which, as I have said, treats investment as a method of application. So far from those words pointing to a limitation of s. 73 powers, they appear to me to be equally

F consistent, to put it at the lowest, with an inclusion of the whole of those powers. If that be the right construction of them, it will be consistent with, and will correspond to, the construction which I have provisionally put on the opening words of s. 28. The argument is also linked with the contention that the words "in relation to the proceeds of sale" are to be read as meaning "in relation to land with regard to the proceeds of sale," and that, it is said,

G would make the earlier part consistent with the limited scope of the concluding words. I have already said all that I wish to say with regard to that argument.

That is the basic ground on which I disagree with the learned judge, and, to sum it up, it lies in these propositions. The powers given by the opening words of s. 28 (1) include the powers of application and choice of application which are conferred by s. 73 of the Settled Land Act, 1925; the word

H "all" when applied to those powers, means "all," and there is no context sufficient to cut it down so as to exclude certain of those powers; there is nothing in this context to limit the powers to the powers of a tenant for life as set out in Part II of the Settled Land Act, or to limit the application of s. 73 to powers which can properly be described as settled land or administrative powers. Had some word of a less recalcitrant nature than "all" been used, the argument would have been easier to support, but, to my mind, it is difficult to understand the argument that when Parliament uses the word

"all" it leaves it to the ingenuity of the reader to find out that it means nothing of the kind. If this section was included so as to be a guide to trustees, the use of the word "all" would be little better than a trap. It is said, on broad lines, that the conception of trustees having power to invest in the purchase of land was, in a sense, a revolutionary conception, because under the old ideas "investment" in respect of land meant investment in mortgages of land. It should not be forgotten that in the course of years investments by way of mortgage have been shown to have certain disadvantages, and anyone who has spent a lifetime in the law dealing with these matters must remember many cases where what have appeared to be good mortgages on land have led to a variety of difficulties, and trustees have come to dislike them. On the other hand, there has arisen in the course of recent years a liking by trustees for the purchase of land as an investment. House property and shop property has been found to be more desirable and more stable and to involve fewer complications, and I should not be at all surprised to find that the legislature in 1922 had an eye to that, or, at any rate, did not regard it as such a shocking and disastrous and revolutionary idea as the old-fashioned practitioner might have thought it. I cannot allow the fact that the idea of investment in land may be in a certain sense a novel one to lead me to construe what seems to me to be the definite language of Parliament in a sense limited in the way suggested.

That disposes of the general question, but it still leaves the separate question in the matter of the investments which the trustees already hold. Those investments, historically, are derived from earlier sales of land, and it might be said that where trustees for sale have sold the land in pursuance of the directions of the settlement and have invested the proceeds, the whole of the trust for sale has been carried out, and, therefore, the powers given by s. 28, which are, so to speak, temporary powers pending sale, cannot be applied. I do not think, however, that s. 28 is to be limited in that way. Verbally there is, indeed, something to be said for that view. The powers conferred are powers in relation to the proceeds of sale, and it is said that once the proceeds of sale have been received and have been invested in, say, War Loan, they cease to be "proceeds of sale" for the purpose of s. 28, and are then properly to be described, not as proceeds of sale, but as investments made out of the proceeds of sale. Therefore, it is said, the power to invest in land must be limited to what in strictness can be called the "proceeds of sale," that is to say, cash. I am not clear how far the limitation is said to go. "Cash" is a loose expression. Nowadays it does not mean mere cash in one's pocket; it includes a chose in action like money on current or deposit account at the bank. At some stage, according to the argument, what starts as money received from a purchaser as the proceeds of a sale loses the character of proceeds of sale and acquires a different character, namely, that of an investment. Counsel for the third defendant, I think quite logically, accepted as the test, which he said must be applied on the facts of each particular case, the question whether an investment has or has not been made. To illustrate the idea that he had in mind, if the money was paid into a bank or put on deposit it would still retain its quality of "proceeds of sale," but if the trustees had gone into the market and bought what was intended to be an investment, then that would not be "the proceeds of sale," and it could not be sold in order that the proceeds of its sale might be applied in the purchase of land.

If I am right in my earlier observations—that s. 28 does empower the investment of cash proceeds of sale in land—it would be illogical—not that that is unexpected in a section of this kind—to find that the power to invest in land stops at the moment when trustees invest, let me say, in a trustee security or other authorised investment. It would have this further odd result, that if the trustees, having the proceeds of sale in the strict sense,

apply them (as I have held that they can apply them) in the purchase of land, that land, under s. 28 (1) is to be conveyed to the trustees on trust for sale, and if and when they sell that land the proceeds of it in their turn may properly be invested in the purchase of other land. Therefore, so long as the trustees have got land and remain trustees for sale, they can, by a continuous chain of investments in land, keep the investment in land going on for ever, but on the other hand, once that chain is broken by an investment not in land the process would be brought to an end and the power to invest the money in land would be killed for ever, because the money could never again be "proceeds of sale" in the sense desired.

- A I realise that the question is a difficult one, and one of the solutions that counsel for the first two defendants suggested does not appeal to me. It was of this nature. Looking at the concluding words of the main part of this sub-section you find that if money, the proceeds of sale, has been invested in a trust security, that money will have been invested under the powers of the Settled Land Act, the Settled Land Act gives powers to change investments, and if, by the exercise of the power, the investment is sold, it is then to be applicable, under the words of the sub-section, "in the same manner as if the money represented proceeds of sale arising under the trust for sale."
- C That would bring those moneys representing the sale money from the investment back into the opening words of the section, and would give them the status of proceeds of sale, which would mean that they, in their turn, could be invested in land. I do not like that argument, which appears to me to be attributing to Parliament a circumlocution which I do not think ought to be ascribed to it.
- D I prefer the other way in which counsel for the first two defendants put it, namely, that, in spite of an investment, "proceeds of sale" within the meaning of the sub-section are properly to be said to exist so long as they can be traced. To take the simplest possible case, if £5,000 is acquired by the sale of a house, and it is used to purchase War Loan, so long as that block of War Loan exists you can trace the proceeds of sale into it and regard it as being the proceeds of sale.
- E In the case where there is an intermingling with other types, the result may be different. I do not want to be more precise than to say that I accept the argument that so long as the proceeds can be traced they remain "proceeds of sale" within the meaning of the sub-section. Whether or not in any individual case they can be traced must depend on the facts of that case, and it is not desirable to say more about it than that.
- F Fortunately, in the present case we are not embarrassed in the application of that principle, because the investments in question do represent, in every case, the actual proceeds of the sale of land.

- I think that I have dealt with all the important points, except, possibly, s. 32 of the Law of Property Act, 1925, to which some reference was made. That section deals with settlements of personalty or of land held on trust for sale where there is an express power to invest money in the purchase of land. It deals with a much wider class of settlement than is dealt with by s. 28. It extends to personalty settlements and to cases where there is a power to invest in land included in a settlement of land on trust for sale, but the object of that section appears to me to be to get rid of the sort of difficulty that arises where land is held on trust for sale, and is, therefore, in equity regarded as personalty, and the settlement contains a power to invest money in the purchase of land without having what is very often omitted, namely, a direction that land so purchased shall be subject to the trust for sale. That gives rise to the difficulty that where land is purchased under the power, in the absence of a trust for sale in the settlement it has the quality, not of personal estate but of real estate, and s. 32 enacts that in such a case the land purchased shall be held by the trustees on trust for sale.
- G
- H

There is one matter on s. 28 which I omitted, and I think I should say a

word about it. It is with regard to the words "unless paid or applied for any purpose authorised by the Settled Land Act, 1925." I do not think it is necessary to decide it, but it appears to me that there is very good ground for the view that those words are referring to the words in s. 73 of the Settled Land Act which provide that the capital money is to be applied subject to the payment of claims properly payable thereout and to the application thereof to any authorised object for which the capital money was raised. For example, where a mortgage is raised for some specific purpose, that purpose has priority over the list of purposes set out in s. 73, and it seems to me that there is ground for thinking that the words "paid or applied for any authorised purpose" in s. 28 may be referring to that. I do not think it is necessary to say, one way or the other. I merely mention it because it took up some part of the discussion. In my opinion, the judgment of the learned judge should be reversed, and there should be a declaration that the trustees are entitled to invest not merely the cash (other than the war damage cash) that they hold, but also the proceeds of the sale of the investments (if they decide to sell them) in the purchase of land.

SOMERVELL, L.J.: I agree, and in view of the judgment which has been delivered by the MASTER OF THE ROLLS, in which he has considered the various arguments directed to the issues in this appeal, I can state very briefly the main ground on which I differ from the learned judge. **VAISEY, J.,** said ([1948] 2 All E.R. 215):

"It is possible to say that s. 73 is not an empowering section at all, but I do not decide the case on that ground."

I respectfully agree with the conclusion that the learned judge there indicates. I think it would have been impossible to exclude s. 73 from the operation of s. 28 (1), having regard to the fact that the powers conferred by the opening words of s. 28 (1) are powers, *inter alia*, in relation to the proceeds of sale. Having reached the stage, therefore, that some powers, at any rate, in s. 73 are covered by the word "powers" in the opening words of s. 28 (1), I find it impossible, for the reasons which have been given by the MASTER OF THE ROLLS, based on the presence of the word "all", to come to the conclusion that one can on any principle select certain of the things which are authorised under s. 73 and eliminate others of things which are so authorised. That is briefly my reason for rejecting the main argument on behalf of the defendants. Other arguments were based on the later words at the end of the first paragraph of s. 28 (1), and I will say a word or two about them. Assuming that counsel for the third defendant were right in submitting that the words which provide what can be done with capital money were less extensive than the powers, as I have construed them, conferred in the opening words with regard to proceeds of sale, I could not accept that as a ground for cutting down what seems to me to be plainly conferred by way of powers in the opening two or three lines. I do not accept the submission that those later words in any way restrict what can be done with capital money. There seem to me to be two possible constructions which lead to that conclusion. One is that the words "paid or applied" cover all the modes (to use a neutral expression) set out in s. 73; the other is a construction which was referred to by the MASTER OF THE ROLLS in the concluding part of his judgment—that the words "paid or applied" in this context refer to the words in the initial sentence of s. 73 (1) of the Settled Land Act, 1925. If that is right, then any capital moneys not so applied would be applicable in the same manner as if the money represented proceeds of sale arising under the trust for sale, and those words would, I think, make them subject to the same powers as the proceeds of sale referred to in the third line of the section. For those reasons I think the appeal should be allowed.

COHEN, L.J. : I agree, and as we are differing from the learned judge I think I should state shortly the reasons for my conclusions. As I follow the judgment of the learned judge, he bases his conclusions, in the main, on the view that the section was not intended to have what he regarded as the far-reaching and revolutionary effect of allowing, for the first time, proceeds of a trust for sale to be invested in the purchase of land, but he (it is his language, and not my own) grasps at two small straws to keep his main argument afloat.

- A The first argument that he fastened on was the use in s. 28 itself of the words "including in relation to the land the powers of management conferred by that Act during a minority," and he said that those words might be held to indicate, by a sort of inverse application of the *ejusdem generis* rule, that the powers previously mentioned were, or were analogous to, powers of management.
- B I have never heard before of an inverse application of the *ejusdem generis* rule, and I think it would be very dangerous here to attempt to cut down, by the application of any such principle, the wide words which precede. I think that the reason for the express mention of those particular powers, as contained in s. 102 of the Settled Land Act, 1925, was supplied by counsel for the first two defendants in the course of his argument, when he pointed
- C out that sub-s. (1) of that section begins with the words : " If and as long as any person who is entitled to a beneficial interest in possession affecting land is an infant " ; and he said that if there had not been that express mention of those powers the condition precedent to their existence might not have occurred, and, therefore, in the absence of that express mention, the trustee would not have had the powers therein conferred. The second straw was
- D s. 32 of the Law of Property Act, 1925, and with regard to that I entirely agree with the observations that were made by the MASTER OF THE ROLLS, and I need add nothing on it.

The main ground of the learned judge's judgment was based on two passages in the judgment of UTHWATT, J., in *Re Wakeman* (1). The first passage is this ([1945] 1 All E.R. 422) :

- E " As regards subject-matter the main point of the section is not to encourage dealings *in* land but to facilitate dealings *with* land, and to that end powers are given which may be duly exercised if circumstances so require."

- F I do not gain any assistance from that quotation. It is to be observed that it is only stated to be " the main point " of the section. With that I entirely agree, but it is quite consistent with that view that there is the subsidiary point, namely, to enable the trustees in a suitable case to invest in land. The other passage was this (*ibid.*, 423) :

- G " No doubt it is right, where there is used in a statute language which is capable of more than one construction, to consider and to take into account the consequences of alternative constructions and also . . . previous legislation on the same topic."

- H I respectfully agree, and no doubt that is particularly true, as counsel for the third defendant pointed out, in the case of a consolidation statute, but I think it is plain on the authorities that even as regards a consolidation statute you cannot disregard what you consider to be the plain meaning of the language used, and I agree with the MASTER OF THE ROLLS and SOMERVELL, L.J., that there is nothing here sufficiently strong to enable us to ignore what I regard as the almost imperative word " all " in the initial words of the section. I would add that I should be reluctant to be driven to the other conclusion, if only for the reason that, if we were to accept the learned judge's judgment, as it seems to me, it would leave the legitimacy of the transaction to depend not on the transaction itself but on the state of mind of the trustees who were

effecting it, a situation which I should be very loth to believe was the intention of the legislature.

There is one more thing that I desire to add. In *Re Wakeman* (1) UTHWATT, J., held that whatever might be the position so long as some land continued to be held on the trusts of the settlement, once all the land was sold the trust for sale had come to an end. That point does not arise for decision in this case, and in what I have said on the construction of this section I desire to reserve the question what the position would be if at the time when the question of investment arose no land was held on the trusts of the settlement. For those reasons I agree that the appeal should be allowed.

Appeal allowed. Declaration accordingly. Costs of all parties to be paid out of the estate.

Solicitors: *Smith & Hudson*, agents for *Rollit, Farrell & Bladon*, Hull (for the first and second defendants); *Smith & Hudson* (for the plaintiffs and the third defendant).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

HOGAN v. BENTINCK WEST HARTLEY COLLIERIES (OWNERS), LTD.

[HOUSE OF LORDS (Lord Simonds, Lord Normand, Lord Morton of Henryton, Lord MacDermott and Lord Reid), December 13, 14, 1948, February 28, 1949.]

Workmen's Compensation—Incapacity resulting from accident—Novus actus interveniens—Improper medical treatment—Ill-advised operation on injured thumb—Incapacity due to tender stump—Workmen's Compensation Act, 1925 (c. 84), s. 9 (1).

The workman, a miner, suffered from a congenital defect, viz., two top joints to his right thumb, the additional joint forming a false thumb in addition to his normal thumb. On June 19, 1946, he met with an accident at his work and fractured the false thumb. The thumb was treated by splinting, and on Aug. 19 he returned to work. The thumb, however, continued to be painful and the workman was sent by his doctor to hospital where it was discovered that the fracture had not united, and an operation was advised and performed for the removal, not merely of the false thumb, but also of the top joint of the normal thumb. On an application by the workman for compensation on the ground of pain in the stump, the county court judge accepted the view of the medical witnesses that the operation was a proper one to cure the congenital deformity but not to cure the pain consequential on the accident, and he refused compensation on the ground that the incapacity then existing was due, not to the accident, but to the operation, which "appeared to have been ill-advised."

HELD: [LORD MACDERMOTT and LORD REID dissenting]: on a true construction of the words in the Workmen's Compensation Act, 1925, s. 9 (1), "where . . . incapacity for work results from the injury," it was for the arbitrator to determine as a fact whether or not the incapacity existing at the date of the arbitration resulted from the original accident or from the operation, and, as there was evidence on which he could properly find that the incapacity resulted from the operation, there was no ground for interfering with the award. In principle, there was no conflict between the line of cases headed by *Humber Towing Co., Ltd. v. Barclay* (1911) (5 B.W.C.C. 142) and the authorities headed by *Dunham v. Clare* ([1902] 2 K.B. 292; 86 L.T. 751), and the question whether a present state of incapacity was substantially the result of the original accident or of the

later unskilful or negligent act of a doctor was to ask, in other words, whether the present incapacity was due to the original accident or to the intervention of a *novus actus* which broke the chain of causation. That question could only be answered on a consideration of all the circumstances and, in particular, of the quality of that later act or event.

Observations of DU PARCQ, L.J., in Rothwell v. Caverswall Stone Co., Ltd. ([1944] 2 All E.R. 365; 171 L.T. 298), approved.

Decision of the COURT OF APPEAL ([1948] 1 All E.R. 129), affirmed.

[AS TO IMPROPER OR UNSKILFUL MEDICAL TREATMENT, see HALSBURY, Hailsham Edn., Vol. 34, p. 864, para. 1183; and FOR CASES, see DIGEST, Vol. 34, p. 351, Nos. 2824-2828.]

Cases referred to :

- B (1) *Rothwell v. Caverswall Stone Co., Ltd.*, [1944] 2 All E.R. 350; 171 L.T. 289; 37 B.W.C.C. 72; 2nd Digest Supp.
- (2) *Humber Towing Co., Ltd. v. Barclay*, (1911), 5 B.W.C.C. 142; 34 Digest 351, 2824.
- (3) *Rocca v. Stanley Jones & Co., Ltd.*, (1914), 7 B.W.C.C. 101; 34 Digest 351, 2825.
- C (4) *Lakey v. Blair & Co., Ltd.*, (1916), 10 B.W.C.C. 58; 34 Digest 351, 2828.
- (5) *Dunham v. Clare*, [1902] 2 K.B. 292; 86 L.T. 751; 66 J.P. 612; 34 Digest 341, 2759.
- (6) *Ystradowen Colliery Co., Ltd. v. Griffiths*, [1909] 2 K.B. 533; 100 L.T. 869; 2 B.W.C.C. 357; 34 Digest 342, 2760.
- D (7) *Williams v. Graigola Merthyr Co., Ltd.*, (1924), 132 L.T. 227; 17 B.W.C.C. 202; 34 Digest 348, 2804.
- (8) *Steele v. Robert George & Co.*, (1937), Ltd., [1942] 1 All E.R. 447; [1942] A.C. 497; 167 L.T. 1; 35 B.W.C.C. 38; 2nd Digest Supp.
- (9) *Harwood v. Wyken Colliery Co.*, [1913] 2 K.B. 158; 108 L.T. 283; 6 B.W.C.C. 225; 34 Digest 348, 2803.
- E (10) *Laverick v. Gray (William) & Co., Ltd.*, (1919), 121 L.T. 289; 12 B.W.C.C. 177; 34 Digest 345, 2783.
- (11) *Doolan v. Hope (Henry) & Sons, Ltd.*, (1918), 119 L.T. 14; 11 B.W.C.C. 93; 34 Digest 345, 2782.

APPEAL by the workman from a decision of the Court of Appeal (LORD GREENE, M.R., BUCKNILL and ASQUITH, L.JJ.), dated Dec. 18, 1947, and reported [1948] 1 All E.R. 129, dismissing his appeal from an award of His Honour JUDGE RICHARDSON, made at Morpeth County Court and dated July 21, 1947.

The workman, who had met with an accident arising out of and in the course of his employment, claimed compensation under the Workmen's Compensation Act, 1925, s. 9, but the learned judge held that the incapacity existing at the date of the arbitration was due, not to the original injury, but to an ill-advised operation, and refused compensation. The Court of Appeal upheld the award, holding, reluctantly, that it was bound by authority to find against the workman. The workman's appeal was now dismissed by the House of Lords (LORD MACDERMOTT and LORD REID *dissenting*). The facts appear in the opinion of LORD SIMONDS.

H *Fenwick, K.C.*, and *W. Temple* for the workman.
Beney, K.C., and *N. Harper* for the employers.

The House took time for consideration.

Feb. 28. The following opinions were delivered.

LORD SIMONDS: My Lords, this appeal raises in the field of law relating to workmen's compensation a problem which in various aspects has long vexed the human mind, the problem of cause and effect, which in this

relation is the problem whether a particular incapacity results from a particular injury by accident arising out of and in the course of a workman's employment. It is, I think, very unfortunate that in such a case the facts should be to such a degree obscure and the judgment of the learned county court judge so terse that it has not been easy to find out what was the evidence on which his judgment proceeded or, indeed, what were the grounds of it.

The workman, Hogan, was at the date of the arbitration, out of which this appeal arises, 37 years of age and by trade a miner. He was born with a somewhat unusual congenital defect, for he had two top joints to his right thumb, a normal top joint and an additional top joint alongside it, which I will refer to as the false thumb. He had worked for three years as a coal filler and afterwards for six years as a stoneman. This change of occupation had been necessitated by an operation to his knee which had no connection with these proceedings. His false thumb does not appear to have interfered with his work. On June 19, 1946, he met with the accident on which his present claim is founded. He was shovelling stone in the employment of the respondents: a stone fell on his false thumb and caused a fracture to it. He was attended by his own doctor, Dr. Wenn, who sent him to the Royal Victoria Infirmary at Newcastle-upon-Tyne, where his injured thumb was treated by splinting. On July 1 he was examined by Mr. Raw, a surgeon, on behalf of the employers, while his thumb was still in splints. On July 19, Mr. Raw examined him again, the splint having then been removed: he found no displacement or clinical evidence of fracture, but it seems that his diagnosis was at fault. On Aug. 19, the workman returned to work, but, his thumb continuing to be painful, he again consulted Dr. Wenn and was sent by her to the Emergency Hospital at Dryburn on Sept. 3. On Sept. 12 she made a report to the employers ascribing his disablement to his congenital deformity, but on Oct. 21, having received a report from the Dryburn Emergency Hospital, which is not in evidence, she appears to have changed her opinion. At Dryburn the workman came under the care of Dr. Webb Jones. An X-ray of the false thumb revealed a fracture which had not united, and on Sept. 5 Dr. Webb Jones amputated the whole top joint of the thumb. His reason for doing so is thus summarily stated in the only notes of evidence with which the Court of Appeal and this House have been furnished. On examination Dr. Webb Jones' evidence, according to the notes, was:

"Advised amputation because of pain. On Sept. 5—not because of double joint."

Then, on his being recalled, Dr. Webb Jones' evidence was:

"Went to see doctor because of pain. Amputation due to technical considerations at time."

Your Lordships are left without any information why Dr. Webb Jones thought it expedient to remove the whole top joint of the thumb, when it was only the false thumb that was fractured. The result of the operation was unsatisfactory, for it left the workman with a tender stump which admittedly rendered him fit for light work only. It was not suggested that the amputation had been unskilfully performed.

I pause in the narrative to say that at the date of arbitration it was the incapacity due to the tender stump which was the basis of the workman's claim, and to pose the question that must be solved: "Was this incapacity the result of the injury which was caused to the workman on June 19, 1946?" I must now refer to certain further evidence as it appears in the learned judge's notes. I have already mentioned Dr. Raw. It seems that when the workman saw him on Aug. 6, he asked his advice about his false thumb. This is the note of evidence:

"Asked my advice about supernumerary thumb—told him matter between him and his doctor. Asked me what I would do. I said I would have it removed."

It is clear that Dr. Raw referred only to an amputation of the false thumb. That he thought an amputation of the whole top joint to be unnecessary appears from this further note of his evidence :

- A "December, 1946, found whole double end of thumb had been amputated—amputation not required because of injury . . . only fit for light work. Due to an amputation because of congenital deformity—not necessitated by injury."

The workman was further examined by Dr. Whyte, but only at some time after the amputation and for the purpose of giving evidence at the arbitration.

- B He saw the X-ray photograph of the fracture. His evidence was as follows :

"Present disability not due to accident, operation for congenital deformity, not necessitated in any way by accident. Looking at X-ray—fracture well out in abnormal part of thumb—no displacement. Imagine no disability."

- C In cross-examination he said :

"Operation for congenital trouble. No necessity because of fracture. Most unlikely amputation was necessary."

On this material, aided, no doubt, by his immediate recollection of the oral evidence, the learned county court judge dismissed the claim. Your Lordships have only three lines to inform you of his reasons :

- D "Onus on applicant—not satisfied incapacity due to accident. Due to operation for congenital deformity which appears to have been ill-advised. Award for respondent. Costs on Scale C."

Some further notes of the judgment were supplied to the Court of Appeal. I do not not find it easy to follow all that is in them, but they contain the salient passage to which I have already referred.

- E I have thought it necessary to refer at this length to the facts because it was urged on your Lordships that there was no evidence on which the county court judge could come to the conclusion that the present incapacity of the workman was due to anything but the original accident. It was said that the question of general importance, to which so much argument was directed, does not really arise, because the learned judge was not justified on the facts in finding that the chain of causation between the original injury and the appellant's final incapacity was broken. My Lords, I have no doubt, although I could have wished for an ampler statement, that the learned judge took the view, accepting what I understand to be the opinion of Dr. Raw and Dr. Whyte, that the amputation of the whole top joint of the workman's thumb was an ill-advised operation, which ought not to have taken place, and that the tender stump was the result of that ill-advised operation. Nor is it, in my opinion, possible for an appellate court to say that he had no material on which he could come to that conclusion. But, my Lords, though I find myself inevitably using the expression "the tender stump was the result of the operation," I do not mean to prejudice the question whether the present incapacity is the result of the original injury within the meaning and for the purpose of the Workmen's Compensation Acts. This raises directly the question of causation which I indicated at the beginning of this opinion. The Court of Appeal in the present case (LORD GREENE, M.R., and BUCKNILL and ASQUITH, L.JJ.) were unanimously of opinion that in the existing state of the law they must dismiss the appeal, for, if the county court judge found that the present incapacity was the result of an ill-advised operation, he was entitled under decisions of that court to reject the claim.

Let me then first, my Lords, say a word about the existing state of the law. The authorities have been fully examined by the Court of Appeal in the recent case of *Rothwell v. Caverswall Stone Co., Ltd.* (1). In that case SCOTT, L.J., after an exhaustive analysis of all the relevant cases, came to the conclusion that there were two lines of authority which were irreconcilable with one another, the one line consisting of *Humber Towing Co., Ltd. v. Barclay* (2), *Rocca v. Stanley Jones & Co., Ltd.* (3) and *Lakey v. Blair & Co., Ltd.* (4), the other a longer line of which *Dunham v. Clare* (5), *Ystradowen Colliery Co., Ltd. v. Griffiths* (6) and *Williams v. Graigola Merthyr Co., Ltd.* (7), may be taken as representative. Concluding that there was this conflict, SCOTT, L.J., found himself at liberty to disregard the first line and to apply the principle of the second line of authority to the case then under appeal. But his view was not accepted by the other members of the court, LUXMOORE and DU PARCQ, L.JJ., who found no such irreconcilability. I do not propose again to review the cases, for in the judgment of DU PARCQ, L.J., I find so lucid and accurate a summary of the result of them that I will respectfully adopt and repeat it. DU PARCQ, L.J., said ([1944] 2 All E.R. 365):

"In my opinion, the following propositions may be formulated upon the authorities as they stand: first, an existing incapacity 'results from' the original injury if it follows, and is caused by, that injury, and may properly be held so to result even if some supervening cause has aggravated the effects of the original injury and prolonged the period of incapacity. If, however, the existing incapacity ought fairly to be attributed to a new cause which has intervened and ought no longer to be attributed to the original injury, it may properly be held to result from the new cause and not from the original injury, even though, but for the original injury, there would have been no incapacity. Secondly, negligent or inefficient treatment by a doctor or other person may amount to a new cause and the circumstances may justify a finding of fact that the existing incapacity results from the new cause, and does not result from the original injury. This is so even if the negligence or inefficient treatment consists of an error of omission whereby the original incapacity is prolonged. In such a case, if the arbitrator is satisfied that the incapacity would have wholly ceased but for the omission, a finding of fact that the existing incapacity results from the new cause, and not from the injury, will be justified. In stating these propositions I am far from seeking to lay down any new principles of construction. I have sought only to collect, by a process of induction, such general, and necessarily vague, rules as seem to emerge from the decided cases. Such rules do no more than indicate the bounds within which an arbitrator is free to decide—the province of fact. It is constantly being said, and must always be remembered, that the arbitrator is the sole judge of the facts."

In this statement I think that the most important word is the permissive "may" which is used four times, for it emphasises the fact which, to my mind, lies at the root of this controversy, that it is, first and last, a question of fact for the arbitrator to determine from what a present incapacity results. He is not, for instance, bound to find that an incapacity results from an operation, but he *may* do so, and, if he does and there is evidence to support his finding, that is conclusive. To this matter I return later.

Assuming, then, that this statement fairly represents, as I think it does, the present state of the law, it is clear that the Court of Appeal in this case rightly held that they could not in face of the learned arbitrator's finding decide in favour of the workman. For he was entitled to find that the present incapacity resulted from the ill-advised operation. It follows then that, if the appeal is to succeed in this House, it must be on the footing that the second

A of the propositions enunciated by DU PARCQ, L.J., is wrong in law, or, to put the matter in more concrete form, that, when in *Humber Towing Co., Ltd. v. Barclay* (2), the Court of Appeal sent the case back to the learned county court judge for reconsideration because he had not considered "whether the condition of the man when he came before him was or was not due substantially to the original accident or to the mismanagement of the bonesetter," that court required him to consider a question which was in law irrelevant. So, also, it would follow in the present case that the question which BUCKNILL, L.J., following the *Humber* case (2), as I think he was bound to do, thus stated: "Was this pain in the stump left after the operation due to the original accident or was it due to a misconceived operation which ought not to have been performed by a skilful and thoughtful doctor?" was equally irrelevant.

B Before I return to the all-important words in the Workmen's Compensation Act, 1925, which have given rise to this controversy, I would recall what is said to be the principle of the conflicting line of authority headed by *Dunham v. Clare* (5). In that case, COLLINS, M.R., said ([1902] 2 K.B. 296):

C "The question whether death resulted from the injury resolves itself into an inquiry into the chain of causation. If the chain of causation is broken by a *novus actus interveniens*, so that the old cause goes and a new one is substituted for it, that is a new act which gives a fresh origin to the after-consequences."

D It does not appear to me, my Lords, that in principle there is any conflict between the two lines of cases that I have cited. The question whether a present state of incapacity is substantially the result of an original accident or of the later negligent act of a doctor is to ask, in other words, whether the present incapacity is due to the original accident or to the intervention of a *novus actus* which breaks "the chain of causation," and the question can only be answered on a consideration of all the circumstances and, in particular, of the quality of that later act or event.

E So, my Lords, I turn again to the Workmen's Compensation Act, 1925. The same words occur both in s. 8 (1), "where death results from the injury," and in s. 9 (1), "where total or partial incapacity for work results from the injury." These few and plain words have to be construed, and at once I ask what possible question of law is involved in their interpretation or application. Is it not a question of fact and nothing else, whether "death results from the injury?" And, if the arbitrator finds the fact, that is the end of the matter,

F unless his finding is open to attack for the reasons which make any finding of fact impeachable. In what respect does an arbitrator misdirect himself or otherwise go wrong in law, if, finding as a fact that an operation has been ill-advised and that a present incapacity is due to that operation, he says that for the purpose of s. 9 of the Act that incapacity is the result of that operation and is not the result of an original injury? I would not, my Lords,

G embark on a discussion more suitable (as DU PARCQ, L.J., pointed out in the *Rothwell* case (1)) to logicians and schoolmen than to a court of law, nor would I substitute their language for the plain English of the Act of Parliament, but it is convenient to use this degree of licence and observe that an arbitrator must be entitled to make his award in the manner above indicated, unless he is bound to treat the original accident as a *causa sine qua non* and every-

H thing that afterwards happens as a result of that cause. This, at least, I would say is not the meaning that can be ascribed to the relevant words. Equally I would say, agreeing here with SCOTT, L.J., in the *Rothwell* case (1), that it is not for the arbitrator to seek out only the *proxima causa* and disregard all other matters. These are refinements which can only lead to confusion. The general words of the Act point to one conclusion—that the arbitrator reviewing all the facts must determine as a fact one way or the other whether the incapacity is the result of the accident. That there will be apparent

inconsistencies and inequalities is inevitable. So there must be while human affairs remain infinitely variable and human judgments differ on questions of fact. But in the vast majority of cases the broad common sense which distinguishes those whose duty it is to administer this Act will lead them to a conclusion consistent with its language and purpose. Nothing could, in my opinion, be more dangerous than to attempt further to limit the bounds of that province of fact which is within their sole jurisdiction. On these considerations I see no ground for disturbing the decision of the learned county court judge.

In coming to this conclusion I have got some assistance from the not infrequent cases in which the employer has contended that the workman's incapacity is the result of his unwillingness to undergo an operation or other curative treatment. It has been held that in such cases, where the workman's refusal has in fact been unreasonable, he is not entitled to compensation. Such a view has the authority of this House: see *Steele v. Robert George & Co. (1937), Ltd.* (8). It has, indeed, been suggested that this is the result of some kind of "judicial legislation," whatever that phrase may mean. From this suggestion I must respectfully dissent. It is to my mind plain that such a case affords a good illustration of the common sense meaning to be attributed to the section. The man in the street and with him the learned arbitrator are entitled and are likely to say of a man, who could be cured, if he would, that his present continued incapacity is the "result" of his obstinacy and unreason, and, if they do say so, that is the end of it. On this point, also, I am happy to find myself in agreement with what DU PARCQ, L.J., said ([1944] 2 All E.R. 367) in *Rothwell's* case (1). In this connection it was urged that it would be strangely hard on the workman, if, on the one hand, he was liable to lose his compensation if he refused to submit to treatment, and, on the other, liable also to lose it, if, submitting to treatment, he was the victim of negligence and his incapacity could be said to be due to that. My Lords, I recognise that such a case would bear hardly on the workman. But the possibility of such hardship cannot outweigh the broad considerations which have led me to the conclusion that I have already expressed. It would be a strange thing if an arbitrator were debarred from finding as a fact that a present state of incapacity is due to the negligence of a surgeon because in another case a state of incapacity might be held to be due to the workman's unreason.

I move that this appeal be dismissed with costs.

LORD NORMAND : My Lords, I accept without reservation the analysis and construction of the evidence and of the judgment of the arbitrator which are before the House in the judgment of my noble and learned friend on the Woolsack. On the facts as stated by my noble and learned friend a question arises under s. 9 (1) of the Workmen's Compensation Act, 1925, whether the workman's incapacity at the time of the arbitration resulted from the injury by accident, and there is a preliminary question of the construction of the words "where total or partial incapacity for work results from the injury," which I will consider on the assumption in the first instance that it is an open question.

Compensation under the Act is for "injury by accident" and only for "injury by accident"; injury not caused by an accident arising out of and in the course of the employment gives no right to compensation. That is made plain by the terms of s. 1. Sections 8 and 9 are concerned only with the amount of the compensation in fatal and non-fatal cases respectively, and they must be read so as to conform to this principle, that compensation is for injury caused by the accident and not for injury otherwise caused. It was necessary to provide for the two possibilities that the conduct of the workman or the conduct of a third party might have contributed to the causation of the accident. There are, therefore, express provisions in s. 1

defining the effect on the workman's claim for compensation when the injury by accident is attributable to his misconduct or when he was at the time of the accident in breach of a regulation applicable to his employment, and in s. 30 provision is made for the distribution of liability between the employer and a third party when the injury by accident was caused in circumstances creating a legal liability in the third party. There are no corresponding provisions to deal with the situation which arises when, subsequently to the accident, the continuing injury and the associated incapacity have been prolonged or aggravated by the conduct of the workman or of a third party. These possibilities are sufficiently covered by the principle that the employer is liable in compensation only for the injury caused by the accident and no further, and no express provisions were needed. So also in the sections dealing with the amount of the compensation (ss. 8 and 9) no express provisions were needed. But it is necessary, in order to give effect to the principle that there is no liability to pay compensation except for the injury by accident, to read the words "results from" as raising the issue of the causal relation between the incapacity and the injury by accident as it is commonly understood in the ordinary affairs of life and as it would be understood by a jury in an action of damages for personal injury, if it was necessary to discriminate between injury and damage caused by the defendant's negligence and injury and damage caused by the lack of due skill or reasonable care in the treatment of the original injury. Neither the words themselves, nor the context, suggest that any special qualification of the conception of causation is intended. But, in truth, the question is no longer open. In *Steele v. Robert George & Co.* (1937), *Ltd.* (8) a case came before this House in which the employer contended that the payment of compensation should be ended because the workman had unreasonably refused medical treatment. VISCOUNT SIMON, L.C., had to consider the legal basis of this contention, and he said ([1942] 1 All E.R. 448) :

"... the Workmen's Compensation Acts do not contain any express provision that the weekly payment during incapacity shall come to an end, or be reduced, if the workman unreasonably refuses to undergo a surgical operation or other medical treatment for the purpose of ending, or diminishing, the incapacity. This ground of relief to the employer is based on the view that, if the proximate cause of the continuing incapacity is the unreasonable refusal of a workman to avail himself of surgical or medical skill, it can no longer be said that the incapacity 'results from the injury' within the meaning of the Workmen's Compensation Act, 1925, s. 9, after the time when the rejected remedy might be confidently expected to bring about a cure."

Accordingly, the words "results from" have now been held to have the meaning which, apart from authority, I was disposed to assign to them, and the question which the arbitrator ought to put to himself in a case of this sort is whether the continuing incapacity is in the ordinary sense caused by the original injury or by the unskilful or negligent conduct of the doctor or surgeon. The form of the question is not meant to exclude and ought not to exclude in an appropriate case the answer that the original injury and the conduct of the doctor are each partly the cause of the continuing incapacity.

A question of causation is a question of fact, and it is none the less a question of fact though a finding that a particular event is the cause of another event, or of a particular condition of things, must involve the selection of the particular event as the cause out of the total complex of events and conditions which are necessary to the production of the given result and the treatment of the rest as a background which is practically irrelevant. It is thus that we proceed in ordinary practical affairs, and is thus that an arbitrator must also proceed in deciding a question of causation. The limits to the finality of a finding on causation by an arbitrator are that it, like other

findings of fact, must not proceed on a misdirection in law and that it must be supported by legal evidence.

My Lords, the first proposition argued for the workman did not lack boldness. It was maintained that the learned arbitrator ought to have directed himself that, if the incapacity would not have existed if there had been no previous injury by accident, the incapacity must be attributed to the previous injury. It has often been said that Latin phrases cannot help to solve problems of causation, but they are sometimes so convenient a label that the careful avoidance of them becomes an inverted kind of pedantry. I will, therefore, not apologise for observing that the workman's argument is an attempt to set up the *causa sine qua non* as in law a sufficient basis for liability under the Workmen's Compensation Act. I think it unnecessary to spend further time in refuting an argument which is so opposed to the reasonable man's conception of causation. Counsel for the workman then fell back on the proposition that, if the workman acted reasonably in submitting to a surgical operation for the cure of his incapacity, the employer must be liable to pay compensation for any incapacity remaining after the operation, though it might be the consequence of the surgeon's ignorance or lack of skill or negligence. This is only the *causa sine qua non* applied as the ground of liability in the restricted field of injury by accident followed by medical and surgical treatment, and the restriction appears to be arbitrary. None of the authorities cited supports the proposition. I do not, however, intend to review them, for they were considered by DU PARCQ, L.J., in *Rothwell v. Caverswall Stone Co., Ltd.* (1). I agree with him and with my noble and learned friend on the Wool-sack that it is erroneous to regard the line of authority consisting of *Humber Towing Co., Ltd. v. Barclay* (2), *Rocca v. Stanley Jones & Co., Ltd.* (3) and *Lakey v. Blair & Co., Ltd.* (4) as inconsistent with the line of authority represented by *Dunham v. Clare* (5). The result of the authorities is stated by DU PARCQ, L.J., in the *Rothwell* case (1) in a passage which I would respectfully adopt.

[LORD MACDERMOTT then cited the passage from the judgment of DU PARCQ, L.J. ([1944] 2 All E.R. 365), quoted by LORD SIMONDS in his opinion, and continued:] Three comments may be made: that in this formulation the question whether an incapacity results from the negligence or inefficient treatment of a doctor or from the injury by accident is treated as a question of fact; that no radical distinction is drawn between medical or surgical treatment and any other event which may have intervened and which may operate as a "new cause"; and, lastly, that it is assumed that neither the workman nor the employer had control over the event or act which is treated as the new cause. If either had had control the problem of liability would at once be easily solved. It must next be considered whether that formulation of the existing state of the law is also sound in law.

I start from the proposition, which seems to me to be axiomatic, that if a surgeon, by lack of skill or failure in reasonable care, causes additional injury or aggravates an existing injury and so renders himself liable in damages, the reasonable conclusion must be that his intervention is a new cause and that the additional injury or the aggravation of the existing injury should be attributed to it and not to the original accident. On the other hand, an operation prudently advised and skilfully and carefully carried out should not be treated as a new cause, whatever its consequences may be. A Court of Appeal would, therefore, be entitled to hold that an arbitrator had misdirected himself if he had made an award in favour of a workman in respect of an incapacity which he had found to be attributable to the surgeon's actionable negligence, or if he had refused to make an award where the injury by accident still subsisted, though in an aggravated form, after an operation prudently advised and properly carried out. But these limiting cases, which exemplify

A the duty of the court to decide questions of remoteness as matter of law, a duty which provides a necessary safeguard against aberrations from the standard of sound practical sense, are somewhat theoretical. For the issue before the arbitrator is not whether the surgeon's conduct was actionable, and a finding that it was actionable would be out of place. He must find the facts and among them the cause of the incapacity. If his finding is not repugnant to good sense, it cannot be set aside because a Court of Appeal may think that he has failed to place the surgeon's conduct at the correct point in the nicely graduated scale of human misfortune and fallibility that extends from venial error of judgment to actionable want of skill or negligence. That is a question on which judges and juries may differ and it is not to be solved by treating it as a question of law.

B In the present case the arbitrator found that the tenderness of the stump of the thumb, which was the subsisting injury and the cause of the existing incapacity, was the result of the ill-advised amputation. There was evidence to support the finding and I can find no misdirection apparent or latent. It was objected that the arbitrator had not found as a fact that the incapacity resulting from the original accident would have ceased if it had been suitably treated. I think that the law is accurately stated in the judgment of DU PARCQ, L.J., already referred to :—When the error of the surgeon is an error of omission by which the original incapacity is prolonged, the arbitrator, if he is satisfied that the incapacity would have wholly ceased but for the omission, may find that the existing incapacity results from the omission. This, however, is not a case of omission, and the objection is ill-founded when the surgeon's active intervention has been found to have been a new cause of a new incapacity, and that, I think, is the effect of the arbitrator's decision read in the light of the evidence. The arbitrator on the view which he took was, I think, entitled on the evidence to treat the original disability as displaced by a new disability.

E I would venture to add that the attribution of an incapacity to unreasonable refusal of treatment and the attribution of an incapacity to a misdirected, unskilful or negligent operation both rest on the same basis of experience that doctors and surgeons are generally to be trusted to give their patients prudent advice and to carry out treatment with reasonable care and skill; otherwise to refuse their advice might not be unreasonable, and the consequences of ill-directed or unskilful or negligent treatment might reasonably be regarded as the result of the original injury.

F I agree that the appeal should be dismissed with costs.

G **LORD MORTON OF HENRYTON:** My Lords, it is necessary first to form a conclusion as to the precise meaning which should be attached to the briefly expressed findings of the learned county court judge, sitting as arbitrator under the Workmen's Compensation Act, 1925. I refer to him hereafter as "the arbitrator." He found that the operation carried out by Dr. Jones was "ill-advised," and I think he meant that it was ill-advised whether it was undertaken with the sole object of curing the pain whereof the workman complained, or wholly or partly with the object of removing the super-normal thumb, which the arbitrator described as a "congenital deformity." I think, also, that the arbitrator must have formed the view that the partial incapacity which existed immediately before the amputation would have disappeared in course of time. This seems to have been the view of Dr. Raw and Dr. Hedley Whyte and I think the arbitrator was accepting their evidence when he found that the incapacity existing at the time of the arbitration was "due to operation for congenital deformity which appears to have been ill-advised." As the arbitrator is the sole judge of fact under the Act, there are only two questions for this House to consider: (i) Did the arbitrator misdirect himself? (ii) If not, was there evidence on which the arbitrator could properly find that

the incapacity existing at the date of the arbitration resulted from the operation and not from the original accident ?

In *Humber Towing Co., Ltd. v. Barclay* (2) the workman had broken both the bones of his forearm. A local bonesetter set the arm so negligently that the union was a vicious one and the arm became practically useless. The Court of Appeal thought that the proper question for the arbitrator to consider was whether the condition of the man, at the date of the arbitration, was due substantially to the original accident or to the mismanagement of the bonesetter. I think that in the present case the arbitrator must have asked himself a similar question, and if this is the right question for the arbitrator to consider, there can be no misdirection. It is said, however, on behalf of the workman, that this is the wrong question, and various other forms of question were suggested as being more appropriate. The *Humber* case (2) and other authorities were recently very fully considered by the Court of Appeal in *Rothwell v. Caverswall Stone Co., Ltd.* (1). In that case, the majority of the court held that the earlier cases on the subject were not contradictory or irreconcilable.

[LORD MORTON OF HENRYTON cited the propositions stated by DU PARCQ, L.J. ([1944] 2 All E.R. 365) in the *Rothwell* case (1), and continued :] I gratefully accept these propositions as correctly stating the law. When DU PARCQ, L.J., said (*ibid.*):

"This is so even if the negligence or inefficient treatment consists of an error of omission whereby the original incapacity is prolonged. In such a case, if the arbitrator is satisfied that the incapacity would have wholly ceased but for the omission, a finding of fact that the existing incapacity results from the new cause, and not from the injury, will be justified."

I think that the passage was based on the decision of the Court of Appeal in *Rocca v. Stanley Jones & Co., Ltd.* (3). In my view, however, *Rocca's* case (3) was one of improper treatment, and not of omission to treat: see the judgment of EVE, J. (7 B.W.C.C. 107) and the reference to *Rocca's* case (3) by LORD COZENS-HARDY, M.R. (10 B.W.C.C. 64, 65) in *Lahey v. Blair & Co., Ltd.* (4). I am by no means satisfied that in the case of a mere omission to treat the injury, without any refusal of treatment by the workman, an arbitrator would be justified in finding that the incapacity resulted from anything other than the injury. I need not, however, pursue this matter, as the case now before your Lordships' House is far removed from a case in which there has been an error of omission. Later, DU PARCQ, L.J., said ([1944] 2 All E.R. 365):

"It is apparent that the line between those cases where a 'supervening cause' aggravates the injury and yet is not to be regarded as superseding the injury as the cause from which the incapacity results, and those others in which the cause is 'new' and the existing injury can be held to result from it alone, is a line which can only be drawn after a full examination of all the relevant facts, and then not with well-defined precision. No rule can be laid down by reference to which the arbitrator, having ascertained the facts, will be enabled to put the case infallibly on the right side of the line. If, however, he confines himself to the question formulated by LORD COZENS-HARDY, M.R., in the *Humber Towing Co.'s* case (2), his own intelligence will be his surest guide, and he will, I think, be all the more likely to come to a right decision if he refuses to be drawn into a discussion of the more subtle refinements of the theory of causation."

My Lords, with these observations I entirely and respectfully agree, and they lead me to the conclusion that the arbitrator asked himself the correct question in the present case and that there was no misdirection.

I now turn to the question whether there was evidence on which the

arbitrator could properly arrive at the conclusion that the workman's incapacity was due to the operation, and not to the original accident. The position at the time of the arbitration was that the workman had an existing partial incapacity for work. His right thumb had been removed and he had a stump, which, to quote Dr. Hedley Whyte, was "conical and tender." There is no doubt that it was this disability which, at that time, rendered it impossible for the workman to do more than light work, but there is equally no doubt that on June 19, 1946, the workman had suffered personal injury by accident arising out of and in the course of his employment, and if that injury had never occurred amputation would never have taken place. In these circumstances the arbitrator had to decide the question posed in the *Humber* case (2). It is true that the answer which he gave involves hardship to the workman, since the operation would never have been performed if the original accident had never occurred, and it cannot be said that the workman acted unreasonably in taking professional advice, and in submitting to the operation which was recommended by Dr. Jones. On the other hand, it may be said that hardship would result to the employers if they were held liable to pay compensation by reason of an operation which had been held as a fact to have been ill-advised. I think that the consideration of questions of hardship is of no real assistance in construing s. 9 (1) of the Workmen's Compensation Act, 1925, and I have endeavoured to disregard them. The arbitrator is the judge of fact, and, in my view, there was evidence on which he was justified in arriving at the findings of fact which I have already summarised. On these findings of fact he was justified in forming the conclusion that the workman's incapacity was due "substantially" to the ill-advised operation. This being so, whether or not I should have arrived at the same findings of fact on the evidence, I can see no ground for interfering with the award. I would dismiss the appeal.

LORD MACDERMOTT : My Lords, it is agreed that the appellant workman was injured by accident arising out of and in the course of his employment by the respondents and also that he is partially incapacitated for work. The question for decision is whether on the facts and findings of fact the injury and the incapacity are so related as to satisfy the condition precedent to compensation which is laid down by the Workmen's Compensation Act, 1925, s. 9 (1), in the words, "where total or partial incapacity for work results from the injury." The problem of causation thus presented necessarily hinges on the meaning and scope to be given to these words according to the true intentment of the Act, for the right to compensation is entirely statutory and independent of liability at common law. It will be convenient in the first place to consider this question of construction without reference to the series of decisions in the Court of Appeal which were cited during the argument.

My Lords, the outstanding purpose of the Workmen's Compensation Acts (in cases where death has not occurred) has been, from the beginning, to provide some means of livelihood for the workman who, by reason of accidental injury arising out of his employment, has suffered a loss of earning capacity. The relief thus afforded was a practical measure directed to the realities of a situation in which the injured workman was often without redress and unable to support himself or his dependants. With this background the words "results from" ought not, in my opinion, to be interpreted in a technical or narrow fashion or with undue regard for common law rules. I think they must be read in the light of common experience and prevailing conditions and as applicable to the sort of world which the ordinary injured workman has to face. They must be wide enough to span changes brought about by the conjoint effect of the injury and natural processes, whether anticipated or not. A trivial flesh wound admits some infection producing a permanent incapacity for work, or it acts on some existing condition so as to create a disability where there was none before. In neither case would it now be disputed that the incapacity "results from"

the injury, although the latter has become but one of several causes, and not necessarily the outstanding cause at that. It is, I think, also clear that these words can embrace changes due to the conjoint effect of the injury and human intervention, but the extent to which this is so is not authoritatively defined, particularly in the field of surgical treatment, which is that germane to this appeal.

My Lords, it cannot be doubted that this legislation, with its references to medical referees, medical examinations and duly qualified medical practitioners, contemplated that a workman's injury might require surgical advice and treatment and that this might have some effect on the degree or duration of his incapacity. The workman's attitude to such treatment is, therefore, regarded as important. If he fails to submit to a medical examination (as required by ss. 17 and 18 of the Act of 1925) his rights are suspended. It may also be very relevant in applying the words of s. 9 (1), for, if the workman unreasonably refuses to undergo a surgical operation likely to terminate his incapacity, he cannot recover. That has been settled by a long series of cases including several decided in this House. The *ratio decidendi* appears sufficiently from the passage in the speech of VISCOUNT SIMON, L.C., in *Steele v. Robert George & Co. (1937), Ltd.* (8) which reads thus ([1942] 1 All E.R. 448):

"... the Workmen's Compensation Acts do not contain any express provision that the weekly payment during incapacity shall come to an end, or be reduced, if the workman unreasonably refuses to undergo a surgical operation or other medical treatment for the purpose of ending, or diminishing, the incapacity. This ground of relief to the employer is based on the view that, if the proximate cause of the continuing incapacity is the unreasonable refusal of a workman to avail himself of surgical or medical skill, it can no longer be said that the incapacity 'results from the injury' within the meaning of the Workmen's Compensation Act, 1925, s. 9, after the time when the rejected remedy might be confidently expected to bring about a cure."

Now, if the workman has acted reasonably and a proper operation has been performed with skill and care, but without attaining the desired result—and it is common knowledge that that sometimes happens—the chain of causation must surely remain intact, and that must be the case even though there has been some change in the nature of the disabling condition as a consequence of the operation. If, for example, the amputation of a useless and disabling finger is advisable, but a skilled operation for the purpose leaves a tender stump which is equally incapacitating for work, I do not think it would occur to anyone to say that the operation was *novus actus interveniens*, and that the ultimate incapacity was not the result of the injury. In cases of this sort, s. 9 (1) of the Act of 1925 must be taken as envisaging, in accordance with the ordinary experience of mankind, the unsuccessful as well as the successful operation, and as wide enough to keep the former within the statutory channel of causation. But what if a proper operation, reasonably submitted to by the workman, is unsuccessful because of some negligence or inefficiency on the part of the surgeon? If that element makes a difference and suffices to break the chain of causation, it means that the treatment contemplated by the sub-section must, in its results, be without flaw or defect due to human failing or mistake. My Lords, I cannot think the legislature so intended. If I am correct in the views above expressed as to the background against which s. 9 (1) is to be read, I think it must follow that the terms of the sub-section are wide enough to allow for the fact that this is an imperfect world and that even the skilled and competent err on occasion. When, in order to rid himself of his incapacity for work, a workman reasonably submits himself to surgical treatment at the hands of a qualified practitioner, why should the risk of some error of judgment or some lack of efficiency on the part of the latter in the course of

the treatment fall on the workman so as to rob him of his right to compensation ? I can see nothing in the statute to demand such a result which, to my mind, would be completely at variance with its true intent. Nor can I see how the view in favour of such a result can be maintained compatibly with the now firmly established doctrine of unreasonable refusal. It is difficult to understand how any refusal could be unreasonable if, however bright the prospects of operative treatment might be, the workman's advisers were justified in saying to him : " Before you decide you must remember that, if the surgeon—no matter how good he may be—fails to effect a cure because of some slip or mistake on his part, your right to compensation under the Act will be gone." It is one thing to venture on the personal risks of an operation and quite another to do that and hazard, in addition, the existing right of receiving a means of livelihood. I venture to think that it would be altogether alien to the spirit of this legislation were the employer entitled to say : " If you refuse this operation your compensation will stop ; but if you undergo it and it fails because of the surgeon's fault your compensation will stop in that case also." I can discern nothing in the Act to warrant the conclusion that it intended to put a reasonable workman on the horns of such a cruel dilemma. It will be remembered that, if the accident is due to negligence on the part of the workman, that, in itself, will not preclude him from the benefits of the Act unless, as provided by s. 1, it is of the grave nature therein described, and then only in certain circumstances. It would be strange, indeed, if the legislation, which thus ignores the workman's fault to such a degree, had the effect of terminating his compensation because, in the course of treatment which it contemplates, and which the workman is powerless to control, there was fault on the part of the surgeon.

My Lords, the foregoing observations, if well founded, do not mean that all untoward events following on the reasonable workman's submission to surgical aid come within what I have termed the statutory channel of causation. While, as it seems to me, s. 9 (1) plainly contemplates that mistakes may happen in the course of treatment, it is, I think, equally clear that it does not contemplate every mishap that may occur to the workman as a patient. Accordingly, if he gets burned because the hospital he has entered goes on fire, or if he is maimed because the ambulance taking him, say, from hospital to a convalescent home is involved in a street accident, I would not regard the sub-section as broad enough to link the resulting incapacity with the original injury. And I would be disposed to come to the same conclusion for the same reason in regard to acts of surgical negligence of such an exceptional kind that what has been done cannot fairly be related to an endeavour to cure or reduce the infirmity—as, *e.g.*, where a workman loses a sound limb because the surgeon takes him for somebody else. As always, it is difficult to trace the dividing line, but I think it may be said, on the basis of the general considerations I have mentioned, that professional fault on the part of one to whom the workman has properly submitted himself will be within the statutory channel, and not *novus actus*, if it occurs in the course of advising or carrying out treatment with the intention of curing or reducing the workman's incapacity for work. In my opinion, there is no material distinction in this connection between fault in diagnosis or choice of treatment and fault in the actual process of treatment. If the workman reasonably submits to the ministrations of a skilled and duly qualified surgeon who happens to make a mistake, I do not think it matters for the purposes of s. 9 (1) whether the mistake was made before or during the operation.

It will be convenient at this stage to summarise the conclusions I would reach apart from authority and looking only to the terms and purpose of the statute. They may be stated thus. (i) It is within the contemplation of s. 9 (1) that an injured workman will seek skilled surgical aid, and that such aid will be as the world knows it, not always successful and sometimes at fault. (ii) If a workman reasonably seeks such aid, and, by some fault on the part of

the surgeon in advice or treatment given to reduce or remove the incapacity, the workman is not cured but remains incapacitated, then the incapacity will be the result of the injury within the meaning of s. 9 (1).

My Lords, I am not aware of any decision binding this House to a different view of the law. In the Court of Appeal, however, another opinion has been maintained in a series of cases commonly called the *Humber* group and of which the most important are *Humber Towing Co., Ltd. v. Barclay* (2), *Rocca v. Stanley Jones & Co., Ltd.* (3), and *Lakey v. Blair & Co., Ltd.* (4). In my opinion, these decisions were wrong in law and should be overruled. In the *Humber* case (2) the court held that the county court judge ought to have found "one way or the other" whether the workman's condition "was or was not due substantially to the original accident or to the mismanagement of the bonesetter," the latter having produced a vicious union of the workman's forearm by his negligence. I do not think that was the right question. Neither in that decision nor those which followed it was an attempt made to ascertain the policy of the Act and the scope of its relevant words. The court seems to have assumed that, if there was one substantial cause, there could not be another. Whether the workman had acted reasonably in submitting to treatment by a bonesetter was not discussed in the judgment and there was, accordingly, no consideration of the important question whether the effect of treatment reasonably and properly submitted to was within the statutory channel. The succeeding cases in this group but emphasise the error. I need not examine their facts in detail. They have been reviewed in the vigorous dissenting judgment of SCOTT, L.J., in *Rothwell v. Caverswall Stone Co., Ltd.* (1), and I find myself in substantial agreement with his criticisms. I may observe, however, that in *Lakey v. Blair & Co., Ltd.* (4), it is plain that SCRUTTON, L.J., while regarding himself as bound by the earlier cases, was obviously alert to the other view, as in the course of his judgment he said (10 B.W.C.C. 66):

"I can quite understand its having been said, when an accident happens, it is reasonable for a man to go to a doctor, and there is nothing unreasonable in saying that the consequences of the accident are the consequences which happened to him from taking the reasonable course of going to a doctor, which may include that the doctor himself has made a mistake."

My Lords, the issue posed by the words of s. 9 (1) involves an issue of fact, but it cannot on that account be said that the enactment has left the arbitrator at large as to how he should decide it. Like many issues of fact, it has to be settled according to law and may be the subject of misdirection. It has to be decided in conformity with the scope and meaning of the words which the statute has used for effecting its purpose. The *Humber* case (2) did not decide that the issue was purely one of fact. It laid down a test to be applied and *Rothwell's* case (1) and this case, as well as others, were decided by the Court of Appeal on the basis that that test had become binding as a matter of law. If, as I think, the test was erroneous and insufficient to meet the requirements of the statute, it is not a sufficient answer to the present appeal to say, as do the employers, that the arbitrator was the sole judge of fact and that there was evidence to support his findings. The meaning of the Act must be ascertained and applied to his conclusions.

Counsel for the appellant workman relied on another group of Court of Appeal decisions, commencing with *Dunham v. Clare* (5), in which compensation was held to be payable although the death or incapacity was immediately due to some supervening cause of a natural kind—in most of the cases, a bacterial infection. These authorities did not raise any question of incompetent treatment and are, therefore, distinguishable on their facts from the *Humber* group. But, though this distinction may justify the view that the Court of Appeal was bound to follow that group on similar facts, I respectfully agree with the

opinion of SCOTT, L.J., in *Rothwell's* case (1) that these two lines of authority conflict in their underlying principles. If I am right in the conclusions I have formed as to the meaning of the enactment, I think it must follow that there is no sound ground on which incapacity due to supervening bacterial infection can be distinguished from incapacity due to mistaken surgical treatment reasonably undergone by the workman. Both events are incidents of the everyday world and both, in my view, are recognised by the policy of this legislation. A It is unfortunate that *Dunham v. Clare* (5), the earliest of these decisions, was not considered in the *Humber* case (2), as, had it been, I cannot but think a closer approach to the intention of the statute would have followed.

I turn now to the facts material to this appeal. They must be gleaned from notes of the evidence and judgment which are meagre to a degree. It is regrettable that this should be so in a case of such importance to the workman and the operating surgeon. A careful scrutiny of all the available material makes it possible, however, to reach the following conclusions which are not, I believe, now in dispute. B (a) The operation for the removal of the whole top joint of the workman's right thumb was advised and performed by the operating surgeon as a cure for the pain due to the original injury which was then causing an incapacity for work. C (b) The operation, though performed with due competence, was unsuccessful in that it left a tender stump causing an incapacity for work. (c) The learned judge has found that the operation was "ill-advised." The facts on which he held this are too briefly stated to be weighed, but there was evidence to justify this finding and it must be accepted. (d) The workman acted reasonably in undergoing the operation. There is no express finding D on this, but it was not disputed and could not well be, having regard to the admitted facts. There was no suggestion that the operating surgeon was other than fully-qualified and competent and it is clear that the workman sought his aid on the advice of his own doctor, given when he complained of pain after a period of light work. My Lords, the finding that the operation was "ill-advised" means, at least, that it was not the apt way of dealing with the E limited problem of the pain caused by the unhealed fracture. I doubt if it means more, but its implications are open to question and it may be that it was intended as a finding that the treatment was wrong and the surgeon inefficient to the point of negligence. For the purposes of this opinion I shall so assume. The assumption, however, will not avail the employers if the conclusions at F which I have arrived as to the true construction of the statute are sound. From these it follows that the learned county court judge misdirected himself. He should have inquired (i) if the workman was reasonable in undergoing the operation, and (ii) if the surgeon's fault occurred in the course of advising or carrying out treatment aimed at curing the incapacity. As, had he done so, the answer to both questions would have been in the affirmative, I am of the opinion, for the reasons already given, that the appeal should succeed. I G would, therefore, allow it with costs here and in the courts below.

LORD REID : My Lords, the decision of this case depends on the true interpretation of the phrase "results from the injury" in s. 9 (1) of the Workmen's Compensation Act, 1925. If personal injury by accident arising out of and in the course of his employment is caused to a workman, compensation is payable "where total or partial incapacity for work results from the injury." H In the present case it is admitted that the workman's original incapacity resulted from injury by such an accident and that an incapacity still exists. The question is whether the workman's present incapacity results from that injury by accident.

There are many ways in which incapacity which was originally caused by injury by accident can be aggravated or prolonged by something which happens after the accident. It is clear that, if that subsequent event had nothing to do with the original injury and is now the sole cause of the incapacity, the present incapacity can no longer be held to result from the original injury.

The highest argument put forward for the workman was that, if a subsequent event could not have happened but for the original injury, then anything that results from that subsequent event must be held to result from the original injury. That would mean that, if the ambulance taking the injured man to hospital were involved in a road accident and the man was killed, or if he died as a result of food poisoning in the hospital, his death would result from the injury by accident. Assuming that the man's injury had not so weakened him as to contribute to the fatal result, I would hold in such a case that the death did not result from the injury. I think that the word "results" here implies a degree of causation which does not exist merely because one event could not have happened if another had not happened first.

On the other hand, it is not necessary that the injury by accident should be the sole or even the chief cause of the present incapacity in order that that incapacity should result from the injury. In *Harwood v. Wyken Colliery Co.* (9) the workman had sustained injury by accident to his knee which was sufficient to cause incapacity. He then contracted disease of his heart which was also sufficient to cause incapacity. His contracting this disease had nothing to do with the injury. His incapacity was, therefore, not solely due to the injury, but it was held to result from the injury so as to entitle him to compensation. In *Laverick v. William Gray & Co., Ltd.* (10) an injury by accident to the man's finger was aggravated by syphilis so that the finger had to be amputated. The arbitrator found that, if there had not been this aggravation, amputation would not have been necessary, and it was almost certain that the man would have been fit for work before the date of his decision. SWINFEN EADY, M.R., said (121 L.T. 292):

"It is the original trouble resulting from the accident aggravated by syphilis that the workman is now suffering from, and not merely this subsequently contracted disease."

In this case the principle was adopted which was applied in *Doolan v. Henry Hope & Sons, Ltd.* (11). That was also a case of subsequently contracted disease and BANKES, L.J., put the question thus (119 L.T. 17):

"Is the workman's condition of which he is complaining in fact due to the original injury, whatever it was, aggravated by infection or disease, or is his condition in fact due to infection or disease quite independent of the original injury?"

On the facts of the case it was held that the subsequent entry of the disease germ was a severable and independent cause and that the incapacity did not result from the original injury. It does not matter that the subsequent aggravating event was not a natural or probable result of the original injury. In *Dunham v. Clare* (5) erysipelas set in and the man died. This was a most unusual development, but it was held that the question was: Did the death in fact result from the injury?—and not: Was it a natural and probable result of the injury? The words of COLLINS, M.R., have often been quoted with approval. He said ([1902] 2 K.B. 296):

"The question whether death resulted from the injury resolves itself into an inquiry into the chain of causation. If the chain of causation is broken by a *novus actus interveniens*, so that the old cause goes and a new one is substituted for it, that is a new act which gives a fresh origin to the after-consequences."

It is needless to cite further authorities. Leaving aside for the moment the cases when the new cause which prolongs the incapacity is wrong medical or surgical treatment or an unreasonable refusal to undergo treatment, I think that it has been rightly established as regards all other cases that death or incapacity can be the result of more than one cause and that, if one of its

causes is injury by accident, that is sufficient to bring the case within the Act. An incapacity may result from the injury although it also results at the same time from another independent cause. If liability to pay compensation is to cease, not only must a new cause of incapacity come in, but the old must go out : there must no longer be any causal connection between the injury by accident and the present incapacity.

A Is the rule the same when the new cause which prolongs the incapacity is wrong medical or surgical treatment ? The first of the series of cases which deal with this matter is *Humber Towing Co., Ltd. v. Barclay* (2). In that case the workman, who had both bones in his forearm broken by an accident, went to a bonesetter and the bones were so badly set that complete recovery was not possible. In an application by the employers for review, the arbitrator did not deal with the question of what was the cause of the man's incapacity at that time and on appeal the case was sent back. COZENS-HARDY, M.R., said (5 B.W.C.C. 144) that the arbitrator :

" . . . ought to have found one way or the other whether the condition of the man when he came before him was or was not due substantially to the original accident or to the mismanagement of the bonesetter."

C The next case in the series is *Rocca v. Stanley Jones & Co., Ltd.* (3). In that case the setting of a bone was found to be "a case of very bad surgery." The arbitrator found that, if the workman had been properly treated, he would already have recovered. EVANS, P., said (7 B.W.C.C. 104) that the arbitrator had found :

D " . . . that although there was an accident arising out of and in the course of the employment of this man, the incapacity from which the man was suffering, and in respect of which he was seeking compensation, was not due to the accident at all, but was due to the treatment he received at the hospital."

E The next case is *Lakey v. Blair & Co., Ltd.* (4). There the workman had suffered injury by accident to his big toe. Three doctors, including a specialist chosen by the man's own doctor, thought that amputation was unnecessary, but the man's own doctor thought otherwise, and the toe was amputated. It was held that the amputation was unnecessary and that the man's subsequent incapacity was due to the unnecessary operation and not to the original injury. The employer was, therefore, not liable to pay compensation. SCRUTTON, L.J., said (10 B.W.C.C. 66) :

F "The learned county court judge has asked himself the very question which two Courts of Appeal have said is the right one : Was the present condition due to the effects of the accident, or to the improper treatment by his doctor ?"

G If this is the correct test in all cases when there has been inefficient medical treatment, it prevents the arbitrator from finding that the man's incapacity is due both to the original injury and to the wrong medical treatment : it requires him to choose between these two causes and, presumably, to choose whether it is now the original injury or the wrong medical treatment which is chiefly responsible for the man's condition. *Dunham v. Clare* (5) was not cited in any of these cases and there was no discussion whether the question approved in these cases implied a different test from that which had been approved in other cases dealing with *novus actus interveniens*, or whether there was any justification for a different test in this class of case.

H I have stressed the difference between the form in which questions were framed in these different cases because I think that it may largely account for the diverging lines of authority. Whether the incapacity were prolonged by the unlikely entry of a germ or by the equally unlikely inefficiency of the doctor, I think that, if the question were put as BANKES, L.J., put it in *Doolan*

v. *Hope* (11)—Is the workman's condition now due to the original injury aggravated by the infection (or the doctor's treatment) or is it due to the infection (or treatment) quite independently of the original injury?—in most cases the answer would be that it was due to the original injury aggravated by the infection (or treatment). But, if the question were put in the same cases as *SCRUTTON, L.J.*, put it in *Lakey v. Blair & Co., Ltd.* (4)—Was the present condition due to the effects of the accident or to (the infection or) the improper treatment by his doctor?—in most cases the answer would be that it was due to the infection or the improper treatment. I can see no difference in principle between the two classes of case. An injured man is equally unable to avoid the risk of his injury being aggravated by the invasion of a germ and the risk of it being aggravated by human error. I agree with the expression of opinion by *LORD GREENE, M.R.*, in this case ([1948] 1 All E.R. 131):

“ . . . an incapacity caused immediately by unskilful treatment may, in truth, be due to the accident, and, on any proper theory of causation, ought to be attributed to the accident and not to the unskilful treatment, provided that recourse to the treatment was the natural and reasonable consequence of the accident.”

I would prefer to make a slight modification and to say that it ought to be attributed to the accident as well as to the unskilful treatment. It is enough that the accident is a cause of the present incapacity—it need not be the sole cause.

The first case in which there was a full citation of authority was *Rothwell v. Caverswall Stone Co., Ltd.* (1). In that case it was found that under proper treatment the man's incapacity would not have lasted more than six weeks, and that his incapacity after that time was wholly due to negligent treatment by the doctor. For the employers it was argued that, on the authority of the three cases to which I have just referred, the man was no longer entitled to compensation. *SCOTT, L.J.*, took the view that these cases were inconsistent with the line of cases beginning with *Dunham v. Clare* (5), that it was, therefore, open to the Court of Appeal to reconsider the matter, that the principle established in these latter cases ought to prevail, and that the workman ought to succeed. *LUXMOORE, L.J.*, and *DU PARCQ, L.J.*, held that the two lines of authority were not necessarily inconsistent and that they must follow the line of authority beginning with the *Humber Towing Co.* case (2) and decide against the workman. I think that they were right in so holding. It might be right where the new cause which prolonged the incapacity was wrong medical treatment to apply a different test from that applied when the new cause was of another kind: there would be no inconsistency in doing so. The question whether there ought to be this difference was not open to the Court of Appeal in *Rothwell's* case (1) and it was not open to the Court of Appeal in the present case, but I think that it is open to your Lordships.

I do not think that much assistance towards the decision of the present case can be got from the authorities which have established the rule that, if an injured workman unreasonably refuses to undergo treatment and it can be shown that the proposed treatment would in all probability have ended his incapacity, he is no longer entitled to compensation. In the most recent case in this House, *Steele v. Robert George & Co. (1937), Ltd.* (8), the rule was said by *LORD WRIGHT* ([1942] 1 All E.R. 450) to be “a piece of judicial legislation.” I do not find difficulty in accounting for a rule which prevents a man from taking advantage of his own unreasonableness by claiming compensation which he could not have claimed if he had acted reasonably. I think that prolongation of a man's incapacity by his doctor's negligence resembles prolongation by infection of the wound much more closely than it resembles prolongation by the man's own unreasonableness, and I see no reason why an exceptional

rule which applies when a man has been unreasonable should also apply when he has been unlucky in his doctor.

I recognise that a rule which has stood for nearly forty years ought not lightly to be altered. If it seemed likely that arrangements for the future have been made in reliance on what appeared to be settled law, that would be a strong reason for maintaining the existing rule. But, if this appeal is allowed,

A I do not see how any such embarrassment can follow. It may be that a certain number of cases will be found to have been decided or settled adversely to the workman which ought to have been decided or settled otherwise. But that does not appear to me to be a sufficient reason for refusing compensation now, if your Lordships should think that on a correct interpretation of the statute the learned arbitrator has misdirected himself and that compensation is due.

B What then is the existing position of the law? I should like to adopt the statement of DU PARCQ, L.J. ([1944] 2 All E.R. 365) in *Rothwell's case**(1).

[LORD REID cited the passage quoted by LORD SIMONDS and continued:]

Let me, however, now assume that it is too late to review the rule that wrong medical treatment may break the chain of causation so that its effect cannot be held to result from the original injury. I do not think that it has ever been

C decided what degree of error or inattention is necessary to bring this rule into operation. It is clear that there are many cases of wrong treatment which cannot have this effect. A medical man may have to act in an emergency or in circumstances where there are no facilities for full diagnosis, or he may be given wrong or inadequate information by the patient or those looking after him. Moreover, there must be a permissible margin of error even for the doctor or surgeon who is highly efficient: the highest degree of skill on every occasion cannot be expected of any man. It could not, I think, be maintained that the chain of causation is broken by a mistake which is not in any degree blameworthy. Treatment by a doctor whose skill had never been of the highest order, whose methods were rather out of date and who had no access to elaborate equipment, might well be much less efficient than the treatment which

E would have been given by a first-class specialist equipped with every modern discovery and invention, and the difference might easily lead to the prolongation of an incapacity which would otherwise have been completely cured. I do not think that such a degree of inefficiency has ever been held to be *novus actus interveniens*. I do not find in any of the cases any warrant for applying the doctrine of *novus actus interveniens* unless there has been grave lack of skill

F or care on the part of the doctor. Indeed, I think that the dividing line between that degree of lack of skill or care which may break the chain of causation and that degree which will not ought to be the dividing line between that degree of lack of skill or care which may make the doctor liable in damages and that which will not.

I now turn to consider what in the present case was the fault of the doctor

G concerned. No lack of care has been suggested. The employers' case must be that the decision of Dr. Webb Jones to amputate the whole top joint of the workman's thumb involved such a lack of professional skill as to amount to *novus actus interveniens*, or, rather, that the facts found by the learned county court judge were such as to entitle him to reach that result. The notes of the learned judge, even with the additional notes accepted in the Court of Appeal,

H are so brief as to make it difficult to be sure what his findings of fact were. It is possible that he intended to find that in amputating the whole joint Dr. Webb Jones had a double object: that the operation was intended not only to remove the pain which resulted from the injury by accident and was at that time the cause of the workman's incapacity, but also to avoid the chance of further trouble by removing the whole of the deformed joint. But I do not think that this was the finding of the learned arbitrator. Dr. Webb Jones' evidence, according to the notes was:

"Sept. 3, 1946. Dryburn Emergency Hospital X-rayed un-united fracture. Complained of pain. Advised amputation because of pain. On Sept. 5—not because of double joint."

There was apparently no cross-examination directed to show that stopping the pain was not his sole object and that, in fact, it was because of the double joint that he decided to do as he did. It was never put to him that, if his sole object had been to stop the pain, a less extensive operation would have sufficed. A I agree with the analysis of the evidence and the findings by LORD GREENE, M.R., and with his conclusion that the judge was not questioning the truthfulness of Dr. Jones when he said why he performed the operation. It follows that the amputation was an operation intended, and solely intended, to remedy the effects of the accident. But the learned judge has found that it was a bad operation for this purpose. That it would have been a good operation if performed for a different purpose appears to me to be quite irrelevant. Once B it is clear that Dr. Jones was acting with the sole object of remedying the injury by accident, the only question is whether he acted with such lack of medical skill that his operation amounted to *novus actus interveniens*. The only finding of the learned judge which reflects on Dr. Jones' skill is that the operation was "ill-advised." This is not amplified in any way. I accept it C as a finding that Dr. Jones made an error of judgment, but it does not, in my opinion, amount to a finding that this was a culpable error or an error which a reasonably skilful and careful doctor would not have made, and there does not appear to have been any evidence which would have justified a finding D to this effect. I am not prepared to hold that an action by a medical man against which nothing can be said except that it was ill-advised is sufficient to bring the case within the principle of the earlier cases. In the *Humber Towing Co.* case (2) the workman went to a bonesetter, and the result was a condition which a qualified doctor could only have produced by grave negligence. It is worthy of note that in that case what COZENS-HARDY, M.R., thought wrong (5 B.W.C.C. 143) was that the employer should be :

" . . . an insurer of the medical man, the chemist, and the nurse who attended the man, and . . . liable in the event of any of them being guilty of gross negligence, which gross negligence might be found as a fact to be the real cause of the disability at the time the matter came before the county court judge." E

I do not think that COZENS-HARDY, M.R., would have said the same if all that had been said against the treatment was that it was ill-advised. In *Rocca's* case (3) the setting of the bone was found to be a case of very bad surgery. In *Lahey's* case the workman's doctor obstinately persisted in a course which he knew was disapproved by a number of other doctors, including a specialist. I see no reason why the scope of these authorities should be extended, and I think that it would have to be extended if it is to cover the present case. F G On this ground, also, I think that the appeal should be allowed.

There is a further reason which is of some importance. There is no finding that any other treatment would have been successful or even would probably have been successful in curing the workman's incapacity before the date of the arbitrator's decision. No doubt, an express finding to this effect might be dispensed with, if it could be inferred from the notes that some alternative H treatment had been suggested and accepted by the arbitrator as likely to lead to recovery before that date, but it is a feature of this case that no witness appears to have given definite evidence as to what ought to have been done to cure the pain or how long the incapacity would have lasted under proper treatment. So far as I am aware, it has never been held that *novus actus interveniens* is a reason for stopping compensation from the date of the *novus actus* : before compensation can be stopped it is essential to prove

that, if there had been no *novus actus*, the incapacity resulting from the original injury would have ceased. It was argued that that is not necessary in this case because here the operation did not prolong the old incapacity: it created a new incapacity in respect of which no compensation is payable. If that were so, it would, I think, necessarily mean that, from the day of the operation which removed the cause of the old incapacity, no more compensation was due, because the old incapacity had gone: and it would not matter that, if there had been no operation, the original incapacity would have continued in existence and compensation would still have been payable for a considerable time. Hitherto, the doctrine of *novus actus interveniens* has operated so as to relieve the employer from paying more than he would have had to pay if there had been no *novus actus*. It would be novel and, I think, unjustifiable to hold that wrong medical treatment allows the employer to pay less than he would have had to pay if the right treatment had been applied. But, unless that novel view is accepted, compensation cannot be terminated until the time has come when the right treatment would have ended the incapacity, and there is nothing to show that that time has come in this case.

Appeal dismissed with costs.

Solicitors: *Hyde, Mahon & Pascall*, agents for *Watson, Burton, Booth & Robinson*, Newcastle-upon-Tyne (for the workman); *Gregory, Rowcliffe & Co.*, agents for *Cooper & Jackson*, Newcastle-upon-Tyne (for the employers).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

Affirmed. C.A. [1949] 2 All E.R. 1003.

Re REES' WILL TRUSTS. WILLIAMS v. HOPKINS AND OTHERS.

[CHANCERY DIVISION (Vaisey, J.), February 24, 25, 1949.]

Will—Gift to trustees as trustees—Validity.

A testator, after appointing his friend H. and his solicitor W. to be executors and trustees of his will (thereinafter referred to as "my trustees"), devised and bequeathed all his property, subject to the payments of his funeral and testamentary expenses and debts, to "my trustees absolutely they well knowing my wishes concerning the same and [I] direct them to permit my brother L.J.R. to have and receive the rents and profits of my property at V. . . . during his lifetime." L.J.R. predeceased the testator. Before signing his will the testator had intimated to H. and W. that he desired them after his death to make certain gifts, which amounted in value to some £8,000, and he then told them that they were to have the surplus for their own use. His residuary estate amounted to more than £30,000.

HELD: on the true construction of the will, the gift was made to H. and W. as trustees, and, the court being bound to disregard any evidence to the contrary, they were not beneficially entitled to the surplus.

Irvine v. Sullivan, (1869) (L.R. 8 Eq. 673), and *Re Foord*, ([1922] 2 Ch. 519; 128 L.T. 501), considered.

[AS TO EVIDENCE TO VARY TERMS OF WILL, see HALSBURY, Hailsham Edn., Vol. 34, pp. 169, 170, para. 221; and FOR CASES, see DIGEST, Vol. 44, pp. 617-621, Nos. 4447-4509.]

Cases referred to:

- (1) *Irvine v. Sullivan*, (1869), L.R. 8 Eq. 673; 43 Digest 572, 208.
- (2) *Croome v. Croome*, (1889), 61 L.T. 814; *affirmg.*, (1888), 59 L.T. 582; 43 Digest 718, 1565.
- (3) *Re Foord*, [1922] 2 Ch. 519; 128 L.T. 501; 43 Digest 718, 1566.
- (4) *Blackwell v. Blackwell*, [1929] A.C. 318; 140 L.T. 444; Digest Supp.

- (5) *Re Keen*, [1937] 1 All E.R. 452; [1937] Ch. 236; 156 L.T. 207; Digest Supp.
- (6) *Re Cooper*, [1939] 3 All E.R. 586; [1939] Ch. 811; 161 L.T. 127; Digest Supp.

ADJOURNED SUMMONS to determine whether, on the true construction of the will of Thomas Richard Rees, an absolute gift to trustees (as such) imported a gift to them beneficially of a surplus fund remaining after certain wishes communicated to them by the testator during his lifetime had been complied with. VAISEY, J., held that there was no gift beneficially to the trustees. The facts appear in the judgment. A

Jennings, K.C., and *Michael Bowles* for the plaintiff, the surviving executor.

R. H. Walton for the first and second defendants, personal representatives of a deceased executor. B

Edwards Jones for the defendant, Thomas J. Thomas, entitled on intestacy.

Ungoed-Thomas, K.C., and *Rowe Harding* for the remaining defendants, entitled on intestacy.

VAISEY, J.: This summons primarily raises a pure question of construction, and the document which falls to be construed is the will of the Rev. Thomas Richard Rees, who died on Sept. 9, 1944. By cl. 2 of the will, which was dated July 29, 1936, the testator, after revoking former wills, appointed two persons to be executors and trustees of the will. One was a great friend of his, Thomas Hopkins; the other was his trusted legal adviser, a solicitor, Mr. Roger Williams, who had acted for him for many years and was, no doubt, much in his confidence. Those two persons were stated by the testator to be referred to in the latter part of his will as "my trustees." Clause 3 contains a devise and bequest of the whole of the testator's property, subject to the payment of his funeral and testamentary expenses and debts, to the two persons I have named whom he calls, as he said he would, "my trustees." That gift is expressed to be made to them absolutely, and then follow the words: "they well knowing my wishes concerning the same." After that the testator directs them to permit his brother, who, in fact, predeceased him, "to have and receive the rents and profits" of certain specified property during his brother's lifetime. The will also contained a charging clause which authorised Mr. Roger Williams to make professional charges, a privilege which is expressed to extend also to any other solicitor, accountant, or other professional person who might become an executor of the will. On Mar. 2, 1945, probate of the will was granted to the two executors. The testator left a residuary estate amounting to upwards of £30,000 in value. The executor, Thomas Hopkins, died on Sept. 12, 1945, and his legal personal representatives are before the court as defendants. C D E F

The summons is supported by an affidavit of Mr. Roger Williams which I regard as a most proper and candid account of the circumstances which it was right to lay before the court. He tells me that the testator, who was a bachelor, had no near relations except the brother named in the will and a number of cousins; that the testator's chief concern seemed to have been for his brother's welfare, and that he had, so far as the deponent knew, no interest in or contact with the cousins; and that the testator frequently discussed what he should do with his property, and mentioned, in addition to his desire that his brother should be provided for, that a certain housekeeper should be rewarded for her services, and that there should be gifts, including charitable gifts, to other persons and objects. The testator appears to have had no definite wishes, but to have said at some time that he did not want any of his property to go to any relative other than his brother. In the end, after discussion, the testator decided to leave his estate, as he did, to the deponent, Mr. Williams, and his friend Thomas Hopkins in trust as regards the specifically described property for this brother for life on the understanding that effect should be given to G H

certain wishes which he had communicated to them before signing his will. The wishes he desired the trustees to implement were nine in number and consisted of gifts of sums amounting to about £8,000 in favour of various named persons, a church, the Society for the Propagation of the Gospel, the Diocesan Pensions Board, and the housekeeper to whom I have already referred, who was to have his house and contents and the sum of £1,000. Then this statement appears in the affidavit: "Any surplus was to be retained by us for our own use." The deponent, Mr. Williams, very properly, felt somewhat uneasy as to the form of the will, and, indeed, pressed the testator to make another will in more explicit terms, but the testator relied on his friends to do what was right and proper and in the end he did not make any further disposition.

Nobody disputes or doubts that the particular directions which the testator indicated to the trustees must be carried out, but the difficulty arises with regard to what is to be done with the substantial surplus. I think that it is not unreasonable to suppose that, if the testator could be heard to say what he wanted or what he meant by his will, he would say that he wanted Mr. Williams and Mr. Hopkins to share that surplus between them, but it is a well settled principle of law that if, on the true construction of a will, a gift is made to a person as a trustee, evidence is not admissible to show that he was intended to take beneficially. For that proposition, *Irvine v. Sullivan* (1) and *Croome v. Croome* (2) are authorities. It is a principle which may (and, possibly, in this case does) operate to defeat *pro tanto* the wishes of the testator. That being the general principle of law, I turn again to the will. These two people were not only appointed executors; they were also appointed trustees. The trusts which they were intended to carry out are somewhat difficult to define, although, undoubtedly, they include the life interest of the brother in the property indicated in the will and also the carrying out of the known wishes of the testator to which I have already alluded.

There is a good deal of authority on this matter which is very well summarised in THEOBALD ON WILLS, 10th ed., p. 339. If I could have construed this will as though it were a gift to these two persons subject to the performance of certain trusts a different position would have arisen, but, in my judgment, this is plainly a gift to these two persons as trustees. They were so closely connected with the testator that it would not be surprising if he chose them to be the objects of his bounty in view of his lack of near relatives, but this case is not the same as those cases in which the legatees were in the position of a son or a parent or a fiancée, as in *Irvine v. Sullivan* (1). These persons are here only named in the will as executors and trustees. In so short a will as this, one would have thought that the emphasis in cl. 2 whereby they were appointed to those offices was something which could hardly have been forgotten in the latter parts of the document.

The statement of law in the passage to which I have referred in THEOBALD at p. 339 is as follows:

"If there is a gift intended to be beneficial to the legatee, and an obligation is then imposed on the legatee, which does not exhaust the subject-matter of the gift, the effect is the same as if it were a gift subject to the obligation. The case is more difficult if there is a gift to several persons as joint tenants subject to trusts and those persons are also executors or trustees of the will. In such a case the donees *prima facie* do not take beneficially, though there may be expressions in the will sufficient to give them the beneficial interest subject to the performance of the trusts. If the gift is upon trust, *prima facie* the donee can take nothing beneficially, though the trusts declared may not exhaust the property. But the question is one of construction upon the whole will, and where the donee in trust is a wife or relative, whom the testator may be supposed to have intended to provide for, and there are other circumstances to assist the construction, the proper con-

clusion may be that the donee is to take subject only to the partial trust declared. Words indicating an intention that the donee is to take beneficially, such as for his own use and benefit, or absolutely, are of course of great weight in rebutting a trust."

In *Irvine v. Sullivan* (1) the testator appointed A., B. and C. as trustees and gave them his property on trust for sale. Then he gave the residue to the lady to whom he was betrothed trusting "she will carry out my wishes with regard to the same with which she is fully acquainted." There it was held that the lady in question took the estate beneficially. At first sight the facts were not unlike the facts here, but they seem to me to differ in several respects including, in particular, that there trustees of the will were named and appointed to carry out the trusts and the lady who was engaged to be married to the testator was the sort of person for whom one would assume that it was likely he would wish to provide. In *Croome v. Croome* (2) the opening words of the judgment of COTTON, L.J., are a useful guide to the solution of this kind of controversy, but they are of general application and do not really refer to the difficulty arising in the present case, which is that the alleged beneficiaries are, in fact, described as, and, undoubtedly, are for many purposes, trustees of the will itself. I was also referred to *Re Foord* (3) where there was a gift to a sister, the will being a very inartistic, home-drawn one. The words there were: "All my effects I leave absolutely to my sister on trust to pay my wife £300 a year." It was held that the sister took the property subject to the annuity.

In the present case, however, I construe this will as a gift to the trustees as trustees who had bound themselves in honour to carry out the directions the testator had given to them. Even assuming that the testator, as I think I probably may, had expressed the wish that they should take the surplus, I still think, having regard to the words of this will, that I should be unable to hold that they did become beneficially entitled. I do not say that I cannot receive evidence of the wish so expressed as part of the story, but it seems to me that, if I held that these two legatees could take the property absolutely, although, as a matter of construction, they were designated throughout the will as trustees, I should be disregarding the principle of equity which I have mentioned. If I hold, as I do, that, on the true construction of this will, the gift is made to them as trustees, evidence to show that they were intended to take beneficially is evidence to which I am bound to pay no attention.

The only effect which I can give to this will in equity is to say that these two persons became trustees (a) for the particular beneficiaries indicated in Mr. Williams' affidavit, and (b) as regards the surplus fund, for the statutory next of kin of the testator and not for themselves. The costs of all parties as between solicitor and client must be taxed and paid out of the estate in due course of administration.

Order accordingly.

Solicitors: *Chamberlain & Co.*, agents for *Beor, Wilson & Lloyd*, Swansea (for the executor); *Barlow, Lyde & Gilbert*, agents for *Rutter & Senior*, Bromyard, Herefordshire (for the first and second defendants); *J. T. Lewis & Woods*, agents for *Alexander & Thomas*, Ystalyfera (for the defendant, Thomas J. Thomas); *D. Miles Griffiths & Co.*, agents for *John O. Morgan*, Ystalyfera (for the remaining defendants).

[Reported by H. McL. MORRISON, ESQ., Barrister-at-Law.]

Re NEW ROCK COLLIERY CO., LTD.
THE COMPANY v. MINISTRY OF FUEL AND POWER.

[CHANCERY DIVISION (Vaisey, J.), February 23, 1949.]

Coal—Nationalisation of industry—Interim income—“Last complete accounting period”—Accounts of company made up quarterly, but embodied in annual account—Coal Industry Nationalisation Act, 1946 (c. 59), s. 22 (3) (c).

A The Coal Industry Nationalisation Act, 1946, s. 22, which deals with the method of satisfying the right of expropriated concerns to interim income, provides by sub-s. (3): (c) . . . a concern's . . . comparable ascertained revenue . . . shall be taken to be either . . . the amount of its profits and gains . . . computed on income tax principles subject to such adaptations as may be prescribed, for its last complete accounting period before July 1, 1946, or the average of the amounts of its profits and gains . . . computed for its two complete accounting periods last before July 1 in the years 1944 and 1945 respectively (any such amount for any accounting period of more or less than twelve months being adjusted to a twelve months' equivalent thereof).

B
C A company from the date of its incorporation made up its accounts quarterly on the last day of March, June, September, and December, and each quarterly account was audited and entered in the company's private ledger. Until 1938 for the purposes of income tax the figures for the four quarters ending in December in each year were aggregated, but thereafter the accounts for the four quarters ending in September in each year were combined, and the combined account as on September 30 was also entered in the private ledger. The annual account presented to the annual general meeting of shareholders was the September account, the quarterly accounts not being presented. The company elected to have the computation under s. 22 (3) (c) based on its last complete accounting period.

D
E HELD: the last complete accounting period for the purposes of s. 22 (3) (c) was the quarter ending on June 30, 1946.

Jenkins Productions, Ltd. v. Inland Revenue Comrs. ([1944] 1 All E.R. 610; 170 L.T. 292), distinguished.

[FOR THE COAL INDUSTRY NATIONALISATION ACT, 1946, s. 22 (3), see HALSBURY'S STATUTES, Vol. 39, pp. 278, 279.]

F Case referred to:

(1) *Jenkins Productions, Ltd. v. Inland Revenue Comrs.*, [1944] 1 All E.R. 610; 170 L.T. 292; *varying*, [1943] 2 All E.R. 786; 2nd Digest Supp.

G ADJOURNED SUMMONS to determine the “last complete accounting period” of the plaintiff company for the purposes of the Coal Industry Nationalisation Act, 1946, s. 22 (3) (c). The facts appear in the judgment and are summarised in the headnote.

Wilfrid Hunt for the company.

McMullen for the Minister of Fuel and Power.

H VAISEY, J.: This summons raises a very short, but not easy, question as to the interpretation of a section of the Coal Industry Nationalisation Act, 1946. By s. 19 (2) of that Act it is provided that a nationalised company, if I may so call it, is entitled to certain interim income for a period between what is described in the Act as a primary vesting date and the date on which the final compensation is to be satisfied. That interim income is to be paid and computed in accordance with the provisions of s. 22 of the Act, and that computation is directed to be based on income tax principles by reference

to the profits of the company for its last complete accounting period before July 1, 1946, or an average of its profits over two such periods. The choice is, apparently, that of the company in question. In the present case the plaintiffs, the New Rock Colliery Co., Ltd., elected to choose its last complete accounting period and not an average of two periods. At the end of s. 22 (3) (c) are these words: "any such amount for any accounting period of more or less than twelve months being adjusted to a twelve months' equivalent thereof." Those A words, in my judgment, plainly indicate that the relevant accounting period may be twelve months, less than twelve months, or more than twelve months, according, I suppose, to the practice of the company or concern claiming the benefit of the interim income.

The facts in the present case are somewhat unusual in that the plaintiff company has ever since its incorporation had its accounts made up and balance B sheet produced quarterly for the periods ending on the last days of the months of March, June, September and December. I am further told that in the preparation of each such quarterly account it has always been the company's practice to make an inventory and valuation of stock at the accounting date, C to bring the valuation into account, to make various adjustments, and to create appropriate reserves, each quarterly account being audited as soon as possible after the end of the quarter and written up in the company's private D ledger. To compute the company's income tax liability, the practice down to 1938 was to add together the income of the four quarters of the calendar year, that is, the year ending on Dec. 31, but after 1938 the four accounts taken were those preceding Sept. 30, and the combined account as on Sept. 30 in each year was written up in the private ledger. The private ledger, therefore, contains not only the quarterly accounts as they were made up every E three months, but also the combined account as made up for the four quarters ending Sept. 30 in each year. The accounts presented to the shareholders at the annual general meeting were the four quarterly accounts combined into one account in respect of the year ending, in recent years, on Sept. 30, and the necessary auditor's certificate was appended thereto. The shareholders at the annual general meeting did not receive the quarterly accounts.

The figures in the present case work out like this. If we take the three months which ended on June 30, 1946, as being the last complete accounting period before July 1, 1946, we get a figure of approximately £21,500 per annum, the three months' profit being £5,382. If we take the twelve months ending F on June 30, 1946, we get a total of £13,492, whereas, if we go back to the twelve months ending on Sept. 30, 1945, we get the much smaller figure of £2,278. In those circumstances the company ask me to decide that the three months ending on June 30, 1946, constitute the last complete accounting period for the purposes of the sub-section, whereas, on the other hand, the Minister of Fuel and Power contends that the last complete accounting period was the period of twelve months ending on Sept. 30, 1945, that being the period covered G by the combined account which was laid before the shareholders at the last annual general meeting. It seems that this company was a private company in the true sense of that expression, that is to say, there were only two shareholders, both of whom were directors. The general meeting was, no doubt, a pure formality, and there was no substantial difference between the meetings to whom the quarterly accounts were presented and those to whom the annual accounts H were presented.

I have been referred to *Jenkins Productions, Ltd. v. Inland Revenue Comrs.* (1) where a somewhat similar question arose under other statutory provisions. There the company had, not quarterly accounts, but half-yearly accounts, and the two half-yearly accounts were, apparently, combined and submitted to the shareholders in one annual account. On the facts of that case MACNAGHTEN, J., upheld the contention of the company that the six-monthly

period was the appropriate accounting period. That decision was reversed by the Court of Appeal, and it was held (170 L.T. 293) :

“ . . . that the twelve-monthly account was truly made up notwithstanding there were available the interim six-monthly accounts for the auditors. The twelve-monthly account was submitted to the shareholders and was therefore a final account, which the six-monthly accounts were not.”

A LORD GREENE, M.R., giving a judgment with which the Lords Justices agreed, said (*ibid.*, 294 ; [1944] 1 All E.R. 612) :

B “ Having regard to the fact that the twelve-monthly account in this case is nothing but a compilation from the six-monthly accounts, it is contended you cannot say that the twelve-monthly account is made up at all. In my opinion, that is an argument which will not bear examination. It seems to me that the twelve-monthly account is truly made up, notwithstanding that, there being available certain interim accounts, the auditors, in order to produce the twelve-monthly account, did not have to re-examine the books ; the material was there all ready to hand and they used it . . . Here you have a company which in fact did prepare two different sets of accounts ; one a six-monthly account prepared for the convenience of the directors ; the other a twelve-monthly account prepared for the information of the shareholders. That twelve-monthly account is one which has certain characteristics. First of all, it is to be submitted to the shareholders, who are entitled to approve or disapprove it. Therefore, in that sense, it is a final account in a way in which the accounts produced to the directors for the six months were not final accounts at all. Secondly, the accounts so submitted to the shareholders were submitted in pursuance of the statutory obligation to submit accounts. It seems to me, bearing those two considerations in mind, that the yearly accounts are primarily the more important of the two sets of accounts which this company in fact got out. Applying the language of this section to that state of affairs, which of these two sets of accounts is properly to be described as ‘ the accounts of the trade or business ’ ? Surely there can be only one answer to that question. The accounts are the important final accounts. It seems to me that these words have to be construed in the light of the well-known practice of companies to have a financial period. A company’s financial period is commonly thirteen months ; and accounts are got out in reference to that financial period. When the paragraph speaks of the accounts being ‘ made up,’ it surely must mean the accounts which are the accounts for the purposes of the company’s financial unit of time.”

For those reasons the appeal from MACNAGHTEN, J.’s judgment was allowed.

G In the present case the words of the Act are somewhat different. The reference is to “ the last complete accounting period,” and there is in the concluding words which I have quoted a distinct indication in the terms of the Act itself that the accounting period may be more or less than twelve months, a necessary adjustment for a twelve months’ equivalent being provided for. I have come to the conclusion that those final words make all the difference, and, although I am anxious not to say anything which in any way conflicts with the judgment in *Jenkins Productions, Ltd. v. Inland Revenue Comrs.* (1), it seems to me that here we have an indication that the last accounting period, whether it be twelve months or something else, is the one which is relevant in such a case as the present. It cannot be disputed on the evidence that the company did account quarterly. There is no evidence that the combined account was anything but the most formal combination of the four preceding quarterly accounts. Here we have a company which, with no ulterior object

in view, but merely as a matter of the legitimate arrangement of its own private affairs, has for years made up its accounts, had them audited, and entered them in its ledger on a quarterly basis. Therefore, I think that the "last complete accounting period before July 1, 1946," was the three months' period which ended on June 30, 1946, and I so decide.

Declaration accordingly with costs.

Solicitors : *Church, Adams, Tatham & Co.*, agents for *Burges, Salmon & Co.*,
Bristol (for the plaintiff) ; *Treasury Solicitor*.

[*Reported by H. McL. MORRISON, ESQ., Barrister-at-Law.*]

DENNIS & CO., LTD. v. MUNN.

[COURT OF APPEAL (Bucknill and Denning, L.JJ., and Jenkins, J.), February 22, 23, 1949.]

Building—Control Licence for specific work—General authority to spend £10 and £2 a month without licence—Whether additional to work covered by specific licence—Defence (General) Regulations, 1939 (S.R. & O., 1939, No. 927), reg. 56A (1), (2) (as amended)—Control of Building Operations (No. 8) Order, 1947 (S.R. & O., 1947, No. 74), art. 2 (1), (2).

By the Defence (General) Regulations, 1939, reg. 56A, the carrying out of certain building work is made unlawful except in so far as there is in force in respect thereof a licence granted by the Minister of Works. By a proviso to para. (2) of the regulation the Minister may by Order authorise the carrying out of work without a licence within such limits of cost as may be specified in the Order. In pursuance of this power the Minister, by the Control of Building Operations (No. 8) Order, 1947, authorised the carrying out without licence of work on any single property, between Feb. 1, and July 31, 1947, costing not more than £2 a month, and, in addition work costing not more than £10 over the total period. The plaintiffs, who were builders, carried out work for the defendant costing £50 under the mistaken belief that a licence was in force for that amount whereas in fact the licence authorised the expenditure of only £34 15s. 0d. The work was carried out during two months of the period covered by Order No. 8, and the plaintiffs claimed to recover, not only the £34 15s. 0d. covered by the licence, but also the free allowance of £10 plus £2 for each of the two months, a total of £14 extra.

HELD : the liberty to spend £2 a month plus £10 given by the Control of Building Operations (No. 8) Order, 1947, could not be prayed in aid to increase the amount authorised to be spent by the specific licence.

[EDITORIAL NOTE : The Control of Building Operations (No. 8) Order, 1947, has been superseded by the Control of Building Operations (No. 12) Order, 1948 (S.R. & O., 1948, No. 2332).]

FOR THE DEFENCE (GENERAL) REGULATIONS, 1939, reg. 56A, see HALSBURY'S STATUTES, Vol. 40, pp. 1392-1395.]

Case referred to :

(1) *Jackson Stansfield & Sons v. Butterworth*, [1948] 2 All E.R. 558.

APPEAL by the plaintiffs from a decision of His Honour DEPUTY JUDGE KONSTAM, sitting at Marylebone County Court, dated July 28, 1948, whereby he awarded the plaintiffs the sum of £4 15s., the unpaid balance of expenditure authorised by a licence for certain building operations carried out by the plaintiffs for the defendant. The plaintiffs had claimed in addition the sum of £14 as being expenditure permitted without a licence, and their appeal was against

the disallowance of this amount. The Court of Appeal dismissed the appeal. The facts appear in the judgment of BUCKNILL, L.J.

H. G. Garland for the plaintiffs.

The defendant appeared in person.

BUCKNILL, L.J. : This is an appeal from a judgment of His Honour DEPUTY JUDGE KONSTAM, sitting at Marylebone County Court, whereby he adjudged that the plaintiffs could recover from the defendant only the sum of £4 15s. The appeal is in connection with a small amount, but the point underlying it is of some importance and not free from difficulty.

The defendant, Mrs. Munn, was the occupier of a house, 45, Beaufort Gardens, Knightsbridge, London, and on Apr. 28, 1947, she obtained from the plaintiffs a written quotation to do the following work :

“ To washing down all painted stonework on front elevation and painting with two coats of oil paint all stonework previously painted except area ; area excluding retaining wall up to ground floor to be painted with best quality oil bound distemper ; area railing to be painted in light green ; for the sum of £50.”

There had been a conversation before that quotation was given between Mr. Fabian, the director of the plaintiff company, and the defendant on the question of a licence. Mr. Fabian's evidence on that point before the learned judge was to this effect :

“ I asked her if she had a licence. She said not so far, but she would apply when she had my estimate. I gave her an approximate verbal figure of £95. She said she did not want to spend so much. I then quoted £65 for painting only stonework. She said she could get me more work if I reduced the price.”

Then he gave the quotation which I have read, and the defendant said she would get the licence. On May 8, the defendant telephoned to the plaintiffs saying that she had a licence for the work. Mr. Fabian then telephoned to the appropriate authority, found that the defendant had got a licence, and proceeded with the work. In fact, the defendant had obtained an estimate from another firm on Apr. 18, 1947, to do a large amount of internal sanitary work which was to cost £294. In addition to that, there was an estimate for external painting amounting to £34 15s. and the licence granted by the Ministry of Works was for those amounts. In due course, the plaintiffs completed the work. They sent in their bill, the defendant considered that the work had not been satisfactorily done and paid £30 on account, and the plaintiffs sued for the balance. At the trial there was a contest whether the plaintiffs had done the work in accordance with their contract, and the learned judge decided that point in favour of the plaintiffs, but he then took the point that the licence was only for £34 15s. 0d., and he ruled against the plaintiffs on the contention that they were entitled to spend another £10 plus £4 on the work under the Control of Building Operations (No. 8) Order, 1947 (S.R. & O., 1947, No. 74). The learned judge decided—and this point is not disputed here—that it was a breach of reg. 56A of the Defence (General) Regulations, 1939, to do work in excess of the licence. He, therefore, gave judgment for the difference between £30 and £34 15s. 0d.

The question turns on the interpretation to be given to reg. 56A. I need not read the whole of it, but the material portions of it are as follows :

“(1) Subject to the provisions of this regulation the execution in the United Kingdom . . . of any operation specified in pt. II . . . shall be unlawful . . . (2) Subject to the provisions of this regulation, the carrying out in the United Kingdom, except for a purpose specified in the first column of the Table set out in pt. I of sched. 6 to these regulations, of

any work specified in pt. III of that schedule or of any maintenance work on a building or on any such works as are mentioned in pt. II of that schedule, shall be unlawful except in so far as there is in force in respect thereof a licence granted by the Minister. Provided that the Minister may by Order authorise the carrying out of such work without a licence within such limits of costs as may be specified in the Order, and may prescribe different limits of cost for different classes of work or for different classes of property or for different areas . . .”

The argument put forward on behalf of the plaintiffs is that the work which was done in excess of the work permitted by the licence might properly have been done without a licence within the limits of the Control of Building Operations (No. 8) Order, 1947, art. 2 of which provides :

“(1) Any person may, without a licence from the Minister of Works under para. (2) of . . . reg. 56A, carry out on any single property, during any month in the period beginning with Feb. 1, 1947, and ending with July 31, 1947, any work to which this article applies, if the cost of the work, together with the cost of any other such work previously carried out on that property during that month without such a licence as aforesaid, does not exceed the sum of £2. (2) In addition to the work authorised by the foregoing paragraph of this article, any person may, without such a licence as aforesaid, carry out on any single property during the said period any work to which this article applies, if the cost of the work, together with the cost of any other such work previously carried out on that property during that period without such a licence as aforesaid (not being work authorised by the foregoing paragraph) does not exceed the sum of £10.”

The conclusion that I have come to is that the learned judge was right when he said that, in his view, the liberty to spend £10 plus £2 a month given by the Control of Building Operations (No. 8) Order, 1947, cannot be prayed in aid to increase the amount licensed to be spent on a particular work. In my view, the proviso to reg. 56A (2) was intended to apply to small items of work of the kind specified in the Order which did not cost more than £10 or £2 in any one month and was not intended to add to the amount of a licence to do a particular work. In the present case there was a contract to do a particular work, namely, to paint the whole of this house. That work was illegal except in so far as it was covered by the licence. I cannot think that the proviso was intended to entitle the person doing the work under such a contract to exceed the licence to the amount of £10 plus £2 in every month. For these reasons, I think the learned judge was right and that the appeal must be dismissed.

DENNING, L.J. : I agree. The plaintiffs undertook to paint the whole of the outside of the house at a cost of £50, whereas the licence was only for £34 15s. 0d. In so far as the work was covered by the licence for £34 15s. 0d., they have recovered payment or judgment, but the excess of £15 5s. 0d. was not covered by any licence and was unlawful. If this excessive work had been done intentionally, there could be no question whatever that they could not recover anything. The fact that it was done unintentionally does not put them in any better position. The plaintiffs seek to rely on the fact that the defendant had a general licence to do £10 worth of work and £2 in every month, and, as this work took two months, they claim £10 plus £4, making £14. The answer to that contention seems to me to be that the general licence is only available in respect of severable work—work ordered separately and executed separately. When there is one indivisible work in hand, covering more than the free allowance, a specific written licence must be obtained, and it is not permissible to increase the amount authorised by that specific licence by adding to it the free allowance. The conditions of these written licences expressly say that the

specified amount shall not be exceeded. If the plaintiffs' contention were to prevail, it would be an indirect way of exceeding the amount.

JENKINS, J. : I also agree that this appeal fails. The question which it raises was really concluded in a sense adverse to the plaintiffs by the decision of the majority of this court in *Jackson Stansfield & Sons v. Butterworth* (1), to which we were referred in the course of the argument. In that case a builder was engaged to do some work for a garage proprietor, consisting of alterations or repairs to his garages. The estimated cost of the work was £35, and the builder obtained a licence in writing for that amount. As the work proceeded he found that more than £35 worth of work was going to be needed, and he obtained from the representative of the local authority an oral licence to complete the work, provided that the total cost did not exceed £100. On the faith of that oral assurance, he completed the work at the cost of £69 18s. 2d., and the question in issue was whether the absence of a written licence made the contract illegal *quoad* the excess over £35, it being conceded in argument that the contract should be considered as legal up to the licence amount of £35. It was contended on behalf of the builder that, if he failed in his claim to recover the full amount of the excess over £35 on the strength of the oral licence, he was, at all events, entitled not only to recover the £35, but to add to that sum the free amount of £10 which was allowed at that time under the Control of Building Operations (No. 6) Order, 1946 (S.R. & O., 1946, No. 86) (the precursor of Order No. 8 of 1947, which is the relevant one in the present case), and also to add one of the monthly sums of £2 which the Order of 1946 also allowed. That contention was rejected by the majority of the court, who held that the absence of writing was a fatal objection and that the builder could only recover the £35, without the additional £12. **SCOTT, L.J.**, dealt with the matter of the £12 in these terms ([1948] 2 All E.R. 559) :

“ On Jan. 16, 1946, the Minister of Works, in exercise of his sub-delegated powers to legislate by Order conferred by reg. 56A, para. (2), made the Control of Building Operations (No. 6) Order, 1946 (S.R. & O., 1946, No. 86), which permitted such work to be carried out without a licence during the period running from Feb. 1 to July 31, 1946, up to £2 per month, and, in addition, allowed unlicensed work up to a further £10. The whole of the work was carried out in a fortnight, it being finished by July 11, 1946. The limit for unlicensed work was, therefore, £12, but there is no provision, either in that Order or in the regulation which authorised the addition of any amount for such unlicensed work to the licensed limit. I read the regulation and Order together as meaning that, when the figure for work proposed exceeds the limit allowed by the Order, the whole has to be licensed. That Order, therefore, has no relevance.”

It seems to me that that passage in the judgment of **SCOTT, L.J.** (which, for the reasons I have explained, was necessary to the decision) substantially answers the question raised in this appeal. I, therefore, agree that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors : *Masons* (for the plaintiffs).

[*Reported by C. N. BEATTIE, Esq., Barrister-at-Law.*]

DAVIES v. SWAN MOTOR CO. (SWANSEA), LTD. (SWANSEA CORPORATION AND JAMES, Third Parties).

[COURT OF APPEAL (Bucknill, Evershed and Denning, L.JJ.), February 9, 13, 11, 14, 15, 1949.]

Negligence—Contributory negligence—Lack of reasonable care by deceased for his own safety—“Last opportunity”—Law Reform (Contributory Negligence) Act, 1945 (c. 28), ss. 1 (1), 4.

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Section 1 (1) of the Law Reform (Contributory Negligence) Act, 1945, provides: “Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant’s share in the responsibility for the damage.” By s. 4 “fault” is defined as “negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence.”

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An employee of the Swansea Corporation was, contrary to regulations, riding on steps attached to the offside of a dust lorry belonging to the corporation when an overtaking omnibus, the property of the defendants, came into collision with the lorry, the employee being struck by the omnibus and receiving injuries from which he died. In a claim by the plaintiff, the widow of the deceased, for damages for negligence against the defendants, who joined, *inter alia*, the driver of the dust lorry as third party, it was held that the defendants were liable to the plaintiff and were not entitled to any contribution by the third party. On appeal the court found that all three parties were to blame—the omnibus driver because he attempted to overtake the lorry on a bend in a narrow road without warning and before receiving a signal, the third party because he turned suddenly across the road without making proper use of his mirror and without giving sufficient warning, and the deceased because he had taken up a dangerous position on the steps of the dust lorry. On behalf of the plaintiff it was contended that the damages should not be reduced on account of the deceased’s share of responsibility for the accident, under the Act of 1945, since he owed no duty to the driver of the omnibus not to stand on the steps of the lorry, and, therefore, could not be guilty of contributory negligence *vis-à-vis* the driver, and, further, since the omnibus driver saw the position of the deceased on the lorry and so had the last opportunity of avoiding the accident.

HELD: the driver of the omnibus was guilty of negligence, but the deceased man was guilty of contributory negligence (resulting in an apportionment of liability under the Law Reform (Contributory Negligence) Act, 1945) since (i) by standing where he did on the lorry he was in breach of a duty which he owed to the driver of the omnibus not to render more difficult the passing of the lorry by the omnibus and so increase the risk of a collision: *dictum* of LORD ATKIN in *Donoghue v. Stevenson* ([1932] A.C. 580; 147 L.T. 285), *applied*; and (ii) in any event, to constitute contributory negligence it was not necessary to show that the conduct of the deceased amounted to the breach of any duty which he owed to the defendants, but it was sufficient to show a lack of reasonable care by the deceased for his own safety: *dictum* of LORD ATKIN in *Caswell v. Powell Duffryn Associated Collieries, Ltd.* ([1939] 3 All E.R. 730; [1940] A.C. 164; 161 L.T. 377), *applied*.

Per curiam: Since the coming into operation of the Law Reform (Contributory Negligence) Act, 1945, the doctrine of “last opportunity” has

ceased to be of any practical effect, if, indeed, it had not ceased to exist before that date.

Davies v. Mann, (1842) (10 M. & W. 546), *discussed*.

[AS TO APPORTIONMENT OF LIABILITY ACCORDING TO DEGREE OF BLAME, see HALSBURY, 1948 Supp., p. 341; and FOR CASES, see DIGEST, 2nd Supp.

FOR THE LAW REFORM (CONTRIBUTORY NEGLIGENCE) ACT, 1945, ss. 1 (1),
A 4, see HALSBURY'S STATUTES, Vol. 38, pp. 357, 360, and FOR THE LAW REFORM (MARRIED WOMEN AND TORTFEASORS) ACT, 1935, s. 6, see HALSBURY'S STATUTES, Vol. 28, pp. 473, 474.]

Cases referred to :

- (1) *Donoghue v. Stevenson*, [1932] A.C. 562; 147 L.T. 281; Digest Supp.
- B (2) *Caswell v. Powell Duffryn Associated Collieries, Ltd.*, [1939] 3 All E.R. 722; [1940] A.C. 152; 161 L.T. 374; 2nd Digest Supp.
- (3) *Grayson (H. & C.) v. Ellerman Line, Ltd.*, [1920] A.C. 466; 123 L.T. 65; *affmg.*, *sub nom.*, *Ellerman Lines, Ltd. v. Grayson (H. & G.), Ltd.*, [1919] 2 K.B. 514; 36 Digest 116, 780.
- C (4) *Anglo-Newfoundland Development Co., Ltd. v. Pacific Steam Navigation Co.*, [1924] A.C. 406; 131 L.T. 258; 36 Digest 115, 768.
- (5) *Corstar Owners v. Eurymedon Owners, The Eurymedon*, [1938] 1 All E.R. 122; *sub nom.*, *The Eurymedon*, [1938] P. 41; 158 L.T. 445; Digest Supp.
- (6) *Davies v. Mann*, (1842), 10 M. & W. 546; 7 J.P. 53; 36 Digest 113, 751.
- D (7) *Admiralty Comrs. v. North of Scotland & Orkney & Shetland Steam Navigation Co., Ltd.*, [1947] 2 All E.R. 350; *sub nom.*, *The Boy Andrew (Owners) v. St. Rognvald (Owners)*, [1948] A.C. 140; 2nd Digest Supp.
- (8) *Henley v. Cameron*, (1948), 65 T.L.R. 17.
- (9) *Admiralty Comrs. v. S.S. Volute*, [1922] 1 A.C. 129; 126 L.T. 425; 41 Digest 780, 6417.
- E (10) *The Bywell Castle*, (1879), 4 P.D. 219; 41 L.T. 747; 36 Digest 118, 791.
- (11) *Swadling v. Cooper*, [1931] A.C. 1; *sub nom.*, *Cooper v. Swadling*, 143 L.T. 732; Digest Supp.
- (12) *Grant v. Sun Shipping Co., Ltd.*, [1948] 2 All E.R. 238; [1948] A.C. 549.
- (13) *Butterfield v. Forrester*, (1809), 11 East. 60; 1 Man. & G. 571, n; 36 Digest 112, 745.
- (14) *Cakebread v. Hopping Bros. (Whetstone), Ltd.*, [1947] 1 All E.R. 389; [1947] K.B. 641; 177 L.T. 92; 2nd Digest Supp.
- F (15) *Searle v. Wallbank*, [1947] 1 All E.R. 12; [1947] A.C. 341; 176 L.T. 104; 2nd Digest Supp.
- (16) *Joseph Eva, Ltd. v. Reeves*, [1938] 2 All E.R. 115; [1938] 2 K.B. 393; 159 L.T. 1; 102 J.P. 261; Digest Supp.
- (17) *The Margaret*, (1881), 6 P.D. 76; 44 L.T. 291; 41 Digest 697, 5287.

G APPEAL by the defendants against an order of CASSELS, J., dated July 13, 1948, awarding damages to the plaintiff and dismissing the defendants' claim to contribution by a third party.

The plaintiff, suing as the administratrix of her deceased husband's estate, claimed damages against the defendants, as employers of the driver of an omnibus whose negligence, resulting in a collision with a lorry, was, she alleged,
H the cause of her husband's death. The defendants denied negligence and claimed that any damages which might be awarded should be reduced on account of the contributory negligence of the deceased under s. 1 (1) of the Law Reform (Contributory Negligence) Act, 1945. They also claimed that the third parties, Swansea Corporation and their employee, the driver of the lorry, which belonged to them, should contribute to the payment of such damages as joint tortfeasors under s. 6 of the Law Reform (Married Women and Tortfeasors) Act, 1935. CASSELS, J., held that the omnibus driver was guilty of

negligence and that the deceased was not guilty of contributory negligence, and he awarded the plaintiff the sum of £2,326 3s. 0d., without any reduction under the Act of 1945. He also held that the first of the third parties, Swansea Corporation, would not have been liable to the plaintiff if sued separately, by reason of the defence, available to them, of common employment, and against this decision there was no appeal. He further held that the second of the third parties, the driver of the lorry, was not liable to contribute in respect of the damages payable by the defendants under the Act of 1935, since the deceased was in the position of a trespasser on the lorry, and the driver, if sued by the plaintiff, would not have been liable. The Court of Appeal found that (i) the defendants, (ii) the deceased man, and (iii) the driver of the lorry were all guilty of negligence, and ordered that the damages awarded to the plaintiff should be reduced by one-fifth on account of the deceased's contributory negligence and that such reduced damages should be paid as to two-thirds by the defendants and as to one-third by the driver of the lorry.

Glyn-Jones, K.C., and Morris Morgan, for the plaintiff.

Beney, K.C., and G. P. Thomas, for the defendants.

H. E. Davies, K.C., and A. T. Davies for the third party.

BUCKNILL, L.J.: This is an appeal by the defendants, the Swan Motor Co. (Swansea), Ltd., from a judgment of CASSELS, J., delivered on July 13, 1948, awarding the sum of £2,326 3s. 0d. to the plaintiff, Mrs. Winifred Davies, in respect of the death of her husband, which was alleged to have been caused by the negligence of a driver of a motor-bus in the employment of the defendants. The accident which resulted in the death of the deceased man occurred on May 1, 1947.

This appeal raises three points. The first is: Was the driver of the omnibus negligent? The second is: Was the deceased man guilty of contributory negligence? The third has arisen in connection with some third party proceedings between the defendants and David Cecil James, the driver of the lorry on which the deceased man was riding. The claim was put forward in those proceedings by the defendants under s. 6 of the Law Reform (Married Women and Tortfeasors) Act, 1935. The learned judge in the court below directed that judgment be entered against the defendants and in favour of the third party. The defendants appeal against that part of the judgment. The third point, therefore, is: Were the defendants entitled to judgment against the third party? That raises the question whether the third party, if sued by the plaintiff, would have been liable in respect of the same damage as that for which the defendants have been held liable.

[HIS LORDSHIP stated the facts, said that the omnibus driver was clearly to blame, and continued:] I now come to the more difficult question: Was the deceased man, Davies, guilty of contributory negligence? Counsel for the plaintiff put forward the view that the deceased man owed no duty to the driver of the omnibus not to stand on the steps of the lorry in the way that he did. Counsel argued that the deceased was entitled to stand there and, in so doing, was not doing anything wrong *vis-à-vis* the omnibus driver. The answer to that point is twofold. In the first place, I am prepared to hold that, in standing where he did on the lorry, the deceased committed a breach of duty to the omnibus driver because by so doing he made the driver's task in passing the lorry more difficult that it would otherwise have been, and, to that extent, increased the risk of a collision. The classic statement on this aspect of the law is that of LORD ATKIN in *Donoghue v. Stevenson* (1), where he says ([1932] A.C. 580):

"The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid

acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.”

- A In the present case the deceased man ought reasonably to have had in contemplation the drivers of other vehicles, as being affected by the very dangerous and unnecessary position which he took up on the lorry. By taking up that position he, to some extent, increased the width of the lorry, thereby making the passageway less broad. It is one thing for a vehicle to pass another vehicle with wooden or iron sides, and another thing for it to pass another vehicle
- B with wooden or iron steps attached to its sides and a living human body standing on those steps. The operation of passing is much more difficult in the latter circumstances. The notices which were put in evidence are material on this aspect of the case. The deceased man had been employed by the Swansea Corporation since January, 1945, and these notices were exhibited in places where he could see them. They were put up in all the corporation's depots.
- C The first of the notices is dated July 24, 1939, and reads as follows :

“Cleansing Department. Notice. It has been observed that carriers are in the habit of riding on the steps of lorries, which is a very dangerous practice, and could be the cause of injury to the man himself and to other users of the road. This practice must cease, and drivers must report any man who persists in doing so.”

- D The next notice is dated Dec. 7, 1942, and reads as follows :

“Notice. Riding on steps of motor vehicles. Despite the previous notice prohibiting employees standing on the steps of motor vehicles whilst in motion, the practice is still prevalent, with the result that three accidents have occurred in the last few months, any one of which could have proved fatal. This is a very dangerous habit, especially at the present time when so many air-raid shelters are built in the centre of streets and free passage of vehicles is somewhat restricted. In the three accidents referred to above, the employees of the department were jammed between the walls of communal shelters and the vehicles. This practice must cease immediately, and disciplinary action will be taken against

E any employee disregarding this instruction. Furthermore, liability under the Workmen's Compensation Acts for accidents arising from this cause may be repudiated by the corporation.”

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The next notice is dated Feb. 13, 1946, and reads as follows :

- “Riding on steps of motor vehicles. Despite the fact that notices were posted in all Cleansing Department depots on July 24, 1939, and Dec. 7, 1942, prohibiting employees of the department riding on the side steps of motor vehicles whilst in motion, the practice, unfortunately, is still prevalent, with the result that another accident occurred as recently as Feb. 1, 1946, which could have resulted in serious, and perhaps permanent, injury being suffered by the employee. This practice must cease immediately.”
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Attention is then drawn to the last paragraph of the notice dated Dec. 7, 1942, regarding liability under the Workmen's Compensation Acts.

In addition to that, there is a second answer to the point made by counsel for the plaintiff, *viz.*, that to constitute contributory negligence it is not necessary to show that the plaintiff's conduct amounted to the breach of a duty which he owed to the defendants. It is sufficient to show lack of reasonable care by the plaintiff for his own safety. That is set out clearly in the speech of

LORD ATKIN in *Caswell v. Powell Duffryn Associated Collieries, Ltd.* (2) ([1939] 3 All E.R. 730), as follows :

"The injury may, however, be the result of two causes operating at the same time, a breach of duty by the defendant and the omission on the part of the plaintiff to use the ordinary care for the protection of himself or his property that is used by the ordinary reasonable man in those circumstances. In that case the plaintiff cannot recover because the injury is partly caused by what is imputed to him as his own default. On the other hand, if the plaintiff were negligent, but his negligence was not a cause operating to produce the damage, there would be no defence."

Counsel for the defendants also drew our attention to a passage in CHARLES-WORTH ON THE LAW OF NEGLIGENCE, 2nd ed., p. 464, which he adopted as part of his argument. It reads as follows :

"The word 'negligence,' however, is not used in its usual meaning. Negligence ordinarily means breach of a legal duty to take care, but as used in the expression 'contributory negligence' it does not mean breach of duty. It means the failure by a person to use reasonable care for the safety of himself or his property, so that he becomes the 'author of his own wrong.' For example, if a railway train draws up at a platform which is too short for the train, a passenger in a carriage which is short of the platform owes no duty to the railway company not to alight, but if he gets out without looking where he is going it is contributory negligence on his part. A workman on a ship owes no duty to the shipowner not to fall down an open hatchway negligently left unfenced by the shipowner, but if his fall is due to his own carelessness he is guilty of contributory negligence. A member of the public owes no duty to a railway company to look out for approaching trains when he is crossing the railway by means of a public crossing, but if he omits to do so and is injured, his conduct amounts to contributory negligence. This difference in the meaning of 'negligence' as applied to a plaintiff and a defendant is pointed out by ATKIN, L.J. [*Ellerman Lines, Ltd. v. Grayson* (3)], where he says ([1919] 2 K.B. 535): 'The doctrine of contributory negligence cannot, I think, be based upon a breach of duty to the negligent defendant. It is difficult to suppose that a person owes a duty to anyone to preserve his own property. He may not recover if he could reasonably have avoided the consequences of the defendant's negligence'."

Therefore, in my view, on both grounds the deceased man was guilty of negligence.

I now come to the most difficult point in the case, namely, the question whether the injuries suffered by the deceased were the result partly of his own fault. The answer turns primarily on the interpretation to be given to s. 1 (1) of the Law Reform (Contributory Negligence) Act, 1945 :

"Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage."

The definition of the word "fault" is contained in s. 4 which provides :

"The following expressions have the meanings hereby respectively assigned to them, that is to say . . . 'fault' means negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence."

The wording of s. 1 (1) of the Act of 1945 differs from the wording of s. 1 (1) of

A the Maritime Conventions Act, 1911, which deals with the same point in respect of collisions between ships. There may be good reason for that. I cannot think that the legislature intended the Act of 1945 (which is described as "an Act to amend the law relating to contributory negligence and for purposes connected therewith") to alter the law which had been laid down as to the legal doctrine of causation. All that the legislature intended to do was to alter the legal consequences of negligence by both parties causing or contributing to the damage complained of. Until the Act of 1945 was passed, the rule in respect of the consequences of collisions on land was different from that in respect of the consequences of collisions at sea. The rules as to causation were the same. That is clear from the opinion of LORD ATKINSON in *Anglo-Newfoundland Development Co. v. Pacific Steam Navigation Co.* (4), where he says this ([1924] A.C. 415):

B "In MARDEN ON COLLISIONS, 5th ed., p. 17, it is laid down on the authority of the cases mentioned in the notes, to some of which I shall presently refer, 'that there is no difference between the rules of law and of Admiralty as to what amounts to negligence causing collision; and that, before a vessel can be held to be in fault for a collision, negligence causing or contributing to the collision must be proved,' and that in the case of a collision a ship though guilty of negligence will not necessarily be held to blame if the ship with which she collides could by the exercise of reasonable and ordinary skill and care have avoided the collision."

C It is also clear from the judgment of GREER, L.J., in *The Eurymedon* (5), a case of a collision between two ships. GREER, L.J., said ([1938] 1 All E.R. 126):

D "I think that the law arising out of what is usually called the *Davies v. Mann* (6) principle may be stated as follows: If, as I think was the case in *Davies v. Mann* (6), one of the parties in a common law action actually knows from observation the negligence of the other party, he is solely responsible if he fails to exercise reasonable care towards the negligent plaintiff."

E EVERSLED, L.J., has drawn my attention to an interesting note in the LAW QUARTERLY REVIEW of October, 1938, p. 466, which deals with *The Eurymedon* (5) and says this:

F "It can therefore be said—and this is the essential point of the problem—that the plaintiffs' negligence had ceased as soon as the defendant knew of it and could avoid its consequences by reasonable care. The plaintiffs, it is true, had been negligent by creating a dangerous situation which might mislead the defendants, but as soon as the latter became aware of it the danger, and therefore the negligence, came to an end."

G In the present case, if the lorry had continued to keep on its proper side of the road and the omnibus had run into or close to it and injured the deceased man, I doubt if the negligence of the deceased man would have contributed to his injuries. This case, however, is not so simple as that. On the one hand, the deceased man could not get off the steps on which he was standing when the omnibus was approaching the lorry, and, apparently, on the other hand, he could not get into the lorry without a great deal of difficulty, and the collision was due to the negligent driving of both vehicles which resulted in the collision and the injury to the deceased man. That being so, it seems to me that it is impossible to say that the dangerous position of the deceased man on the lorry had ceased to be a factor contributing to the damage that he suffered. It is difficult in a case of this kind, to say exactly whether, and if so, when, the negligence of the deceased man ceased before the injury complained of. It is clear that there can be two separate causes for a collision. There are two recent cases one has in mind on this point, in both of which there was a difference of judicial opinion. *Admiralty Comrs. v. North of Scotland & Orkney &*

Shetland Steam Navigation Co., Ltd. (7) was a case (not altogether unlike the present case) in which a ship was overtaking another ship on the starboard side, dangerously close. While one ship was in the process of overtaking the other, the overtaken vessel negligently allowed herself to fall off to starboard, with the result that there was a collision. Each side said that the other was solely to blame, but the House of Lords came to the conclusion that both vessels were to blame, and, on this aspect of the case, LORD SIMON said ([1947] 2 All E.R. 353):

"The suggested test of 'last opportunity' seems to me inaptly phrased and likely in some cases to lead to error, as the Law Revision Committee said in their report (Cmd. 6032, p. 16): 'In truth there is no such rule—the question, as in all questions of liability for a tortious act, is, not who had the last opportunity of avoiding the mischief, but whose act caused the wrong?' In *Davies v. Mann* (6), the negligence of the absent donkey-owner, serious as it was, created a static position where nothing that he could do when collision threatened would have avoided the result, whereas the negligence of the driver of the vehicle continued right up to the moment when the collision became inevitable. As by driving more carefully he could have avoided hitting the donkey, his negligence was the sole cause."

The other case is *Henley v. Cameron* (8). In that case the defendant had negligently left his motor-car unlighted on a highway and a motor-cyclist coming along (with headlights, and, therefore, presumably able to see it) ran into it and was killed. The question was whether the defendant, by leaving his unlighted vehicle on the road was guilty of negligence which contributed to the accident or whether the accident was solely due to the fault of the motor-cyclist, who saw the vehicle and could have avoided running into it. TUCKER, L.J., and SINGLETON, L.J., held that both parties were to blame and ASQUITH, L.J., held that the motor-cyclist was alone to blame.

I mention the difficulty of deciding these matters by way of leading up to what was said by the House of Lords in *Admiralty Comrs. v. S.S. Volute* (9). In that case, when dealing with the question of contributory negligence, LORD BIRKENHEAD said this ([1922] 1 A.C. 144, 145):

"Upon the whole I think that the question of contributory negligence must be dealt with somewhat broadly and upon common-sense principles as a jury would probably deal with it. And while no doubt, where a clear line can be drawn, the subsequent negligence is the only one to look to, there are cases in which the two acts come so closely together, and the second act of negligence is so much mixed up with the state of things brought about by the first act, that the party secondly negligent, while not held free from blame under the *Bywell Castle* (10) rule, might, on the other hand, invoke the prior negligence as being part of the cause of the collision so as to make it a case of contribution . . . The *Volute*, in the ordinary plain common sense of this business, having contributed to the accident, it would be right for your Lordships to hold both vessels to blame for the collision."

In the light of the ordinary, plain common-sense of this matter, the negligence of the deceased man in standing on the steps of the lorry right up to the moment of the collision (or at any rate, until he tried to climb inside the lorry), contributed to his injury. I think that what he did clearly contributed to his injury.

[HIS LORDSHIP, in conclusion, said, with regard to the apportionment of blame, that the proportions of blame should be four-fifths to James, the driver of the lorry, and one-fifth to the deceased man, the damages awarded to the plaintiff being reduced by one-fifth. As regards the apportionment of the sum awarded to the plaintiff, namely, four-fifths of £2,300 odd, the conclusion

of CASSELS, J., placing two-thirds of the blame on the omnibus driver and one-third of the blame on the lorry driver should stand.]

EVERSHED, L.J. : I have reached the same conclusion. As my Lord has pointed out, three questions have been presented for our determination : (i) Whether the learned judge was justified in holding the motor-omnibus driver, and therefore, the motor-omnibus company, liable to the plaintiff for negligence ; A (ii) whether, in the action, the omnibus company can reduce its liability by virtue of the Act of 1945 by showing that the person injured, namely, the deceased, was so injured as the result partly of his own fault as defined in that Act ; and (iii), whether, in the third party proceedings, the omnibus company can call on the driver of the lorry to contribute towards the damages which they (the omnibus company) should pay to the plaintiff. Under that third head arises B a subsidiary point, whether arithmetically the figure, if any, of contribution which the driver of the lorry, James, must provide, is affected by considerations as between himself (James) and the deceased, also arising under s. 1 of the Act of 1945, for it might be that in an action brought by the plaintiff direct against James a different conclusion as to contributory negligence could be reached from that which should be arrived at in an action brought against C the omnibus company.

In approaching the questions it seems to me, first, that one must regard the judgment given, both in the action and in the third party proceedings, as a single document in the sense that it is right and proper in considering the language used by the learned judge to read his judgment as a whole. One cannot sever the judgment into two mutually exclusive parts, and, when considering his conclusion about contributory negligence, shut one's eyes to what D the learned judge found later in his judgment as regards the behaviour of the deceased in riding on the steps of the lorry.

With those preliminary observations I turn to the three questions which are presented to the court for decision. As to the first, the question whether the defendant omnibus company was properly held liable to the plaintiff, I content E myself by saying that, in my judgment, there is no ground to justify us in coming to any different conclusion from that to which the learned judge came.

The second question, as to the contributory negligence, if any, of the deceased, is plainly the question which is most difficult to answer, and I confess that my mind has undergone considerable fluctuation in the course of the arguments presented to us on that point. I start with the difficulty that the learned F judge has found in terms that there was no contributory negligence, and I only arrive at a different conclusion with diffidence, because the experienced judge who tried the case must have had well in mind all the facts of the case when he pronounced his finding. Nevertheless, as I have indicated, I do come to the conclusion that the right answer is that suggested by my Lord, namely, that the deceased did suffer damage as the result partly of his own fault, and, G expressed arithmetically, I hold that the answer to that question should be : " to the extent of one-fifth."

I was at one time in trouble to formulate any specific duty owed by the deceased to the omnibus driver which might be said to found a case of contributory negligence against the deceased, but after considering the authorities to which counsel for the defendants referred, particularly the speeches of LORD ATKIN H and LORD WRIGHT in the *Caswell* case (2), I am satisfied that it is not necessary to found on some breach of a specific duty owed by the deceased to the driver of the omnibus. In arriving at the conclusion at which I do arrive, I conceive it to be my duty to look at the whole facts of the case as they emerged at the trial both of the action and of the third party proceedings, and then, using common-sense, to try fairly to apportion the blame between the various participants in the catastrophe for the damage which the deceased suffered.

At one stage of the hearing we were invited to consider whether, and to

what extent, the Act of 1945 had abrogated or modified what has been called the rule in *Davies v. Mann* (6), and what, in my view, is quite a different thing, namely, the so-called "last opportunity" rule. My conclusion is that these interesting points, if they do exist and if they should arise for decision in some case, do not in point of fact arise for decision in the present case. I hope, therefore, that I shall not be regarded as disrespectful to learned counsel and their arguments if I do not refer to the numerous authorities to which they referred in support of their arguments. I would, however, like to say this on that topic. As I understand the *Davies v. Mann* (6) principle, which, indeed, has already been stated by my Lord, it is this. In that case the plaintiff's negligence or fault consisted in placing a donkey on the highway, but, it having been observed in due time by the defendant, the defendant by colliding with it was treated as the person responsible for the accident, since, by the exercise of ordinary care, he could easily have avoided it. In other words, the negligence of the plaintiff had really ceased to be an operating factor in the collision. If I may apply a common phrase, the plaintiff in that case, as a negligent actor, was at the material time, *functus officio*—one might say *functus culpa*. I cannot do better than cite a passage from LORD SHAW'S speech in *Anglo-Newfoundland Development Co. v. Pacific Steam Navigation Co.* (4) where he says ([1924] A.C. 419):

"The principle does not apply to shipping law alone, but to all the law of contributory negligence, from *Davies v. Mann* (6) downwards. And I take the principle to be that, although there might be—which for the purpose of this point I am reckoning that there was—fault in being in a position which makes an accident possible yet, if the position is recognised by the other prior to operations which result in an accident occurring, then the author of that accident is the party who, recognising the position of the other, fails negligently to avoid an accident which with reasonable conduct on his part could have been avoided. Unless that principle be applied it would always be open to a person negligently and recklessly approaching, and failing to avoid a known danger, to plead that the reckless encountering of danger was contributed to by the fact that there was a danger to be encountered."

As regards the so-called "last opportunity" rule, that, as I have indicated, seems to be something different, if I have apprehended it correctly, from the rule in *Davies v. Mann* (6). In the "last opportunity" type of case the original negligent actor has not become *functus officio*, but still, it is said, the other party had an opportunity of avoiding the collision. That as a doctrine, I venture to think, has suffered a demise independently altogether of the Act of 1945. I need not refer again to the passage in LORD SIMON'S opinion in *The Boy Andrew* case (7) which BUCKNILL, L.J., has already cited. No doubt, in practice such a rule was found useful by judges who were anxious in the interests of justice to avoid coming to a conclusion wholly adverse to a plaintiff merely because at the material time the plaintiff was still a negligent actor to some, perhaps, quite trivial extent. The Act of 1945 has rendered no longer necessary resort to devices of that kind.

On this topic, therefore, it is unnecessary to express any concluded opinion, but I entirely share the view, as at present advised, which my brother has indicated, that such a rule as that which applied in *Davies v. Mann* (6) would not be, and is not, affected by the Act of 1945. In the present case it is to be observed that the deceased did not merely lie down in the street and remain there still, so that an on-coming vehicle could see him and avoid him with no less difficulty that it could avoid a vehicle drawn up stationary at the side of the road. What he did do, in disregard of prudence and the instructions which he had been given, was to elect to ride in a position of great danger on a moving vehicle. Therefore, his position in relation to other road users must, in part at least,

- at any particular point of time, depend on what the driver of his own vehicle did. When all the facts are examined (and anticipating somewhat the answer to the third question) it will be seen that the two drivers (the omnibus driver and the lorry driver) were so incautious in their performances that their two vehicles were involved in a collision. On the facts of the case it seems to me to be plain that no doctrine of "last opportunity," if such there is or was, could be applied. One could not fairly say of anybody here that they had a "last opportunity" of avoiding the accident, and, in fact, in the general *melee* which resulted, the deceased suffered, and suffered most grievously, partly as the result of the hazardous position which he occupied in relation to the two vehicles. Looked at in that way, this case seems to me to be different on its facts from such a case as would have arisen if the lorry had proceeded straight along the road, and the omnibus had tried to pass it without there being sufficient room for it so to do. With all respect to the learned judge in the court below, I have, therefore, come to the conclusion that his finding that there was no contributory negligence within the meaning of the Act of 1945 cannot stand, and that on the facts the fair common-sense view to take of the matter is that which has been proposed by my Lord. I only add this. I express the hope that there will be no divergence of principle or of the application of principle between the Admiralty courts and the common law courts in dealing with matters of contributory negligence under the Maritime Conventions Act, 1911, and the Law Reform (Married Women and Tortfeasors) Act, 1935, respectively. In substance the intention of the two Acts is the same, so that similar principles should be applied in the same way.
- It only remains for me to add a few words in regard to the third question : Can the omnibus company require the driver of the lorry, James, to contribute to the damage which in the action the omnibus company must pay, namely, four-fifths of the figure awarded by the learned judge. Again with all respect to the learned judge, I cannot see that the answers which he accepted to that claim are made out. It seems to me that on the facts, particularly the outstanding fact that the lorry driver started to turn across the main road without giving any warning signal in time, it is impossible to resist the conclusion that James also caused in part the accident by his negligence, and, taking that view, I see no reason to differ from the apportionment of blame which CASSELS, J., thought appropriate, namely, two-thirds to the omnibus driver and one-third to the lorry driver.
- For these reasons, as well as those stated by my Lord, I have, in this difficult case, reached the conclusion that the answer is that which I have indicated, and I would, therefore, allow the appeal to the extent necessary to give effect to that result.

DENNING, L.J. : This case raises the important question, how far the doctrine of "last opportunity" has survived the Law Reform (Contributory Negligence) Act, 1945. It was well and fully argued before us, but the answer to my mind is that, as a doctrine of law, it was dead before the Act, though it remained in use by some as a practical test. Since the Act, it is no longer a practical test, and should disappear from the books. I will give my reasons.

The doctrine of contributory negligence was based on causation. If the plaintiff's negligence was one of the causes of his own damage, he could not recover anything : see *Caswell v. Powell Duffryn Associated Collieries* (2) ([1939] 3 All E.R. 730) *per* LORD ATKIN. To resolve the question of causation the courts used to apply the so-called doctrine of "last opportunity." That was not a principle of law, but a test of causation. It was a fallacious test, because the efficiency of the causes do not depend on their proximity in point of time, but it held sway for many years because it enabled the courts to mitigate the harshness of the doctrine of contributory negligence. After the decision of the House of Lords in *The Volute* (9) and *Swadling v. Cooper* (11) the doctrine

of "last opportunity" fell into disrepute and was superseded by the simple test: What was the cause, or what were the causes, of the damage? : see the notes to *Davies v. Mann* (6), in SMITH'S LEADING CASES, 13th ed., vol. 2, pp. 579-589. Since the recent speeches of LORD SIMON in *The Boy Andrew* (7) ([1947] 2 All E.R. 353) and of LORD DU PARCQ in *Grant v. Sun Shipping Co.* (12) ([1948] 2 All E.R. 245) the doctrine has no place even as a test of causation.

The legal effect of the Act of 1945 is simple enough. If the plaintiff's negligence was one of the causes of his damage, he is no longer defeated altogether. He gets reduced damages. The practical effect of the Act is, however, wider than its legal effect. Previously, to mitigate the harshness of the doctrine of contributory negligence, the courts in practice sought to select, from a number of competing causes, which was *the* cause—the effective or predominant cause—of the damage and to reject the rest. Now the courts have regard to all the causes and apportion the damages accordingly. This is not a change in the law as to what constitutes contributory negligence—the search, in theory, was always for all the causes—but it is a change in the practical application of it. Let me illustrate this by considering how the well-known cases of *Butterfield v. Forrester* (13) and *Davies v. Mann* (6) would be decided today. If *Butterfield v. Forrester* (13) came up today, it would, I think, probably be found that the damage was due to two causes: (i) the negligence of the defendant in placing the obstruction on the road, and (ii) the negligence of the plaintiff in not keeping a proper lookout. It would, therefore, under the Act of 1945 be a case for contribution. Indeed, many cases have occurred since the Act where the injured plaintiff had the last opportunity of avoiding the damage, but, nevertheless, he recovered reduced damages. I refer particularly to the Factory Act cases, such as *Cakebread v. Hopping* (14) and the unlighted vehicle cases, such as *Henley v. Cameron* (8). If *Davies v. Mann* (6) came up today, it might well be decided in favour of the plaintiff on the ground on which it was, in fact, decided, namely, that the donkey was lawfully on the highway, *c.f.* *Searle v. Wallbank* (15), but I propose to put the special law as to animals on one side. Instead of the donkey, I will take the case of a man who negligently leaves his car parked on a dangerous bend in the road or across a railway line in the docks and it is negligently run into by an oncoming vehicle. That is a case to which the observations in *Davies v. Mann* (6) would appear to apply. Those observations, which were the foundation of the doctrine of "last opportunity", were re-stated in modern form by LORD SHAW in *Anglo-Newfoundland Development Co., Ltd. v. Pacific Steam Navigation Co.* (4) ([1924] A.C. 419, 420), and by GREER, L.J., in *The Eurymedon* (5) ([1938] P. 49, 50) and come to this: If the defendant actually saw that a dangerous state of affairs had been created by the negligence of the plaintiff, and the defendant thereafter, by the exercise of reasonable care, could have avoided doing any damage, then he was solely liable if he failed to exercise that care. I desire to say that, in my opinion, that is not a proposition of law, but only a test of causation, and it is a test which may sometimes lead to error. In the case I have put it is, of course, plain that, if the defendant actually saw the parked vehicle in good time and purposely ran into it—or, indeed, what comes to the same thing, if he, seeing its position, drove recklessly on that account, careless whether he hit it or not—his conduct would be so powerful a factor in producing the damage that the presence of the parked vehicle would be not itself a cause of the damage but only the circumstances in which or on which the cause operated. That is the kind of illustration taken by LORD ELLENBOROUGH in *Butterfield v. Forrester* (13), PARKE, B., in *Davies v. Mann* (6) and LORD SHAW in *Anglo-Newfoundland Development Co., Ltd. v. Pacific Steam Navigation Co.* (4), but if the defendant did not do it purposely or recklessly, but was merely negligent, as in *Davies v. Mann* (6)—for instance, in not keeping a proper lookout so that he did not actually see the parked vehicle in time

to pull up, or in driving too fast, so that, although he actually saw it before the accident, he could not pull up, or in not applying his brakes soon enough—then there are two causes of the accident (i) the negligence of the owner of the parked car in letting it be an obstruction on the road; and (ii) the negligence of the driver of the oncoming vehicle in driving too fast and not keeping a proper lookout, or not applying his brakes soon enough. Both are at fault, and if both vehicles are damaged, then, under the Act of 1945, which-
A ever is plaintiff or defendant, on claim or counterclaim, the damages are apportioned. That this is the correct approach can be seen by supposing that, instead of a parked car, there was a slow-moving wagon on the bend. If it was going on its wrong side, the fault of the driver of the wagon would be one of the causes of the accident, but, if it was going on its proper side, he
B would not be in fault and his conduct would not be a cause of the accident, because the law on this subject is only concerned with causes due to some-one's "fault." I do not myself believe that there is any difference in kind between negligence after seeing the danger and negligence in not seeing it. Nor do I believe that negligence in creating a dangerous obstruction ceases
C if the driver of the oncoming vehicle sees it. Even when he sees it, it may still be one of the causes of the accident. It all depends whether it is a significant factor in producing the damage or not. In the result, therefore, if it were not for the special law as to animals, I think that *Davies v. Mann* (6) might well be held today to be a case for a reduction in damages, because the plaintiff's own fault was one of the causes of the damage. I venture to think that, if the doctrine of "last opportunity" is discredited, so is the rule in *Davies v.*
D *Mann* (6), for, as I have always understood it, they are one and the same doctrine.

Another test of contributory negligence, as fallacious as that of "last opportunity," is the test of *duty*. It has sometimes been suggested that an injured plaintiff is not guilty of contributory negligence unless he is under a duty of care towards the defendant. Counsel for the plaintiff did not himself
E contend that this was a correct approach, but drew our attention to *Joseph Eva v. Reeves* (16) which was said to support the proposition. In my opinion, it is not a correct approach. When a man steps into the road he owes a duty to himself to take care for his own safety, but he does not owe to a motorist who is going at an excessive speed any duty to avoid being run down. Nevertheless, if he does not keep a good lookout, he is guilty of contributory negligence.
F The real question is not whether the plaintiff was neglecting some legal duty, but whether he was acting as a responsible man and with reasonable care: see *per ATKIN, L.J.*, in *Ellerman Lines v. Grayson* (3) ([1919] 2 K.B. 535), approved by the House of Lords ([1920] A.C. 475-7), and *Caswell v. Powell Duffryn Associated Collieries* (2) ([1939] 3 All E.R. 730).

The correctness of these views as to contributory negligence, and, indeed,
G the necessity for them, is shown by considering how inapposite the test of "last opportunity"—or the test of duty—is in cases where the damage is due to the faults of three persons. Take the present case. The omnibus driver, it is said, actually saw the deceased man standing on the steps of the dust lorry and thus had the last opportunity of avoiding the accident. Furthermore, the deceased man owed no duty to him. Therefore, the deceased man
H was not guilty of contributory negligence *vis-à-vis* the omnibus driver. But the dustcart driver, it is said, did not actually know that the deceased man was on the steps, and thus had not the last opportunity of avoiding the accident. Furthermore, the deceased man owed a duty to the dustcart driver not to stand on the steps. Therefore, the deceased man was guilty of contributory negligence *vis-à-vis* the dustcart driver. That would be equivalent to saying that the fault of the deceased man was not a cause of the accident *vis-à-vis* the omnibus driver, but was a cause of the accident *vis-à-vis* the

dustcart driver—which is absurd. If it is a cause of the accident, it is a cause *vis-à-vis* all concerned. This point is made plain by seeing what would happen if the plaintiff brought an action against the drivers of both vehicles. If they were both found guilty of a “fault” which caused the damage, could it possibly be said that the plaintiff’s damages were to be reduced as against one and not as against the other? And even if that were possible, what would be the proportions as between the two drivers? Would contributions be assessed on the higher or lower figure of damages? If the Act of 1945 were to involve such questions, it would introduce many complications into the law. The Act seems to contemplate that, if the plaintiff’s own fault was one of the causes of the accident, his damages are to be reduced by the self-same amount as against any of the others whose fault was a cause of the accident, whether he sues one or more of them, and they bear the amount so reduced in the appropriate proportions as between themselves: see ss. 1 (1), (3), (4) and (6) of the Act. A

While causation is the decisive factor in determining whether there should be a reduced amount payable to the plaintiff, nevertheless the amount of the reduction does not depend solely on the degree of causation. The amount of the reduction is such an amount as may be found by the court to be “just and equitable,” having regard to the claimant’s “share in the responsibility” for the damage. This involves a consideration, not only of the causative potency of a particular factor, but also of its blameworthiness. The fact of standing on the steps of the dustcart is just as potent a factor in causing damage, whether the person standing there be a servant acting negligently in the course of his employment or a boy in play or a youth doing it for a “lark,” but the degree of blameworthiness may be very different. B

Speaking generally, therefore, the questions in road accidents are simply these: What faults were there which caused the damage? What are the proportions in which the damages should be apportioned having regard to the respective responsibilities of those in fault? In the present case the first question is: What were the faults which caused the damage? The collision between the two vehicles was caused by the negligence of the two drivers—the omnibus driver because he attempted to overtake in a narrow road on a bend without warning and before receiving a signal, and the dustcart driver because he turned suddenly across the road without making proper use of his mirror and without giving sufficient warning of his intention to do so. Although those negligent acts were the cause of the collision, what was the cause of the damage to the deceased man? He was, as the judge found, in a position which he must have known was a very dangerous position, in defiance of the dictates of common sense. If he had not been in that position, he would not have been injured. His position was certainly one of the causes of the damage, just as in *The Margaret* (17) the improper position of the anchor was one of the causes of the damage to the barge. It would, therefore, appear that the damage was caused by the faults of all three. Counsel, however, took a special point on behalf of the dustcart driver. He contended that that driver should be exempt from any liability to contribution. He said that the deceased man was a trespasser on the step of the lorry, and, therefore, if the driver of the dustcart had been sued, he would not have been liable—that is, he would not be guilty of any “fault.” Counsel argued that the distinctions about invitees, licensees and trespassers were as applicable to vehicles as to land. I do not agree. It would, I think, be unfortunate if these refinements and distinctions were introduced into road accidents. I regard the deceased man, not as a trespasser, but as a servant acting negligently, and, indeed, disobediently, in the course of his employment. Although the dustcart driver did not actually know that he was on the step, he might have foreseen it. He would, therefore, have been liable, if sued, and was guilty of a “fault.” It is C

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a case, therefore, where the damage was caused by the faults of all three of them.

The only remaining question is: In what proportions should the damage be borne? I think that the deceased man was very considerably to blame, but I am not prepared to differ from the figure of one-fifth suggested by my Lord. The damages should, therefore, be reduced by that figure. They should then be borne by the omnibus company and the dustcart driver in the proportion of 2 to 1 assessed by the judge.

A *Order accordingly. The defendants to recover the costs of the third party proceedings paid below. The third parties to pay all the defendants' costs of the third party proceedings below, including one-third of the costs which the defendants paid to the plaintiff below. The third parties to pay two-thirds of the defendants' costs on appeal. The order that the defendants pay all the plaintiff's costs below to stand. The plaintiff to pay one-third of the defendants' costs on appeal.*

B Solicitors: *Pattinson & Brewer*, agents for *Andrew, Thompson & Partners*, Swansea (for the plaintiff); *Clifford-Turner & Co.*, agents for *Dahne & Thomas*, Swansea (for the defendants); *Kenneth Brown, Baker, Baker*, agents for *T. B. Bowen*, Swansea (for the third parties).

[Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.]

C

LONG EATON CO-OPERATIVE SOCIETY, LTD. v. SMITH.

[COURT OF APPEAL (Bucknill and Denning, L.JJ., and Jenkins, J.), February 22, 1949.]

D *Agriculture—Wages—Benefits or advantages reckoned as wages—Tenancy of cottage—Contract of employment and tenancy agreement separate transactions—Rent higher than value of cottage fixed by statutory order—Agricultural Wages (Regulation) Act, 1924 (c. 37), s. 7 (11).*

E The Agricultural Wages (Regulation) Act, 1924, s. 7 (1), provides that, where a minimum rate of wages for agricultural workers has been fixed under the Act, it is a criminal offence to pay less than the minimum rate. Section 7 (11) provides: "Subject to any definition under this Act of the benefits or advantages which may be reckoned as payment of wages in lieu of cash and the value at which they are to be reckoned . . . the court may, in any proceedings under this Act, reckon as a payment of wages such amount as in the opinion of the court represents the value of any benefits or advantages . . . received by a worker under the terms of his employment." By a statutory order made under s. 8 (1) (a) of the Act of 1924, the benefits or advantages which could be reckoned as payment of wages in lieu of payment in cash included the provision of a cottage, the value of which was reckoned at 6s. a week.

F

G The contract of service of an agricultural worker to whom the statutory order applied provided merely for payment to him of a weekly wage in cash, the amount being at all times in accordance with the minimum wage for the time being in force under the statutory regulations. For the first two years of his employment he found his own living accommodation, and then, at his request, his employers allowed him to become a tenant of a cottage belonging to them on payment of a sum varying from 8s. 6d. a week to 9s. 6d. a week (the statutory rent of the cottage) and on condition that he would give up the cottage within four weeks of his ceasing to be employed by them. In an action by the employers for possession of the premises after the worker's employment had ended, the worker conceded their right to possession, but counterclaimed for the rent paid by him in excess of 6s. a week on the ground that, as 6s. was the maximum amount fixed as the value of the benefit of a cottage under the Act of 1924, the employers were not permitted to receive more than that sum as rent.

H

HELD : the letting of the cottage was not one of the terms of the worker's employment, but was a completely separate and independent transaction, and, therefore, no offence against s. 7 of the Act of 1924 had been committed and the worker was not entitled to recover any rent which he had paid in excess of 6s. a week.

Williams v. Smith ([1934] 2 K.B. 158; 151 L.T. 112), *explained and distinguished*.

[AS TO AGRICULTURAL WORKERS' WAGES, see HALSBURY, Hailsham Edn., Vol. 1, pp. 389-394, paras. 652-658; and FOR CASES, see DIGEST, Vol. 44, pp. 1301, 1302, Nos. 63-70, and Supplements.]

Cases referred to :

- (1) *Williams v. Smith*, [1934] 2 K.B. 158; 151 L.T. 112; 98 J.P. 231; Digest Supp.
- (2) *Bomford v. South Worcestershire Assessment Committee*, [1947] 1 All E.R. 299; [1947] K.B. 575; 111 J.P. 202; 2nd Digest Supp.

APPEAL by an agricultural worker from an order of His Honour JUDGE WILLES, made at Derby and Long Eaton County Court, and dated July 22, 1948.

In an action by the employers for recovery of possession of a cottage occupied by the worker, the worker counterclaimed in respect of rent alleged to have been paid by him in excess of the rate permitted by a statutory order made under the Agricultural Wages (Regulation) Act, 1924, s. 8 (1) (a). The learned judge made an order for possession and dismissed the worker's counterclaim. The worker appealed in respect of the counterclaim, and his appeal was now dismissed by the Court of Appeal on the ground that the contract of employment and the tenancy agreement were completely separate transactions, and, therefore, the statutory order made under the Act of 1924 did not apply to the rent paid by the worker. The facts appear in the judgment of JENKINS, J.

L. Blundell for the worker.

Argyle for the employers.

BUCKNILL, L.J. : I will ask JENKINS, J., to deliver the first judgment.

JENKINS, J. : The defendant, Mr. Smith, is an agricultural worker who was formerly employed as such by the Long Eaton Co-operative Society, Ltd. For the first two years, or thereabouts, of his employment he lived in a house or cottage which he rented from some landlord other than the co-operative society. On Nov. 13, 1943, at his request, he became the tenant of the co-operative society's house, No. 10, Co-Operative Street, Long Eaton, under a tenancy agreement recorded in these terms :

"I, D. A. Smith, of 2, Harrington Street, Long Eaton, do hereby accept the tenancy of the society's property situate at No. 10, Co-Operative Street, Long Eaton, on the condition that, should I cease under any cause to be employed by the society as a farm labourer, I give up the tenancy of the said property within four weeks of my being so employed by the society."

The worker remained in occupation of No. 10 under that tenancy agreement during the remainder of the period of his employment by the co-operative society, and he paid a rent of 8s. 10d., 9s. 4d., and 9s. 6d. per week during various parts of that period, the rent being, I understand, the standard rent under the Rent Restrictions Acts, plus small permitted increases made from time to time. On Jan. 31, 1948, the co-operative society gave the worker one week's notice to terminate his employment with the society on Saturday, Feb. 7, 1948. That was followed up on Feb. 14, 1948, by a notice to quit No. 10, Co-Operative Street in these terms :

"Dear Sir, Under the terms of the agreement signed by you on entering

the society's employ I hereby give you four weeks' notice from Saturday, Feb. 14, to vacate the premises No. 10, Co-Operative Street."

Apparently, the worker did not vacate the premises in accordance with that notice, and, in consequence, the society sued him for possession in the Long Eaton county court. In their particulars of claim they pleaded the fact that they were the owners of No. 10, Co-Operative Street, which was let by them to the worker in connection with his employment with them as a farm labourer :

" . . . and on condition that his right to occupy the same ceased when his said employment terminated."

They further pleaded the fact that his employment had terminated on Feb. 7, and that the premises were required for occupation by a new employee, and they claimed possession accordingly. By his defence the worker challenged the society's right to possession and claimed the protection of the Rent Acts. The substantial matter in his case, however, was a counterclaim in which he alleged that under his tenancy of No. 10 he had been charged rent at a higher rate than the rate permitted by the Agricultural Wages (Regulation) Acts, 1924, 1940 and 1947, or some of them, and the regulations made thereunder by the Agricultural Wages Board. He alleged, and it is not in dispute, that " the value of a cottage or house occupied as a separate dwelling by farm workers has throughout the relevant period been a benefit or advantage valued " under the legislation I have mentioned " at 6s. per week," while rent at a rate varying from 8s. 6d. to 9s. 6d. per week had been charged under the tenancy agreement in respect of No. 10, Co-Operative Street. In the course of the hearing before His Honour JUDGE WILLES, the right of the society to possession of No. 10, Co-Operative Street was conceded, so no dispute arises as to that. The real matter in issue was the counterclaim, and the learned judge dismissed the counterclaim on the ground that in the circumstances the letting of No. 10, Co-Operative Street to the worker at the contractual rent did not involve a breach of the legislation and regulations relevant to agricultural workers.

It will be remembered that for the first two years of his employment the worker found his own living accommodation. The contract of service was simply a contract to employ him as a farm labourer at so much a week in cash, and it is not disputed that the amount of the wages paid to him week by week was at all times in accordance with the minimum wage for the time being in force. Two years after he was engaged came the letting to him, at his own request, of No. 10, Co-Operative Street. Therefore, his agricultural employer became his landlord, and the rent reserved by the tenancy agreement was duly paid by him week by week to his employer in the capacity of landlord. The rent was no more than the rent properly chargeable under the Rent Restrictions Acts. I think I am right in saying also that the rent reserved for No. 10 represented some small saving to the worker over the rent which he had previously had to pay for the accommodation he had found elsewhere.

I will now turn to the relevant Acts, to some passages of which, and also of the regulations, it will be necessary to refer. The Act which is mainly relevant for the purposes of this case is the Agricultural Wages (Regulation) Act, 1924, s. 3 of which provides :

" (1) Where a committee have fixed any minimum rate of wages or have cancelled or varied any such rate, they shall forthwith send in the prescribed manner to the Agricultural Wages Board notification of their decision. (2) The Agricultural Wages Board, on receipt of such notification, shall as soon as practicable make such order as may be necessary for the purpose of carrying out the decision of the committee."

That arrangement seems to have been modified by the Agricultural Wages

(Regulation) Amendment Act, 1940 (which provided for the fixing of a national minimum wage by the Agricultural Wages Board), and by the Defence (Agriculture and Fisheries) Regulations, 1939 (S.R. & O., 1939, No. 1303, as amended by S.R. & O., 1940, No. 882, and subsequent amendments), reg. 23.

Section 7 of the Act of 1924 provides :

“(1) Where any minimum rate of wages has been made effective by an order of the Agricultural Wages Board under this Act, any person who employs a worker in agriculture shall, in cases to which the minimum rate is applicable, pay wages to the worker at a rate not less than the minimum rate, and, if he fails to do so, shall be liable on summary conviction in respect of each offence to a fine not exceeding £20 and to a fine not exceeding £1 for each day on which the offence is continued after conviction. (2) In any proceedings against a person under this section it shall lie with that person to prove that he has paid wages at not less than the minimum rate. (3) In any proceedings against an employer under this section the court shall, whether there is a conviction or not, order the employer to pay in addition to the fine, if any, such sum as may be found by the court to represent the difference between the amount which ought at the minimum rate applicable to have been paid to the worker during the period of six months immediately preceding the date on which the information was laid or the complaint was served and the amount actually paid to him during that period.”

Sub-sections (1) and (3) are, I think, material for the present purpose as showing the penal character of the legislation, which creates a criminal offence punishable by fine. Section 7 (9) saves the worker's right to recover any wages due to him by civil proceedings. Section 7 (10) is :

“Any agreement for the payment of wages in contravention of this Act, or for abstaining to exercise any right of enforcing the payment of wages in accordance with this Act, shall be void.”

Section 7 (11) provides :

“Subject to any definition under this Act of the benefits or advantages which may be reckoned as payment of wages in lieu of cash and the value at which they are to be reckoned, and to any limitation or prohibition under this Act of the reckoning of benefits or advantages as payment of wages in lieu of cash, the court may, in any proceedings under this Act, reckon as a payment of wages such amount as in the opinion of the court represents the value of any benefits or advantages (not being benefits or advantages prohibited by law) received by a worker under the terms of his employment.”

Section 8 provides for regulations. Sub-section (1) says :

“The Minister shall, in addition to any special power to make regulations given to him under this Act, have power to make regulations for the following purposes (a) for requiring the wages committees by order to define the benefits or advantages (not being benefits or advantages prohibited by law) which may be reckoned as payment of wages in lieu of payment in cash and the value at which they are to be reckoned, and for enabling the committees by order to limit or prohibit the reckoning of benefits or advantages as payment of wages in lieu of cash, and for enabling the committees on the application of any employer or worker, to determine any question which may arise as to the value of any such benefits or advantages, or generally as to any contract of employment so far as the application of this Act thereto is concerned.”

The Agricultural Wages (Regulation) Act, 1947, repeated the Act of 1940 and the Defence (Agriculture and Fisheries) Regulations, 1939 (as amended),

and contains, in s. 2, a slightly modified version of s. 8 (1) (a) of the Act of 1924. Section 2 of the Act of 1947 is in these terms :

A “ (1) The Agricultural Wages Board shall have power, for each county for which an agricultural wages committee is established under the principal Act, by order made in accordance with the provisions of sched. I to this Act (a) to define the benefits or advantages (not being benefits or advantages prohibited by law) which for the purposes of any minimum rate of wages fixed under the principal Act may be reckoned as payment of wages in lieu of payment in cash ; (b) to determine the value at which, for the purposes aforesaid, such benefits or advantages may be so reckoned ; (c) to limit or prohibit the reckoning for the purposes aforesaid of benefits or advantages as payment of wages in lieu of payment in cash ; B (d) to define, for the purposes of any differential rate of wages for overtime fixed under the principal Act, the employment which is to be treated as overtime employment.”

C A large number of orders were made under this legislation. For the present purpose it is only necessary to refer to the particular one which counsel for the worker showed us as typical, that is, No. 1345 made in relation to the county of Derby. This order sets out in a schedule the minimum wages for workers of 21 years of age and over, and for workers of varying ages less than that. In para. 10 of the schedule there is a provision about benefits and advantages :

D “ (1) For the purpose of the application of the above minimum rates of wages the Derbyshire Agricultural Wages Committee have by order dated Dec. 12, 1941, defined the following as the benefits or advantages which may be reckoned as payment of wages in lieu of payment in cash and the values at which they are to be so reckoned, and prohibited the reckoning of any other benefit or advantage as payment of wages in lieu of payment in cash :—1. Benefits or advantages :—(a) New milk. (b) Board (including any meals, but not including intoxicating drink). E (c) Lodging provided by the employer, whether in his own house or otherwise, except in any case in which the agricultural wages committee may determine that the lodging accommodation provided is so defective as to be injurious to health. (d) Cottage including any garden provided with the cottage except where the cottage is one in regard to which the medical officer of health has reported that it is in a state so dangerous or F injurious to health as to be unfit for human habitation.”

In para. 10 (2) the material provision is :

G “ (d) Cottage, 6s. per week (less any charge made to the worker in respect of rates) provided that in the case of a cottage with regard to which the agricultural wages committee, on an application by or on behalf of a worker, have certified that by reason of inadequate accommodation, want of repair or sanitation or lack of water supply, the value of such cottage is less than 6s. per week, the value shall be such sum less than 6s. per week as the committee shall determine (less any charge made to the worker in respect of rates).”

H The question for this court is whether the learned county court judge was right in holding that on the facts of this case no breach of those Acts and regulations had been made out. To succeed the worker must show that he has been paid something other than the full minimum wage made up either of cash or of benefits or advantages permitted to be reckoned as payment of wages in lieu of cash and reckoned at values not exceeding those authorised by the regulations, *viz.*, so far as a cottage is concerned, 6s. per week. It is contended by counsel for the worker that the Acts and regulations have this effect. He says that they not only prohibit the payment to an agricultural

worker of a sum less than the minimum wage in cash plus the giving to him of a benefit or advantage making the wage up to the minimum wage, but reckoned at a figure in excess of the permitted value, but that they also prohibit in all circumstances wherever the relation of employer and employee exists between an employer and an agricultural worker any transaction of letting of lodgings, or provision of milk, or whatever it may be, which involves the payment by the agricultural worker to his employer of a greater sum, or a greater price, than the permitted figure which is given in the regulations as the value at which those matters may be reckoned as payment of wages in lieu of payment in cash. So, in this case, according to the argument of counsel for the worker, although in origin the contract was a contract of service into which no question of the provision of a cottage entered, yet, because the worker, while still in the employment of the society, although it was as long as two years after he entered their employment, asked to be accepted as tenant of No. 10, Co-Operative Street, the Acts and the regulations have been infringed by the co-operative society stipulating that he pay for the cottage the ordinary rent that any other tenant would be expected to pay.

I am unable to place such a construction on the Acts and regulations. What they prohibit is the payment of wages other than in cash, with the exception that benefits or advantages of certain kinds can be taken as equivalent to payment in cash up to, but not exceeding, a specified value. In my view, they clearly have not in any literal sense been infringed by anything which was done in this case. The worker was paid the full minimum wage in cash. Nothing was credited to the employer as a payment of wages otherwise than in cash in respect of any accommodation or other privilege or advantage. After the worker had received his wages in full in cash, he paid, among other things, his rent. It so happened that the landlord who received the rent was also his employer, but that circumstance did not alter the fact that the worker had received the whole of his wages in cash.

Counsel for the worker contends that, unless his argument prevails, the whole of this legislation is rendered ineffective because, he says, all that is necessary in order to avoid its effect is for an employer to say to his workman: "I will pay you the minimum wage of so much, and I can let you have a cottage at so much rent." That, if I may say so with respect, is something of a travesty of the true position which, in my judgment, is that each case must be considered on its own facts and the question in each case must be: In this case is the employee receiving the full amount of his wages in cash, or in cash plus some permitted benefits or advantages charged for at more than the permitted figure? If it is found that the contract of service was in substance a contract for so much cash, plus a house or a cottage, then, if the amount of the rent attributed to the cottage is higher than the permitted amount, it does not matter in the slightest degree whether the form of the contract was £2 a week cash, plus a cottage counted at £1 a week, or £3 a week cash "and you can have this cottage for which you will pay £1 a week." In either of those two instances the substance of the matter would have been that there was included as part of the wages a cottage reckoned for the purpose at more than the permitted figure, but that does not mean that it is never possible for an employee, as a genuinely separate transaction, to rent a house or cottage from his employer at whatever figure may be agreed between them. Whether or not the transaction is genuinely separate and distinct must be a question of fact in each case. It would be idle to attempt to give an exhaustive definition of the facts which would fall on one side of the line or the other. I am satisfied that on the facts of this case the learned county court judge was right in holding that the worker had failed to make out his case of infringement of the Acts and regulations and rightly dismissed the counterclaim.

We have been very strongly pressed with the decision of the Divisional Court in *Williams v. Smith* (1) where the headnote is in these terms :

A “ A worker in agriculture under his contract of service received his proper statutory wages in full. Under a separate agreement with his employer he paid back to his employer £1 each week for board and lodging with him, 15s. being the maximum amount fixed by statutory order under the Agricultural Wages (Regulation) Act, 1924, s. 8 (1) (a), as the value of that benefit or advantage which could be reckoned as payment of wages instead of payment thereof in cash. The worker was free to lodge elsewhere, and the employer would have preferred him to do so :—*Held*, that as the employer had allowed the worker to board and lodge with him he might not receive from him more than 15s. per week in respect thereof, although in form the contract to pay more was distinct from the contract of service.”

C Looking at the facts of that case, it seems to me to be reasonably plain that the arrangement under which the worker was to lodge with the employer at £1 a week was part of his contract of service. It is true that it was a separate agreement, but it was entered into at the time the worker was engaged. He was to be paid the minimum wage of £1 11s. a week, and he was given the option of finding himself lodgings elsewhere in the village, or lodging with his employer and paying £1 a week. He chose the latter arrangement, and it seems to me that the upshot of the bargain he made was that he was given board and lodgings by the employer as part of his contract of service. That being so, in my opinion, *Williams v. Smith* (1) is a case where a benefit or advantage was reckoned in the wages at a figure higher than the permitted figure, and, none the less so because the employer paid the full wage in cash to the worker and the worker paid back £1 to the employer's wife for his board and lodging. Accordingly, I am in complete agreement with the conclusions arrived at by the Divisional Court in that particular case. It does seem to me, however, that some of the observations which fell from their Lordships went further than was necessary for the decision of the case, and, if any of those observations properly construed involve the view that, in a case like that now before the court, the house ought to be considered as a benefit or advantage included in the wages in lieu of cash at a figure higher than the permitted figure, then, in my judgment, those observations should not be accepted as representing the law.

F *Bomford v. South Worcestershire Assessment Committee* (2), the other authority to which we were referred, was a rating case, and, therefore, dealt with a very different subject-matter, but it did concern the rateable value of an agricultural cottage. The argument for the owner was that, having regard to the Agricultural Wages (Regulation) Acts, 1924 and 1940, and to the construction placed on those Acts in *Williams v. Smith* (1), it was impossible for him ever in any circumstances to get a greater rent than 3s. a week for the cottage in question, which, presumably, was a cottage which no one except an agricultural worker would occupy. The argument that 3s. was an absolute limit was rejected by the court, mainly on the ground that a farmer might be so much in need of the accommodation for one of his agricultural workers that he would be prepared to pay more than 3s. a week for the cottage, bearing the additional amount he had to pay out of his own pocket. Be that as it may, the passage which, I think, is the only one which has any bearing on the present case occurs in the judgment of TUCKER, L.J., where he said ([1947] 1 All E.R. 301) :

“ The argument is that, in any event, by reason of the operation of the Agricultural Wages (Regulation) Acts, 1924 and 1940, and the orders made thereunder, the value, for the purposes of rating, is fixed irretrievably,

once and for all, at 3s. a week because that sum has been fixed as the maximum which may be deducted from the wages fixed by the statute as payable to the farm workers. Furthermore, it has been decided by the Divisional Court in *Williams v. Smith* (1), the correctness of which both sides accept, that, if the cottages are let, they cannot be let to the farm worker at a rent in excess of 3s. It is said to follow from that, as a matter of law, that there is only one figure which can be taken as the gross value, namely, the figure arrived at on the basis of 3s. a week."

I cannot regard that reference to *Williams v. Smith* (1) as adding anything to its value as a decision. TUCKER, L.J., it will be observed, in referring to the case, said "the correctness of which both sides accept," so the question whether or not *Williams v. Smith* (1) was rightly decided was not in issue in *Bomford v. South Worcestershire Assessment Committee* (2). For the reasons which I have endeavoured to state, in my judgment, the learned county court judge was right in his conclusion in the present case, and the appeal should accordingly be dismissed.

BUCKNILL, L.J. : I will ask DENNING, L.J., to give the next judgment.

DENNING, L.J. : By statute agricultural workers have to be paid at least a specified wage. It is a criminal offence to pay a wage below the minimum. The legislature realised that wages might be paid in cash or in kind. For instance, the worker might receive, in addition to cash, benefits and advantages such as the provision of a cottage, or milk, or board and lodging. The legislature, therefore, said that the court had to reckon the value of the additional benefits and advantages, translate them into cash, add that to the cash payment, and then see whether or not the minimum was paid. To relieve the courts of the task in every case of assessing the value of those benefits and advantages, power was given to county agricultural committees—now to the Agricultural Wages Board—to specify what value was to be put on the benefits and advantages. Accordingly, orders have been issued giving figures for the more usual benefits, such as a cottage, or milk, or board and lodging. If a free cottage is given, the value is to be taken at 6s. a week. If milk is provided, it is to be taken at the current wholesale price, and so forth. Those provisions are intended to translate into cash the value of benefits in kind so as to see whether the minimum has been paid or not. The legislature did not, however, specifically deal with the position which would arise if at the time of the worker's employment arrangements were made for the farmer to pay him the minimum sum for wages in cash, and then, by a transaction at or about the same time, the farmer were to agree to give the worker certain benefits in return for a payment in cash over and above the sums specified by the wages board for those benefits. If the two transactions were to be regarded in law as separate and distinct from one another, it would mean that any employer could evade the Act by a simple expedient. The excessive sum charged for the benefits and advantages could be made an indirect method of paying less than the minimum wage. What the farmer paid with one hand, he would take back with the other. Faced with a case of that kind, the court in *Williams v. Smith* (1) considered that the reality, and not the form, of the transaction must be regarded. If in reality the man is receiving less than the minimum wage, the employer is guilty of an offence.

The key to the question is found in s. 7 (11) of the Act of 1924, which provides that the court has to see what are "the terms of [the] employment." The employer cannot evade the Act by making, in point of form, two separate contracts. The court must look at the whole terms of the employment and see, taking them as a whole, whether or not the minimum is paid. In *Williams v. Smith* (1) the terms of the employment were that the worker was to receive the minimum wage of £1 11s. in cash, and pay £1 for his board and

lodging, whereas the prescribed allowance was only 15s. Taking the terms of employment as a whole, therefore, the extra 5s. was, in effect, a deduction from the minimum wage, and the court held that an offence had been committed. The governing words, in my opinion, are "the terms of [the] employment." They may be found in one document or in two, in one contract or in two contracts. Whenever found, the whole must be looked at to see whether or not the minimum requirements of the Act are complied with. It is altogether different in the present case. The letting of this house was not one of the terms of the employment. It was not part and parcel of the transaction when the worker was employed, as in *Williams v. Smith* (1). It was a completely separate and independent transaction, and such a transaction is not touched by the Act at all. The defendant was receiving his full minimum wage throughout the period. Two years after he entered the employment the employer let him this house. He paid less rent than he had been paying for his previous house, and he only paid the rent allowed by the Rent Restrictions Acts. In those circumstances it seems to me to be wrong to say that there is any offence against the Act. To succeed the argument for the defendant must go so far as to show that there is a prohibition against any employer letting to a farm worker a house or cottage at more than 6s. a week. There is no such prohibition in the Act, and there is nothing in the Act to enable any committee or board to make any such prohibition. If the words of AVORY, J., in *Williams v. Smith* (1) go as far as that, I cannot agree with them. Instances have been put in the course of argument of the absurd results which would follow from the contention put before us today. It would mean that, if a worker took a house at a fair rent from a separate landlord (a third person) and then the farmer took an assignment of the lease of the house, the farmer would have to reduce the rent. It would also mean that, if a farmer let a good house which could be sub-let at considerable profit, and the tenant later entered the farmer's employment, the farmer would have to reduce the rent of the house to 6s. a week. In my judgment, there is nothing in the Act which compels us to reach any such absurd conclusions. Whenever there is a separate and independent transaction which does not form part of the terms of the employment the Act does not affect it, and this is one of those cases. I agree that the appeal should be dismissed.

BUCKNILL, L.J. : I agree.

Appeal dismissed with costs.

Solicitors : *Vizard, Oldham, Crowder & Cash*, agents for *Bartlett, Young, Murphy & Walters*, Loughborough (for the worker) ; *Savery, Stevens & Nutt*, agents for *R. A. Young & Pearce*, Nottingham (for the employers).

[*Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.*]

Re SILVERSTON (deceased). WESTMINSTER BANK LTD. v. KOHLER AND OTHERS.

[CHANCERY DIVISION (Romer, J.), March 1, 1949.]

Will—Servant—Legacy to—"If in my service at the time of my death"—Receiver in lunacy of testator appointed—Employment of servant continued by receiver—Release from performing any service for testator.

By her will, dated Dec. 21, 1944, a testatrix provided : "I bequeath free of duty to the following domestic servants if they respectively shall be in my service at the time of my death and not under notice to leave whether given or received (i) to A.K. £500, (ii) to R.M. £500." On Mar. 19, 1945, a receiver of the testatrix's property was appointed, the testatrix having become a patient under the Lunacy Act, 1890, and having been

removed to a nursing home. Her residence was sold pursuant to an order of the Management and Administration Department. At the date of the sale A.K. and R.M. were in the employment of the testatrix, each receiving a wage of £2 per week. By the direction of the assistant master of the Department the receiver continued the employment of A.K. and R.M. at retaining fees of £2 per week each with authority to release them from performing any service to the testatrix. The retaining fees were paid until the testatrix's death on May 31, 1948, and no services were then being performed by A.K. or R.M. A

HELD : A.K. and R.M. were in the testatrix's service at the time of her death within the meaning of the will so as to qualify under the terms of the bequest.

Re Lawson ([1914] 1 Ch. 682 ; 110 L.T. 573) and *Re Cole* ([1919] 1 Ch. 218 ; 120 L.T. 374), *applied*. B

Re King ([1917] 2 Ch. 420 ; 117 L.T. 529), *distinguished*.

[AS TO GIFTS TO SERVANTS, see HALSBURY, Hailsham Edn., Vol. 34, pp. 323-325, paras. 373, 374 ; and FOR CASES, see DIGEST, Vol. 44, pp. 899-903, Nos. 7584-7640.]

Cases referred to :

- (1) *Re Cole*, [1919] 1 Ch. 218 ; 120 L.T. 374 ; 44 Digest 472, 2912.
- (2) *Re Hartley's Trusts*, (1878), 47 L.J.Ch. 610 ; 44 Digest 902, 7628.
- (3) *Re Lawson*, [1914] 1 Ch. 682 ; 110 L.T. 573 ; 44 Digest 900, 7593.
- (4) *Re King*, [1917] 2 Ch. 420 ; 117 L.T. 529 ; 44 Digest 903, 7629.

ADJOURNED SUMMONS to decide, *inter alia*, whether servants receiving a retaining fee but performing no services for the testatrix at the date of her death were in her service at that date so as to qualify for legacies under her will. ROMER, J., held that they were so entitled. The facts appear in the judgment. D

Donald Cohen for the plaintiff, trustee of the will.

John L. Arnold for the first two defendants, the legatees A.K. and R.M.

E. G. Wright for the third defendant, a legatee. E

Droop for the remaining defendants, beneficiaries under the will, including an infant residuary legatee.

ROMER, J. : I have to decide whether two ladies named Annie Kohler and Rose Moody are entitled in the events which have happened to legacies on the footing that they were in the service of the testatrix at the date of her death. F

The testatrix made her will on Dec. 21, 1944, and a codicil on the same day. The legacies in question were given by cl. 5 of the will and the codicil. Clause 5 of the will says :

"I bequeath free of duty to the following domestic servants if they respectively shall be in my service at the time of my death and not under notice to leave whether given or received (i) To Annie Kohler £500, (ii) To Rose Moody £500 . . . (iv) To each of the servants indoor or outdoor who shall have been in my or my husband's service for three years prior to my decease (including the above . . . legatees) the amount of one year's wages in addition to all moneys (if any) owing to them respectively by me or my said husband at my death." G

The will was attested by two witnesses of whom Rose Moody was one. By the first codicil, which was not witnessed by Rose Moody, the testatrix bequeathed H

" . . . to my maid Rose Moody if she shall be in my service at the date of my death and not under notice to leave whether given or received the sum of £500 and also the amount of one year's wages in addition to all moneys (if any) owing to her by me at my death. In all other respects I confirm my said will."

At the date of the will the defendants Annie Kohler and Rose Moody were employed by the testatrix as domestic servants at Hans House, Hans Street, London, where the testatrix lived. On Mar. 19, 1945, a receiver of the property of the testatrix was appointed, and that receiver continued in office down to the date of the testatrix's death, which took place on May 31, 1948. The facts necessary to understand the point in issue are set out in Mr. Hulbert's affidavit in support of the summons, in which he says, after referring to the order appointing a receiver of the property of the testatrix :

" Shortly after the date of the said order the testatrix was removed to Chiswick House, Pinner, Middlesex, and her said residence was sold pursuant to an order of the Management and Administration Department. At the date of the said sale the defendants Annie Kohler and Rose Moody continued in the employment of the testatrix. They had each been in her service or that of her late husband for upwards of 3 years and they were respectively in receipt of wages at the rate of £2 per week. By the directions of the assistant master of the Management and Administration Department the said receiver continued the employment of the defendants Annie Kohler and Rose Moody in the patient's service at retaining fees of £2 per week, but with authority to release them from performing any service for the testatrix. The said retaining fees were paid until the death of the testatrix, but no services were then being performed by either of the said defendants to her. Such directions were given by the master to preserve any rights the said defendants Annie Kohler and Rose Moody might claim to payment of the said legacies of £500 and one year's wages each referred to in the said will and codicil."

On behalf of Annie Kohler and Rose Moody it is said, having regard to the language which the testatrix used, that they qualify for their legacies. It is undisputed that before the order appointing a receiver of the testatrix's property they had been in the service of the testatrix at the house in which she resided. It is equally plain that at her death neither of them was under notice to leave, so the question for decision comes down to whether it can be said that they were in the testatrix's service at the time of her death. It is contended on their behalf that when the testatrix died they were under a contract by which the receiver continued their employment at a remuneration and that it is not material whether or not they were actually performing services for the testatrix when she died. The crucial matter, it is argued, is that they had not left the testatrix's service at her death. Counsel referred me to *Re Cole* (1), which came before SARGANT, J., and, having considered that case, I am satisfied that it does justify the view that, assuming that in other respects these ladies were in the employment of the testatrix at the time of her death, the fact that they were not actively engaged in rendering her services does not destroy their claim.

Then arises the question whether, having regard to the fact that their employment was continued by the receiver, it can be said that they were in the testatrix's service rather than in the receiver's service at the time when the testatrix died. Counsel says it is plain that circumstances may well arise in which a person who is in the apparent employment of one person is in the actual employment of another—for example, a lady's maid is usually paid by the lady's husband. I have been referred to three cases which I will mention shortly. The first was *Re Hartley's Trusts* (2). The testatrix in that case had given a legacy to a servant named Mary Bond provided that Mary Bond remained in her service until her death. Later, the testatrix was removed to a lunatic asylum, and a few days later Mary Bond was dismissed by a relative who was managing the testatrix's affairs and was ignorant of the contents of her will. On the question coming before HALL, V.-C., whether, notwithstanding what had happened, Mary Bond could be described as being in the service of the

testatrix at the time of her death and so entitled to the legacy, he held that after the order in lunacy which directed the establishment of the testatrix to be broken up the service of Mary Bond was at an end and in the circumstances he could not hold her to have been in the service of the testatrix at the time of her death.

In *Re Lawson* (3), a testator made a will in 1905 by which he bequeathed

" . . . to each of my domestic servants who shall have been in my service for two years prior to my decease and shall not be under notice to leave whether given or received, the amount of one year's wages free of duty."

The testator died in April, 1912. One of the claimants for the legacy was B, a certified male nurse and masseur who was first engaged in 1907 by the receiver in lunacy of the testator's estate as an assistant attendant on the testator at a weekly wage of a guinea. He did not sleep in the house, but took some of his meals there. From November, 1910, till the testator's death, with one break, he was engaged on night duty at a salary of two guineas a week paid every fourth week. Owing to the strain of this attendance B was obliged to take a holiday of four months in 1911 with the consent of the receiver, and he received no salary during his absence. During his attendance he was free to undertake other work and did so to a limited extent. On a summons by the executors to determine the question whether B was entitled to the legacy, it was held that on the true construction of the will he was a domestic servant, the term "domestic" being equivalent to "household," and also that, although the service must be continuous for the period named, that did not involve service from day to day, and the suspension of the service, with the consent of the master, did not disentitle B to the legacy claimed. No argument there was founded on the view that this man, having been engaged by the receiver in lunacy, could not be properly regarded as in the testator's own service. EVE, J., assumed that that was the true view to take and said ([1914] 1 Ch. 686, 687):

"He was obviously a servant, and a servant of the testator, and not the less so because he was possessed of qualifications which enabled him, when not actually engaged with the testator, to add to his income by serving others . . . It is true that in this case, in the circumstances I have mentioned, no payment was made to the servant while his absence continued, but I do not think this element is of itself conclusive, coupled as it was with the arrangement that he was to return to his duties as soon as his health was restored. The result is that, in my opinion, the service of the respondent was of such a nature as to qualify him to claim, and I think he is entitled to be paid, a legacy as a domestic servant of the testator."

The last case was *Re King* (4), where the servants who claimed legacies under a similar type of bequest to the one I am now considering were employed, not by the receiver of the testator's estate, but by the committee of his person. The principal servant employed was a man called Oldfield, who was appointed by the committee to have charge of the testator's establishment, and Oldfield himself employed, as I understand it, other servants as well. The question was whether Oldfield and the servants whom he employed were entitled to legacies as being persons in the testator's service at his death. It was argued before YOUNGER, J., that there was a distinction between an appointment by the committee of the person and an appointment by the committee of the estate—that the committee of the estate contracts in the name of the lunatic but the committee of the person does not and is not liable to account for the allowance made to him for the maintenance of the lunatic. YOUNGER, J., in delivering judgment on the question, said ([1917] 2 Ch. 424):

"The question is whether any of them can claim this legacy as being a

A person in the testator's service at his death. In my opinion they cannot. I think these persons were either in the service of the committee of the person or, as Mr. *Austen-Cartmell* suggested, in the service of the court, and I do not think there was at the testator's death any person who was in his service within the meaning of the codicil. The committee of the person under a scheme in lunacy was apparently allowed a certain sum by means of which he was to provide for the comfort of the testator, including in that the engagement of a proper staff of servants; and Mr. *Terrell* cited an authority which shows that the committee of the person is not liable to account for the actual disposition of moneys placed in his hands for the purpose so long as he discharges the duty of maintaining the lunatic, which it is not in dispute has been properly performed in the present case. It appears, therefore, that these persons cannot be said to have been in the service of the lunatic as persons either appointed or paid by him. They were in fact paid by the committee of the person out of the money allowed to him for that and other purposes, and were also appointed mediately or immediately by him."

He then referred to *Re Lawson* (3) and the fact that EVE, J., allowed the legacy to the male nurse who was concerned in that case. YOUNGER, J., then said

C (*ibid.*, 425):

"It is, however, obvious from the report either that there were special circumstances which enabled the judge to hold without question that the servant in that case was in the service of the testator, or that the point was not either taken or pressed in argument. It is certainly not discussed in the judgment, and I do not think that the decision of EVE, J. can be considered as an authority either one way or the other on the point which has been now definitely argued before me. Moreover, the difference between a receiver and the committee of the person may be, and I think properly is for this purpose, very marked. The answer to this question raised by the summons will accordingly be that the bequest did not take effect in favour of Oldfield or in favour of any of the other persons who claim it."

E I have authority there that there is a distinction, in a case of the kind now under consideration, between a receiver of the estate and a committee of the person, and I have EVE, J.'s view, or assumption on, in *Re Lawson* (3) that a person who is employed by the receiver of the estate of a patient can be regarded as equivalent to an employee of the patient himself.

F In those circumstances, I am satisfied that these ladies in the present case qualify under the terms of the testatrix's bequest. I am satisfied that they were in the service of the testatrix in that they were in receipt of a retaining fee which would place them under a moral obligation, at all events, to put themselves at the disposal of the testatrix if she should regain control of her affairs, and that they could, in every fair sense of the word, be regarded as being in her service. I am also satisfied that the true view of the matter is that they are to be regarded as being in her service none the less because the actual extension of their employment was effected by the receiver and not by the testatrix herself. I will, therefore, make a declaration that, in the events which have happened, both these ladies were in the service of the testatrix at the date of her death.

Order accordingly.

Solicitors: *Hicks, Arnold & Co.* (for all parties).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

R. v. PORTER.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Humphreys and Birkett, JJ.), February 28, 1949.]

Betting—Use of room for betting—Saloon bar of public house—Need of permission of licensee—Localisation—Betting Act, 1853 (c. 119), s. 3.

The appellant, a bookmaker, was charged with using a public house for the purpose of betting with persons resorting thereto. On five days between July 14 and 29, 1948, the appellant was seen in the saloon bar taking bets to the number of 45. For the appellant it was contended that, before he could be convicted, it was necessary to show that he was permitted by the licensee to use the house for the purpose of betting, and that there must be evidence that he was carrying on his business of a bookmaker in some particular place in the saloon bar.

HELD : if a bookmaker makes a habit of using the bar of a public house for the purpose of betting, he commits an offence against the Betting Act, 1853, s. 3, the bar being a "room" for the purposes of the Act, and it is not necessary to prove that the licensee knew he was there or permitted him to be there, nor is it necessary, to constitute the offence, for him always to stand in a particular place in the bar.

Milne v. Comr. of Police for City of London ([1939] 3 All E.R. 399; [1940] A.C. 1; 161 L.T. 65), *applied*.

R. v. Deaville ([1903] 1 K.B. 468; 88 L.T. 32), *no longer good law*.

[AS TO USE OF HOUSE FOR BETTING, see HALSBURY, Hailsham Edn., Vol. 15, pp. 513-516, paras. 920, 921; and FOR CASES, see DIGEST, Vol. 25, pp. 445, 446, Nos. 380-394.]

Cases referred to :

- (1) *Powell v. Kempton Park Racecourse Co.*, [1899] A.C. 143; 80 L.T. 538; 63 J.P. 260; *affirm.*, [1897] 2 Q.B. 242; 25 Digest 441, 358.
- (2) *R. v. Deaville*, [1903] 1 K.B. 468; 88 L.T. 32; 67 J.P. 82; 25 Digest 446, 392.
- (3) *Milne v. Comr. of Police for City of London*, [1939] 3 All E.R. 399; [1940] A.C. 1; 161 L.T. 65; 103 J.P. 299; Digest Supp.
- (4) *Belton v. Busby*, [1899] 2 Q.B. 380; 81 L.T. 196; 63 J.P. 709; 25 Digest 445, 390.
- (5) *Noble v. Southern Ry. Co.*, [1940] 2 All E.R. 383; [1940] A.C. 583; 164 L.T. 1; 33 B.W.C.C. 176; 2nd Digest Supp.
- (6) *Young v. Darrah*, [1929] S.C. (J.) 17; Digest Supp.
- (7) *Hawke v. Dunn*, [1897] 1 Q.B. 579; 76 L.T. 355; 61 J.P. 292; 25 Digest 437, 339.

APPEAL against conviction and sentence at the London Quarter Sessions on Nov. 2, 1948.

The appellant was convicted of using a public house for the purpose of betting and was ordered to pay a fine of £50 and twenty guineas costs. His appeal was now dismissed and he was ordered to pay the costs of the appeal. The facts appear in the judgment of the court delivered by LORD GODDARD, C.J.

Edward Clarke for the appellant.

Vernon Gattie for the Crown.

LORD GODDARD, C.J., delivered the following judgment of the court. The court is of opinion that this appeal fails. It is an appeal by a bookmaker who was originally summoned before magistrates for an offence against s. 3 of the Betting Act, 1853, and elected to go for trial. He was charged before the learned deputy chairman at the London Sessions for that :

" . . . on July 14, 1948, and on other days between that date and July

29, being a person using the Abbey Arms public house, Harrow Manor Way, you used the same for the purpose of betting with persons resorting thereto."

Section 1 of the Act of 1853, prohibits a house, office, room or other place being kept or used for the purpose of any person using the same for betting with persons resorting thereto, and s. 3 provides :

- A " Any person who being the owner or occupier of any house, office, room, or other place, or a person using the same, shall open, keep, or use the same for the purposes hereinbefore mentioned, or either of them ; and any person who being the owner or occupier of any house, room, office, or other place, shall knowingly and wilfully permit the same to be opened, kept, or used by any other person for the purposes aforesaid, or either of them ; and
- B in conducting the business of any house, office, room, or place, opened, kept, or used for the purposes aforesaid, or either of them ; shall . . . "

be guilty of an offence.

- C From July 14 to 29 observation was kept on this house and the saloon bar by police officers, and on five days during that period the appellant was seen in the saloon bar taking bets to the number of 45, standing or sitting at different places in the bar. During the time he was in the bar he was taking some refreshment. Our attention has been called to evidence which shows that the licensee or his employee or wife were always in the bar while the bookmaker was there and could see what was going on, but no question relating to that was left to the jury. The learned deputy chairman in his summing-up charged the jury in this way :

- D " . . . on the whole, I have come to the conclusion that it is not necessary for the user to be in the position of receiving permission from the landlord. I do think it is necessary, as Mr. Gattie puts it for the prosecution, that he should be localised, which means that he is in the bar during the racing hours day by day when the police see him and he is not there merely on an
- E odd day or so, now and again, but he is doing it as a regular habit, a regular custom, and, therefore, he makes that place, for the time being, while he is operating, into a betting house and, in that sense, he can be convicted of using it for the purpose of betting."

- F In the opinion of the court, that was a correct direction to the jury as the law now stands, whatever it may have been some years ago. There was evidence that on several occasions within a limited time the appellant was using this house for the purpose of betting, and he was seen during those times to take no fewer than 45 bets on one day or another. There was, therefore, evidence for the jury that he was carrying on the business of a bookmaker in this public house.

- G The argument of counsel for the appellant, however, is that, in view of the decision in *Powell v. Kempton Park Racecourse Co.* (1), and other cases including *R. v. Deaville* (2), which was decided in the Court of Crown Cases Reserved and would ordinarily be binding on this court, no offence was committed. His main contention is that it is necessary to show two things. First, he says, it must be proved that the appellant was in what the deputy chairman described as " a privileged position," meaning thereby that he was not in the position
- H of an ordinary user of the house, but was permitted by the licensee, expressly or impliedly, and, therefore, with knowledge of what he was doing, to use the house for the purpose of betting, and, as there was no evidence left to the jury and no finding by the jury either that the licensee permitted the appellant to use the house for this purpose or that the licensee knew that he was so using it, therefore, the conviction was wrong. Secondly, counsel submits that there must be evidence that the appellant was localised, as it was put, in the sense that he must have been standing or sitting in some particular place in the

saloon bar on the occasions in question and it is not enough if he was merely in the bar, though why, providing the requirement of using the place is enough, he should have to stand in any particular part of it, I find some difficulty in following.

Counsel for the appellant relies particularly on the speech of LORD HALSBURY, L.C., in *Powell v. Kempton Park Racecourse Co.* (1). It is not necessary for this court now to consider that case since it has recently (in 1939) been explained by the House of Lords in *Milne v. Comr. of Police for City of London* (3), but LORD HALSBURY in his speech referred to the judgment of A. L. SMITH, L.J., in the Court of Appeal where the Lord Justice said ([1897] 2 Q.B. 279) :

"I do not propose to deal with the numerous cases which have arisen about the user of rooms at public houses by betting men when carrying on their business of betting with persons resorting thereto, for the words 'house' and 'room' are specifically mentioned in the Act as two of the prohibited places, when used by a betting-man for the carrying on the business of betting therein, and in my judgment these cases have no application to betting in an inclosure at a racecourse in the usual way as in the present case."

When one remembers that the question in *Powell v. Kempton Park Racecourse Co.* (1) merely related to the legality of betting in Tattersall's Ring at a racecourse, it is impossible to suppose that the noble and learned Lords who formed the majority in that case meant to say that all the public house cases were wrong. The judgment of A. L. SMITH, L.J., was noted for special approval by LORD HALSBURY, and the Lord Justice distinctly expressed the opinion that the court were not considering cases, such as the present, of people betting in public houses and that its decision was not intended to throw any doubt on the decisions in those cases. It must be remembered that the Court of Appeal in *Powell's* case (1) (RIGBY, L.J., dissenting) had come to the same decision on the point before them as did the House of Lords.

A variety of other cases followed. One, to which we have been referred, was *Belton v. Busby* (4), the headnote of which states :

"A bookmaker was in the habit of attending at the bar of a licensed beerhouse daily at certain hours for the purpose of betting with persons resorting thereto, and he carried on there a business of ready-money betting with the knowledge and permission of the licensed occupier of the beerhouse."

It was held that the bookmaker "used" the bar of the beerhouse for the purposes prohibited by the Betting Act, 1853. Counsel for the appellant relied on the judgment of GRANTHAM, J., in that case where there was knowledge on the part of the licensee. The learned judge said ([1899] 2 Q.B. 383) :

"There is, it seems to me, this great distinction between the racecourse cases, such as *Powell v. Kempton Park Racecourse Co.* (1) and the present, that in the former the bookmakers and the members of the public who bet with them go into the racecourse inclosures on exactly the same footing; the place is open to them both on the same terms; the one has no greater right to be there than the other. But that was not the case here. The bookmaker Woods had something in the nature of a right or licence to use the bar of the beerhouse for the purposes of his betting business over and above the right of an ordinary member of the public to resort there. This seems clear from the findings of the magistrate. The case finds that he was allowed to remain there regularly for certain hours every day . . ."

There the learned judge had no difficulty in saying that that case was distinguishable from *Powell's* case (1), and he applied the very passages in LORD HALSBURY'S speech on which so much reliance has been placed by counsel

for the appellant. BRUCE, J., did not put his judgment on that ground at all. He adopted the ground mentioned by A. L. SMITH, L.J., in *Powell's* case (1), which was cited with approval in the House of Lords. BRUCE, J., said ([1899] 2 Q.B. 384) :

A “I think that the room, the saloon bar, was used by Woods for the purpose of betting with persons resorting thereto. I think that Woods was a person using the room in the sense that he regularly resorted there for the purpose of carrying on the betting business, and was the person in control of that business. Therefore, I entertain no doubt that he was guilty of an offence against the Betting Act.”

B The next case is *R. v. Deaville* (2). There is no doubt that in that case the court did hold that there could not be a conviction unless it could be shown that the bookmaker was carrying on his betting on the premises with the consent, express or implied, of the licensee. If *R. v. Deaville* (2) stood alone, it might be decisive of the present case, because in the ordinary way that case would be binding on this court and it would be difficult to distinguish the facts in it from those in the present case, but when one finds that a case, although not expressly overruled by the final court of appeal, has been so dealt with that C it is obvious that, in the opinion of that court, the case was wrongly decided, this court ought to treat the case as overruled. I may cite what LORD WRIGHT said in *Noble v. Southern Ry. Co.* (5) when dealing with this point. That was a case under the Workmen's Compensation Act, 1925, and the Court of Appeal, when it came before them on appeal from the county court judge, though they D thought that the appeal should be allowed, felt bound by an earlier decision of the Court of Appeal to dismiss it, although there were cases in the House of Lords which showed that the reasoning which had led the Court of Appeal on the earlier occasion to decide as they did decide was erroneous. LORD WRIGHT said ([1940] 2 All E.R. 392) :

E “I feel no doubt that the decision of the Court of Appeal was wrong. I can understand the difficulty in which both the county court judge and the Court of Appeal were placed in the present case. What a court should do, when faced with a decision of the Court of Appeal manifestly inconsistent with the decisions of this House, is a problem of some difficulty in the doctrine of precedent. I incline to think that it should apply the law laid down by this House, and refuse to follow the erroneous decision.”

F If I may say so with respect, I entirely agree. If we find that the House of Lords has given a decision which is manifestly inconsistent with an earlier decision of a court from which an appeal lies to the House of Lords, we ought not to follow that earlier decision whether or not it has been expressly overruled. In *Milne v. Comr. of Police for City of London* (3) one member G at least of the House of Lords said that *R. v. Deaville* (2) was wrongly decided, and it is obvious that the learned Lords did not approve of the decision in *R. v. Deaville* (1), but thought it was wrong. Therefore, this court ought to follow the decision of their Lordships in *Milne's* case (3). The point that fell for decision there was whether a bookmaker who used a telephone H to communicate between his office and a club, taking bets from members and laying the odds over the telephone, could be said to be using the club for the purpose of betting, and their Lordships came to the conclusion that in those circumstances no offence had been committed because, they said, it is impossible to say that a person uses a house merely because he telephones to that house. They pointed out how absurd it would be to say that a man who telephoned from Liverpool to a house in London or New York was using that house. All their Lordships found it necessary to go at length into the meaning of the word “user” and what amounted to user. It would be wrong to say that their observations on that matter were *obiter*. I think they formed part of the decision

of the House. *Milne's* case (3) disposes once and for all of many of the difficulties which LORD HALSBURY's speech in *Powell v. Kempton Park Racecourse Co.* (1) caused. In the course of his speech LORD MAUGHAM, L.C., said ([1939] 3 All E.R. 407):

"My Lords, I think we are driven to the conclusion that the owner or other persons in control of the place who open, keep or use it for the first purpose mentioned in s. 1 of the Act, are only doing something illegal if the 'user' is one which involves that the betting with persons resorting thereto is carried out by the owner, occupier or keeper, or by a person using the place in a popular sense who, if not present by himself or some agent or nominee, is permitted to exercise, or in fact exercises, some *de facto* control or some privilege or right over the place in question not being a control, privilege or right possessed by the public at large. Such a conclusion might be arrived at if the owner, occupier or person using the place received a commission on the bets . . . or if he allowed the bookmaker to stand outside at an open window and to call out the odds."

Then he deals with certain other illustrations. In those last words I think the noble and learned Lord was referring to a case where a man could be said to be using the premises though he was not actually physically present, but I think it is equally clear that he means that a person "uses" a place for the purposes of this Act if he uses it in the popular sense, and there is no more popular use of the word "use" than when it is said that a man "uses" a particular licensed house, meaning that he is frequently to be found there.

LORD ATKIN puts it more emphatically. He explains *Powell v. Kempton Park Racecourse Co.* (1), and says (*ibid.*, 412):

"The present case does not raise the question whether the premises in question are a place within the meaning of the Act, the debated question which is supposed to have been decided in *Powell v. Kempton Park Racecourse Co.* (1) . . . So in the public-house cases I cannot see why, if the bookmaker uses the bar of the public-house for betting in conditions which make it an offence if committed with the permission of the licensee of the premises, exactly similar user fails to be an offence if done without the licensee's permission. The user appears to be the same in both cases. I think, therefore, that *R. v. Deaville* (2), and the cases that followed it were wrongly decided, so far as they laid down the test of permission by the occupier."

It would certainly be a strong thing for this court to take the view that such an emphatic pronouncement as that by one of the noble and learned Lords was merely *obiter* and to refuse to follow it. LORD ATKIN continues (*ibid.*, 413, 414):

"My Lords, one would agree that, if the bookmaker stood at the door and made his bets verbally with the members, he would be using the premises for betting with the members. It cannot matter whether it was during the whole afternoon or less, and it cannot matter whether he did so with the permission of the owner or not . . . I also think that he [the bookmaker] can be said to be using the premises if he has such a degree of control over them that it can be said that the premises are a place where he is carrying on his betting business. I do not think that he need have any legal right of occupation, or that he need be a partner with the actual occupier. Payments made to the occupier or keeper or user of the premises, either by way of commission or otherwise, for the privilege of betting with the persons resorting to the premises, the installation by the bookmaker on the premises of facilities for betting with him, such as a private telephone, or possibly a private letter-box . . . might well afford evidence of the question of fact whether the bookmaker was in fact carrying on his business on the premises . . . The question, then, to be considered by the

tribunal of fact, whether justices or jury, when a charge is made that a bookmaker has used premises for the purpose of betting with persons resorting thereto, is the same whether the bookmaker has been actually present on the premises or not—namely, has he in fact been carrying on his betting business there, betting with persons resorting thereto ? ”

A LORD MACMILLAN agreed with both the LORD CHANCELLOR and LORD ATKIN, and LORD WRIGHT dealt with the case at considerable length. Having made reference to LORD HALSBURY’s speech in *Powell v. Kempton Park Racecourse Co.* (1) he says ([1939] 3 All E.R. 423) :

B “ It is not clear, but I shall here assume that the opinion of the EARL OF HALSBURY, L.C., represented the opinions of the majority of the House. It may be that these words would, if taken in their full and literal significance, at once rule out Payne from the category of a person using the club premises. Equally, however, they would rule out other cases where the offence has been held to have been committed, rightly as I think, such as the case of the bookmaker who used a slag heap on waste land as the place for his betting business, or the workman in Scotland who, without the knowledge or permission of his employers, used the room in which they were allowed to have their dinner to conduct a betting business with his fellow workmen.”

C He refers to the decision in *Young v. Darrah* (6), and says :

D “ I agree with that decision. A like case would be that of a bookmaker who, without the permission of the publican or any authorised agent of his, carried on his betting business in the bar of the public-house. Permission is, I think, immaterial in cases of this type if in fact the place is used for the prohibited purpose. The offence may be committed by a licensee or by one who is not even a licensee and has no permission from the occupier.”

LORD PORTER deals with *Powell’s* case (1) in this way (*ibid.*, 428) :

E “ That case is primarily a decision as to what is a ‘ place,’ and determines that Tattersalls’ ring, in which many bookmakers congregate, is not a place within the meaning of the Act, inasmuch as no bookmaker, though usually to be found at a particular spot, takes his stand at an individual place, nor has any particular spot been allotted to him. He is free to bet on any part of the course, and, though the owners of the course know that he goes to Tattersalls’ ring, yet they do not set aside any particular part of the course for his use.”

F He deals with *Hawke v. Dunn* (7) and says (*ibid.*, 429) :

G “ In neither case, however, was any *de jure* user proved—the bookmaker, had no more rights in the ring or elsewhere on the course than any other member of the public—and no *de facto* user was established because no particular place was set aside for, or used by, any particular bookmaker.”

H Throughout the whole of his speech it is clear that he is of opinion it is not necessary for there to be any *de jure* occupation of any particular place, and he, like the other learned Lords, says that a distinction is to be drawn between a place like a ring on the racecourse and the words mentioned in the Act “ any house, office, room, or other place.”

In these circumstances, I think it must no longer be thought that *R. v. Deaville* (2) is good law. That case must be taken to be overruled by *Milne v. Comr. of Police for City of London* (3), and it must be taken to be the law that, if a bookmaker uses, that is to say, makes a habit of using the bar of a public house for the purpose of betting he is committing an offence against the Betting Act, 1853. It is not necessary that he should be found always to stand in exactly the same place. If he is in the saloon bar, that is a sufficient localisa-

tion—to use the word used in these cases—to show that he is carrying on his business there. A man can carry on his business at one end of the room, just as well as at the other. It is sufficient localisation if he is found in a room. A saloon bar for this purpose is a room. Nor is it necessary to prove that the licensee either knew he was there or permitted him to be there. If he is found there, carrying on the business of betting, that is enough to constitute the offence. That does not mean that a man who is not carrying on a bookmaker's business, but merely takes or makes a casual bet with another commits an offence. In such a case there would be no evidence that he was carrying on the business of a betting house, but, the facts found in the present case having been proved, it follows that an offence has been committed. That, in the opinion of this court, is the result of *Milne v. Comr. of Police for City of London* (3), and, accordingly, the appeal fails.

There is one other matter with which the court thinks it should deal. The appellant, as he was entitled to do, elected to go for trial. If he had not so elected, the case would have been dealt with by the magistrate, an appeal would have come before the Divisional Court on a Case Stated, and, if it had failed, the appellant would have had to pay the costs. Under the Criminal Justice Act, 1948, s. 38 (5), it is provided that :

“The Court of Criminal Appeal may, when they dismiss an appeal or application for leave to appeal, order the appellant or applicant as the case may be to pay the whole or any part of the costs of the appeal . . .”

We think in the present case we ought to use that power. If a bookmaker brings up a question of this sort which he thinks is important and on which he wants and obtains a decision and the decision is adverse to him, we think he ought to pay the costs. Accordingly, we dismiss the appeal and order the appellant to pay the costs.

Appeal dismissed with costs.

Solicitors : *Good, Good & Co.* (for the appellant) ; *Director of Public Prosecutions* (for the Crown).

[*Reported by H. McL. MORRISON, Esq., Barrister-at-Law.*]

Re A DEBTOR (No. 452 OF 1948). *Ex parte* THE DEBTOR *v.*
M.R. LE MEE-POWER.

[COURT OF APPEAL (Bucknill, Cohen and Denning, L.JJ.), March 4, 1949.]

Bankruptcy—Receiving order—Prima facie right of petitioning creditor to order—Special circumstances to justify adjournment of petition.

The debtor entered a *caveat* in proceedings by the petitioning creditor in the Probate Division to obtain probate of a will, but, later, he withdrew his opposition and was ordered to pay the petitioning creditor's costs, taxed at £550. He failed to pay these costs, and also his own costs amounting to about £1,000. He then instituted proceedings in the Chancery Division, claiming that the testator had died domiciled in France and that he (the debtor) was entitled under French law to a share of the testator's estate notwithstanding the will. While those proceedings were pending the petitioning creditor presented a petition in bankruptcy against the debtor, based on the order for costs made against him in the Probate Division. At the hearing of the petition it appeared that the Chancery action was not likely to come to trial in the immediate future. The debtor asked for an adjournment pending the trial of the Chancery action as, in the event of success, he would be entitled to a large sum from the

testator's estate and would become solvent, but the registrar refused an adjournment and made a receiving order.

HELD : (i) the petitioning creditor had a *prima facie* right to a receiving order unless the debtor established some very special circumstances which justified the court in departing from its usual practice.

(ii) having regard to all the facts, and, in particular, to the circumstances in which the debt was incurred and the nature of the dispute in the Chancery action, it was not a case in which the registrar should have departed from the usual practice.

Re Whitley. Ex parte Mirfield Commercial Co., Ltd. (1891) (65 L.T. 351), *explained and applied*.

Ex parte Yeatman. Re Yeatman (1880) (16 Ch.D. 283 ; 44 L.T. 260), *applied*.

[AS TO CIRCUMSTANCES IN WHICH A RECEIVING ORDER WILL BE MADE OR REFUSED, see HALSBURY, Hailsham Edn., Vol. 2, pp. 80-86, paras. 96-101 ; and FOR CASES, see DIGEST, Vol. 4, pp. 153-160, Nos. 1443-1499.]

Cases referred to :

(1) *Re Whitley. Ex parte Mirfield Commercial Co., Ltd.*, (1891), 65 L.T. 351 ; 8 Morr. 149 ; 4 Digest 156, 1466.

(2) *Ex parte Tynte. Re Tynte*, (1880), 15 Ch.D. 125 ; 42 L.T. 598 ; 4 Digest 114, 1028.

(3) *Ex parte Yeatman. Re Yeatman*, (1880), 16 Ch.D. 283 ; 44 L.T. 260 ; 4 Digest 145, 1348.

APPEAL by the debtor from an order of Mr. Registrar PARTON, made on Nov. 17, 1948, by which he made a receiving order against the debtor.

The debtor asked for an adjournment of the bankruptcy proceedings pending the hearing of an action brought by him against the petitioning creditor in the Chancery Division, but this the registrar refused. The Court of Appeal dismissed the appeal. The facts appear in the judgment of COHEN, L.J.

V. R. Aronson for the debtor.

Milner Holland, K.C., and *C. W. Chandler* for the petitioning creditor.

BUCKNILL, L.J. : I will ask COHEN, L.J., to give the first judgment.

COHEN, L.J. : This is an appeal from a receiving order made by Mr. Registrar PARTON against the debtor, on Nov. 17, 1948. The petitioning creditor is the step-mother of the debtor. Her husband, the debtor's father, was born in 1860, and in 1921 he sold his home in England and went abroad to Italy, where, in due course, he acquired various residences in Bordighera. There is some dispute as to the extent to which he afterwards re-visited England. I think it is clear that he did so up to 1931, but after that date nothing is known. On May 2, 1939, he married the petitioning creditor in Italy and lived with her in France from July, 1939, until his death on Feb. 21, 1944. He left a large estate and in a will made by him in February, 1937, the debtor was named as a substantial beneficiary, but, in 1939, after his marriage to the petitioning creditor the testator made a new will giving interests in his property to the petitioning creditor. Between 1939 and Apr. 22, 1940, he made a series of wills, and, by the last one, dated Apr. 22, 1940, he appointed the petitioning creditor sole executrix and left the whole of his estate to her. It is to be observed that in that last will he describes himself as "a domiciled British subject." In 1945 the petitioning creditor commenced proceedings in this country to obtain probate of the will. In those proceedings, the debtor entered a *caveat*, and, by his defence, he made a number of charges alleging that the testator had been induced to make his will in favour of the petitioning creditor by her undue influence. That defence was delivered on Mar. 20, 1946. By a rejoinder the debtor raised the question where the testator was domiciled for the purpose of establishing the will of 1937 by showing that it had not been revoked by

the marriage of the testator to the petitioning creditor. As a result, however, of evidence obtained from a friend of the testator, the debtor came to the conclusion that he could not proceed in the probate action, and in 1948 he withdrew his opposition to the will of 1940. On Apr. 6, 1948, an order was made in the Probate Division for him to pay the costs of the probate action, taxed at some £550. It was in respect of that debt that the petitioning creditor served a bankruptcy notice, and, that not being complied with, presented the petition with which we now have to deal. In the meantime, the debtor had started new proceedings against the petitioning creditor in the Chancery Division, alleging that the testator was domiciled in France and that under French law the petitioning creditor was not entitled to more than one-quarter of the testator's estate, the debtor and his brother being entitled to the residue thereof in equal shares. The proceedings in that action have been protracted. Discovery is not yet complete, and the parties are unable to say when the action is likely to come on for trial. I think there is obviously little hope of the case coming on in the near future.

That was the position when this petition came before the learned registrar. Counsel who appeared on behalf of the debtor asked, not that the petition should be dismissed—he had no hope of that—but for an adjournment pending the hearing of the action in the Chancery Division. Counsel for the petitioning creditor opposed that application. He said that the same issue was raised in the probate proceedings. That was true, but it was not raised with the same object, and, of course, it could not be decided in the probate action once the debtor withdrew his charge of undue influence. Counsel for the petitioning creditor submitted that he was entitled to a receiving order, and, when the learned registrar suggested that he might consent to an adjournment, he refused to do so. Finally, Mr. Registrar PARTON said :

“On the whole I think I cannot refuse the receiving order if, as he does, the petitioning creditor presses for it. It will be a question for the trustee whether or not he continues the proceedings.”

Counsel for the debtor invited us to construe that short note of the decision of the learned registrar as meaning that the learned registrar thought that he had no discretion in the matter but was bound to make a receiving order if the petitioning creditor pressed for it. I am not sure that that was his meaning. I think it may well be that he thought he was bound to take into account the fact that the petitioning creditor resisted the adjournment, but it is by no means clear, and, for the purpose of my judgment, I will assume that the learned registrar did think that, as the petitioning creditor pressed for the order, he was bound to make it. It is suggested that, if he did so think, he was right on the authority of *Re Whitley, Ex parte Mirfield Commercial Co., Ltd.* (1) in which it was held by the Divisional Court that the fact that considerable property to which the debtors claimed to be entitled was locked up in a Chancery suit was not a sufficient ground for dismissing a petition presented against them for non-compliance with a bankruptcy notice. The petition had been dismissed by the county court registrar on the ground that in the circumstances no receiving order ought to be made against the debtors. It appears from the report of the case that the decision of the registrar had been based on an earlier decision of *Ex parte Tynte, Re Tynte* (2), a case of an entirely different character which was of no assistance in deciding *Re Whitley* (1). In those circumstances the Divisional Court was faced with the exercise by the registrar of his discretion on a wrong principle, and was, therefore, compelled to consider the case on its merits, and, on the particular facts, the court held that the petitioning creditor was entitled to his order. I do not think it is right to read that case as deciding that the learned registrar had no discretion in the matter. If that were not the correct interpretation of the case, I think counsel for the debtor would be right when he said that it was inconsistent

with the decision of the Court of Appeal in *Ex parte Yeatman, Re Yeatman* (3). In that case there were proceedings on a bankruptcy petition and the question was whether there should be an adjudication. It appeared that there was an action pending before FRY, J., the result of which might be that the debtors would have funds available to satisfy the debt claimed by the petitioning creditor, and it appeared that the action would be tried in a few days. In those circumstances, JAMES, L.J., said (16 Ch.D. 287):

A "But the more serious objection arises out of the suggestion that in the action before FRY, J., a fund may be forthcoming which will be available to pay the debt claimed by the [debtors]. If that is so, it is not desirable that an adjudication should be made. It is proper that the hearing of the appeal should stand over until after that action has been decided, when we shall be able to see whether there is any foundation for the appellant's suggestion. The appeal will stand over for that purpose only."

B It seems to me that the proper inference to draw from *Re Whitley* (1) and *Ex parte Yeatman* (3) is that there is a discretion in the matter, that in a proper case the court can grant an adjournment, and that it is the duty of the learned registrar in each case, in considering how to exercise his discretion, to have regard to the circumstances of the case. Assuming, in the present case, that the learned registrar has not exercised his discretion and that we have to do so, what are the facts to be taken into account? Counsel for the debtor says that we must first take into account that these Chancery proceedings are not frivolous with no possible chance of success. I do not propose to say more about that, because it would be very wrong for this court on the very slender matter before it—nothing but the pleadings and the wills—to express any opinion as to the result of the action. I cannot say it is a frivolous action, but, on the other hand, it is not plain on the pleadings that it is bound to succeed. We have to have regard to a number of other circumstances, and, although the authorities show that the learned registrar has a discretion, we should not forget that the petitioning creditor is a judgment creditor for a debt which arose in very peculiar circumstances. She was subjected to an offensive attack by this debtor which in due course he had to withdraw, and, in defending herself, she incurred costs of £550. It may well be thought unreasonable that she should be compelled to sit by and allow the debtor to pile up further costs in an action which may not be tried for some time and which she will have to resist. That seems to me to be an important element. Moreover, if a receiving order is made, the debtor will not be entirely without protection. If the debtor could prove any collusive arrangement between the petitioning creditor and the trustee, when appointed, there is no doubt that he would have a right to bring the matter to the notice of the court under s. 80 of the Bankruptcy Act, 1914. Further, why should we assume that the trustee is going completely to disregard the possibility of a surplus for the debtor? Counsel for the petitioning creditor has offered an undertaking that, if the debtor became an adjudicated bankrupt, his client would do all in her power to see that the official receiver remained as trustee of the estate. I think it is probable, although I am in no way seeking to interfere with the discretion of the trustee, that in the circumstances of this case he might think it proper to keep the bankrupt informed as to the steps he was taking in relation to the action on which the result of the bankruptcy proceedings so much depends.

H In my opinion, the short ground on which this appeal fails is that the petitioning creditor has a *prima facie* right to an order unless the debtor has established some very special circumstances which justify the court in departing from its usual practice. Having regard to all the circumstances, and, in particular, to the circumstances in which the debt was incurred and the nature of the dispute in the Chancery action, this is not a case in which the learned registrar should have departed from the usual practice. I would add that

there may be an advantage in having an independent person in charge of the Chancery action. A settlement would plainly be desirable in the interests of all parties, including the debtor, and the chances of such a settlement would be better if there were an independent person in charge of the action. For these reasons, I think that the order which the learned registrar made should be upheld.

BUCKNILL, L.J. : I speak with some diffidence on any matter of A
bankruptcy practice, but, if I had had to deal with this case as the learned
registrar had to deal with it, I should have made the receiving order he made.
The debtor has already instituted abortive proceedings in connection with this
estate and incurred costs which he estimates at £1,000, and the petitioning creditor
has incurred costs amounting to £550. None of these costs has been paid by B
the debtor. The debts in connection with which this receiving order was made
amount to some £2,000. I agree that we ought not to express any opinion
about the success or failure of the Chancery proceedings, but, if the debtor
is successful, he may receive from the estate of his father a sum very much
larger than that. I see no reason to suppose that the interests of the debtor
in the Chancery action will not be properly considered if the question of a
settlement arises. For those reasons, as well as for the reasons given by my C
Lord, I agree that the appeal should be dismissed.

DENNING, L.J. : I agree.

Appeal dismissed with costs.

Solicitors: *Tarlo, Lyons & Co.* (for the debtor); *Mayo, Elder & Co.* (for
the petitioning creditor).

[*Reported by C. N. BEATTIE, Esq., Barrister-at-Law.*] D

R. v. LICENSING AUTHORITY FOR GOODS VEHICLES FOR THE METROPOLITAN TRAFFIC AREA. *Ex parte* E B. E. BARRETT, LTD.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Birkett, JJ.),
March 1, 2, 1949.]

*Road Transport—Carriage of goods for hire—Restriction on area of operation—
Application to licensing authority to specify new "operating centre"—
Desire to carry goods more than 25 miles from true centre—Transport Act,
1947 (c. 49), ss. 52 (1), 58 (4).* F

By the Transport Act, 1947, s. 52 (1): "... it shall be a condition
of every A licence . . . that, except under . . . a permit granted by
the [British Transport] Commission, goods shall not be carried for hire
or reward in any authorised vehicle if the vehicle, at any time while the
goods are being so carried, is more than 25 miles from its operating
centre . . ." By s. 58 (1) "operating centre" is defined as "the premises
specified in the application for the licence as the permanent base or centre
from which it is intended that the vehicle will normally be used for the
purpose of carrying goods for hire or reward." G

Public carriers holding an A licence in respect of their vehicles were H
permitted under s. 52 (1) of the Act of 1947 to carry goods only as far
as the northern suburbs of London, the rest of London being more than
25 miles from Luton, where the industry on which they relied for their
customers was established. Instead of exercising their right under s. 52
to apply to the Transport Commission for a permit to carry goods beyond
the 25 miles limit, the carriers applied to the licensing authority for the
Metropolitan Traffic Area under s. 58 (4) of the Act to move their operating

centre from Luton to London Colney, which would enable them to carry goods into any part of London. The licensing authority refused the application on the ground that the true operating centre remained at Luton, and, therefore, the carriers' proper course was to apply to the Transport Commission under s. 52 for a permit to extend their area of operation. The carriers applied for an order of *mandamus* on the ground that the licensing authority had declined to exercise his jurisdiction under s. 58 (4) of the Act on account of the existence of s. 52.

HELD : (i) sections 52 (1) and 58 (4) of the Act of 1947 were not alternative provisions available to carriers to secure the same result, but were two distinct provisions intended to deal with two different sets of circumstances.

(ii) in refusing the application the licensing authority had not declined to exercise his jurisdiction under s. 58 (4), but had properly taken into account the carriers' right to apply for an extension of their area of operation under s. 52 and the prohibition contained in that section against goods being carried more than 25 miles from the operating centre, and, therefore, *mandamus* would not issue.

[FOR THE TRANSPORT ACT, 1947, ss. 52 and 58, see HALSBURY'S STATUTES, Vol. 40, pp. 1219 and 1227.]

Cases referred to :

(1) *R. v. Port of London Authority, Ex p. Kynoch, Ltd.*, [1919] 1 K.B. 176 ; 120 L.T. 177 ; 83 J.P. 41 ; 16 Digest 287, 1003.

(2) *R. v. Board of Education*, [1910] 2 K.B. 165 ; *affmd. sub nom.*, *Board of Education v. Rice*, [1911] A.C. 179 ; 104 L.T. 689 ; 75 J.P. 393 ; 19 Digest 602, 290.

MOTION for an order of *mandamus*.

The applicants, public carriers, who held an A licence in respect of their vehicles, applied under the Transport Act, 1947, s. 58 (4), to the responsible licensing authority to move their operating centre from Luton to London Colney, which would bring the whole of London within the 25 miles area of operation permitted by s. 52 (1) of the Act. The licensing authority refused the application on the ground that, on the facts, the true operation centre remained at Luton and the carriers' proper course was to apply to the Transport Commission, under s. 52, for a permit to extend their area of operation. The carriers applied for an order of *mandamus* directing the licensing authority to exercise his jurisdiction under s. 58 (4), on the ground that he had declined to do so. The Divisional Court now held that the licensing authority had not declined to exercise his jurisdiction under s. 58 (4), and refused the order.

The facts appear in the judgment of LORD GODDARD, C.J.

Sir David Maxwell Fyfe, K.C., and *David Karmel* for the carriers.
The Solicitor-General (Sir Frank Soskice, K.C.), and *H. L. Parker* for the licensing authority.

Sir Valentine Holmes, K.C., and *Stockdale* for the Railway and Road Transport Executives (on behalf of the British Transport Commission).

LORD GODDARD, C.J. : In this case counsel for the applicants obtained leave to move for an order of *mandamus* directed to the licensing authority for the metropolitan area under the Road and Rail Traffic Act, 1933, and the Transport Act, 1947, and the grounds on which the *mandamus* was sought were (i) that the licensing authority

" . . . declined jurisdiction by holding that, whatever the merits of the applicants' case might be, the said application ought, on the proper construction of the Transport Act, 1947, to have been made to the British

Transport Commission under s. 52 [of that Act] and not to the licensing authority under s. 58 . . .”

and (ii) that

“ . . . he arrived at his conclusion without having any or any proper regard to the applicants’ evidence or to the merits of the applicants’ case.”

The two sections of the Transport Act, 1947, which we have to consider are ss. 52 and 58. Section 52, which is contained in pt. III of the Act, is one of a group of sections which are headed: “Restrictions on carriage of goods for hire or reward otherwise than by [Transport] Commission.” Section 52 (1) provides:

“On and after the appointed day, it shall be a condition of every A licence and every B licence that, except under and in accordance with a permit granted by the Commission, goods shall not be carried for hire or reward in any authorised vehicle if the vehicle, at any time while the goods are being so carried, is more than 25 miles from its operating centre, and the Road and Rail Traffic Act, 1933, shall have effect as if the said condition were included among the conditions specified in s. 8 (1) of that Act.”

An A licence and a B licence are licences granted under the Road and Rail Traffic Act, 1933, the only difference between them being that an A licence is a licence granted to a public carrier, and a B licence is one which is granted to a person who desires to carry his own goods, or to carry goods for hire or reward subject to conditions imposed by the licensing authority.

Section 58 provides:

“(1) Subject to the provisions of this section, in this Part of this Act, the expression ‘operating centre’ means, in relation to a vehicle authorised to be used under an A licence or a B licence, the premises specified in the application for the licence as the permanent base or centre from which it is intended that the vehicle will normally be used for the purpose of carrying goods for hire or reward . . . (3) On an application after the passing of this Act for an A licence or a B licence, the applicant may, if he thinks fit, request the licensing authority to whom the application is made to specify a point in the area of the authority which is to be treated as the operating centre of the authorised vehicles, and where such a request is made, the licensing authority may, if he thinks fit, specify as the operating centre for all or any of the authorised vehicles any such point in his area as he thinks fit. (4) Where an A licence or a B licence is in force at the passing of this Act, the holder of the licence may, within the prescribed time, make such a request as is specified in sub-s. (3) of this section to the licensing authority by whom the licence was granted, and that sub-section shall, with the necessary modifications, apply accordingly.”

To deal briefly with the facts of the case, the applicants carried on business at Luton, and, at the time of the passing of the Act, an A licence was in force in respect of their vehicles. Therefore, as public carriers, they could use their vehicles a distance of 25 miles in any direction from Luton, which, in other words, was the centre of the circle with a radius of 25 miles within which they were entitled to operate. They desired to carry goods a greater distance than 25 miles in one direction because the circumference of the circle within which they were entitled to travel only takes in, to the south, the northern suburbs of London. It would, therefore, be a great convenience to their customers and to themselves if the applicants could carry goods more than 25 miles from Luton, *i.e.*, more into the centre of London than they can at the present time. Therefore, they went before the licensing authority for the Metropolitan Traffic Area, and asked to have their operating centre moved from Luton to London

Colney, which is some 12 or 14 miles nearer London than is Luton. If their operating centre were fixed as London Colney instead of Luton, it would enable them to run their vehicles into any part of London that they might desire.

The real basis of the argument of counsel for the applicant was that ss. 52 and 58 of the Act of 1947 are alternative sections, *i.e.*, a person who desires to achieve the object which the applicants had can apply either to the British Transport Commission for permission to run more than 25 miles or to the licensing authority to grant a new operating centre from which he would be able to run 25 miles and so achieve the same result as if he were permitted to go more than 25 miles from his original centre. It will be seen, however, that the two bodies to whom the applications have to be made are not the same. To operate one's vehicle for a greater distance than 25 miles, permission has to be obtained from the British Transport Commission. To change the operating centre permission has to be obtained from the licensing authority. When the Act is considered carefully, I think that the argument of counsel for the Railway and Road Executives (the delegates of the British Transport Commission) that these two sections are not alternative is right. In truth, they deal with two different things. As defined in s. 58 (1) :

“ . . . ‘operating centre’ means, in relation to a vehicle . . . the premises specified in the application for the licence as the permanent base or centre from which it is intended that the vehicle will normally be used for the purpose of carrying goods for hire or reward.”

There may be a case, such as was suggested by counsel for the licensing authority in his argument, where carriers have a number of vehicles, with A or B licences, which are used for carrying goods from some particular place, *e.g.*, Covent Garden market, but which are ordinarily kept at some distance away because, it may be, there is no other satisfactory garage accommodation available. It is then open to the licensees to go to the authority and say : “ Our vehicles work from Covent Garden market. That is the true operating centre of the vehicles, and it is nothing to the point that we have to garage them three or four miles away. Therefore, we ask you to allow us to change the centre of the circle within which we are entitled to operate to the place from which, in fact, we do our work.” That seems to me to be the kind of matter with which s. 58 is designed to deal, and in the case with which we are now dealing no one suggests that the true operating centre of these vehicles is anything but Luton. The business which the applicants carry on is that of conveying straw hats to various establishments and business houses, particularly in London. Luton (and not London Colney) is the principal manufacturing centre, in England, of straw hats, and the applicants have only one customer in London Colney, so there is no question what is the true operating centre of their vehicles. It is Luton and not London Colney. It is clear that what the licensing authority decided in this case was to this effect : “ You are asking me to alter the operating centre, but now that I have heard and appreciated the facts, it appears plain to me that what you are really asking for is permission to run more than 25 miles from your operating centre, and I am not going to allow an application, which ought to be made under s. 52, to be made under the colour of an application under s. 58.” By the words “ under the colour ” I am not suggesting that there was anything improper in the application, because this was a point on which it was perfectly legitimate to get a decision, but it seems to me that the licensing authority is clearly entitled to say : “ It would be wrong to give people who operate lorries from Luton to convey goods from Luton for Luton manufacturers an operating centre at a place where there are no manufacturers and from which they do not collect goods when the effect of doing so would be to enable them to run their vehicles for a considerably greater distance from their real operating centre than 25 miles. If they want that permission, they must go to the British Transport Commission and apply to be allowed to run

greater distances than 25 miles." I think that when the purposes of ss. 52 and 58 are appreciated, it becomes clear that they are not alternative sections, but are sections which are intended to deal with different sets of circumstances. In my opinion, the application fails and must be dismissed.

HUMPHREYS, J. : It is not for us to say whether the licensing authority was right or wrong. There was brought before the authority an application under this Act of Parliament. He heard it fully—there is no question about that—and gave a considered judgment. It is said, on this application for an order of *mandamus*, that that judgment amounted to a declining of jurisdiction. There is no allegation in this case that the tribunal at the outset refused to consider the application. It did consider it, but that does not prevent an order for *mandamus* going, if, eventually, the tribunal, having heard evidence and argument, wrongly declined jurisdiction. I think it is plain that the licensing authority refused this application under s. 58 because of the provisions of s. 52 of the Act of 1947. The best proof of that is that he did not mention any other ground in his careful, considered judgment. Therefore, the question is this: Was the licensing authority entitled, in the exercise of his discretion, to take into consideration the existence and the terms of s. 52? In my opinion, clearly he was. A tribunal, in considering whether it will grant an application, is entitled to—and, indeed, must—take into account other sections of the Act than the particular section under which it is asked to grant a licence. That is elementary. Though the language of this judgment was, perhaps, not very happily chosen, what emerges, I think, from it is that the licensing authority was considering s. 52 as distinct from s. 58, and did say that he refused the application on its merits. He did not think it was necessary to give these additional facilities to the applicants, and he came to this conclusion partly because he had considered the provisions included in s. 52 (1) and especially the prohibition contained in that sub-section against persons carrying goods more than 25 miles from their base of operation unless they could get a permit from the Transport Commission. Whether he was right or wrong, I do not stop to consider, and I do not think that is a question for this court. It may be that it would have been better if he had merely said: "I decline this application on its merits," and said nothing about s. 52, but I think it is greatly to the credit of the licensing authority—recognising, as, no doubt, he does, that he is a single individual appointed to be the sole judge, without any right of appeal from his decision—that he thought it right that he should state what was in his mind. I also think it right that he should do so and that other persons in a similar position should do so, and I do not think the court ought lightly to say that he has refused jurisdiction because he has based his judgment mainly on the existence of the provisions of s. 52. For these reasons, I agree with the judgment of my Lord.

BIRKETT, J. : In the initial stages of the argument, I was attracted by the submissions made by counsel for the applicants. One form of the argument presented was that Parliament had given to the subject two distinct and separate rights which, in his discretion, he could choose to exercise, and that what had happened in this case was that an applicant, proceeding under a particular section, had been declined his rights under that section. At the same time I was troubled by the reflection that, although the central ground of the submission was that jurisdiction had been declined, yet all the time there were present all the outward and visible signs of the jurisdiction having been exercised. All the witnesses were heard, the evidence was put forward quite freely, and there was a most helpful discussion of the whole scheme of the Act.

I think it is important to remember the exact point which is at present before this court. It is a motion ;

“ . . . for an order of *mandamus* that the licensing authority for goods vehicles for the Metropolitan Traffic Area re-hears and determines an application by B. E. Barrett, Ltd., under the Transport Act, 1947, s. 58 (4), requesting him to specify a point to be treated as the operating centre of certain vehicles, in respect of which they hold a public carriers’ A licence upon the grounds set forth in the copy statement.”

A Among those grounds, the first and the chief is that the licensing authority wrongly declined jurisdiction. On that matter I should like to refer to a few words from the judgment of BANKES, L.J., in *R. v. Port of London Authority. Ex parte Kynoch, Ltd.* (1). BANKES, L.J., said ([1919] 1 K.B. 183) :

B “ Every case must depend on its own particular circumstances ; but decided cases furnish some rules which ought to govern the court in the exercise of its discretion to grant or refuse the prerogative writ of *mandamus*. There must be something in the nature of a refusal to exercise jurisdiction by the tribunal or authority to whom the writ is to be directed. A refusal may be conveyed in one of two ways : there may be an absolute refusal in terms, or there may be conduct amounting to a refusal.”

C In the case with which we are now dealing, counsel for the applicant suggested that it was the second head on which he relied. BANKES, L.J., proceeded (*ibid.*) :

D “ In the latter case it is often difficult to draw the line between those cases where the tribunal or authority has heard and determined erroneously upon grounds which it was entitled to take into consideration and those cases where it has heard and determined upon grounds outside and beyond its jurisdiction ; but this conclusion may be drawn from decided cases, that there is no refusal to hear and determine unless the tribunal or authority has in substance shut its ears to the application which was made to it, and has determined upon an application which was not made to it.”

E He then quoted FARWELL, L.J., in *R. v. Board of Education* (2) ([1910] 2 K.B. 179) :

F “ ‘ If the tribunal has exercised the discretion entrusted to it *bona fide*, not influenced by extraneous or irrelevant considerations, and not arbitrarily or illegally, the courts cannot interfere ; they are not a court of appeal from the tribunal, but they have power to prevent the intentional usurpation or mistaken assumption of a jurisdiction beyond that given to the tribunal by law, and also the refusal of their true jurisdiction by the adoption of extraneous considerations in arriving at their conclusion or deciding a point other than that brought before them, in which cases the courts have regarded them as declining jurisdiction ’.”

G In the present case the application was made under the Transport Act, 1947, s. 58 (4). The whole point of the application that was made to the licensing authority was for the fixing of a notional point at London Colney which should be the applicants’ new operating centre. It was conceded both by counsel for the applicants and by counsel for the Railway and Road Transport Executives that the authority had full discretion to deal with the application under s. 58.

H It seems to me, on full reflection, that it was vital for the proper exercise of that discretion that the licensing authority should consider the part which s. 58 played in the whole scheme of transport comprehended in the sections in pt. III of that rather complicated Act. It would have been quite impossible, in my judgment, to exercise a proper and equitable discretion without full consideration of the background of legislation of which s. 58 forms part. It was said by the applicants : The evidence was fully placed before the licensing authority, and he gave the fullest opportunity to all interested parties to express

their views. No complaint can be made on that head, but when the language of his decision is looked at, his hearing all the evidence is vitiated because the construction to be put on the language is that he had virtually declined to exercise jurisdiction in this matter. At the Bar it was called "plain English," but it would not be the first time that words expressed in plain English have been the subject of very much disputation. However, the language of the decision does lend colour, certainly at first sight, to the view that could be taken that the licensing authority had listened to all the evidence but, that, when he came to make his decision, he held that everything he had heard was irrelevant. I think the true view was that the licensing authority heard all the evidence, listened to full argument, took into consideration the scheme of the Act, and, particularly, pt. III and the particular provisions of ss. 58 and 52, and then said: "In the exercise of my discretion, having heard and listened to all the relevant matters, I refuse this application. I think that the real purpose of this application was the purpose which is more appropriately and more properly comprehended under s. 52 of the Act of Parliament." In so doing, in my opinion, the licensing authority exercised a proper discretion, and it could not be said—which is the central and fundamental thing which counsel for the applicants must establish in order to succeed—that he declined jurisdiction. For these reasons, I agree with the two judgments which have just been delivered and with the results which follow therefrom.

Application refused. One set of costs awarded to respondents.

Solicitors: *Mawby, Barrie & Letts* (for the carriers); *Treasury Solicitor* (for the licensing authority); *M. H. B. Gilmour, R. P. Humphrys, E. Coleby* and *H. F. Burt* (for the Railway Executive); *J. C. Chambers* (for the Road Transport Executive).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

KREMEZI v. RIDGWAY.

[KING'S BENCH DIVISION (Hilbery, J.), February 21, 22, 23, 1949.]

Conflict of Laws—Contract of marriage—English and foreign law the same—Difference in remedy for breach—Jurisdiction of English court—Performance of the contract—Full relation of husband and wife.

While in Greece, an English naval officer entered into a contract of marriage with a Greek girl, resident in Athens. Later the contract was renewed in England, with the intention that the new contract should be in substitution for the previous one. The marriage was to take place in Athens but the parties intended to make their matrimonial home in England. In an action for breach of promise of marriage:

HELD: (i) on the facts, the intention of the parties was that the contract should be governed by English law.

(ii) as there was no difference between English law and the Greek code in the law affecting the contract and the contractual obligations, but merely a difference in the remedy, the English court had jurisdiction in the matter.

Hansen v. Dixon, (1906) (96 L.T. 32), *applied*.

Per HILBERY, J.: the performance of the contract which the parties had under consideration when they entered into the contract was not exhausted on the performance of the marriage ceremony, but included their intended residence together in England after the marriage.

[AS TO LAW GOVERNING CONTRACTS, see HALSBURY, Hailsham Edn., Vol. 6, pp. 263-268, paras. 321, 322; and FOR CASES, see DIGEST, Vol. 11, pp. 388-392, Nos. 641-663.]

Cases referred to :

(1) *Hansen v. Dixon*, (1906), 96 L.T. 32 ; 11 Digest 392, 661.

(2) *Hamlyn & Co. v. Talisker Distillery*, [1894] A.C. 202 ; 71 L.T. 1 ; 58 J.P. 540 ; 11 Digest 389, 643.

A ACTION for damages for breach of promise of marriage. The breach of the contract being admitted, the question was whether the contract was governed by Greek law, under which damages would be restricted to the cost of the trousseau and other expenses necessitated by the contract and lost through its breach, or by English law, under which the damages would be at large. HILBERY, J., directed the jury that the damages should be assessed according to English law.

B *Scott Henderson, K.C.*, and *J. T. Molony* for the plaintiff.
Fearnley-Whittingstall and Godfrey Carter for the defendant.

C HILBERY, J. : The contract sued on in this case, which is admitted—and, incidentally, the breach of it, an unjustifiable breach, is now admitted—was made, on the first occasion, in Greece, but later it was made again in England with the intention that the new contract should be a solemn substitution for any previous contract between the parties. The contract so made in England was by an exchange by the plaintiff and the defendant of mutual promises to marry. It is the mutuality of promises which English law regards as essential if a contract is to be made, and, therefore, the undertaking was one which the English law recognises as a contract. The defendant, an Englishman, born and domiciled here, is an officer in His Majesty's Navy. He proposed the marriage, and his intention was to live here with his wife after the contemplated marriage and to make the matrimonial home in England. I am satisfied that it was the intention of the plaintiff to adopt her husband's home and people, but it was arranged that the marriage ceremony should take place at Athens, the place of the plaintiff's home where her parents resided. To that extent the contract was to be performed in Athens and not in England.

E In those circumstances, according to the principles of international law, what is the law which governs the contract ? If it is Greek law, then the damages are confined to a reasonable sum for the trousseau or other incidental expenses necessitated by the promise and lost because of the breach. If, however, it is English law, the damages are at large, the action being one of the exceptional actions in contract where English law allows more than the strict measure of damages ordinarily applicable to contract. In my view, the guiding principle is still to be found—as BRAY, J., said in *Hansen v. Dixon* (1)—in the leading judgment of LORD HERSCHELL, L.C., in *Hamlyn & Co. v. Talisker Distillery* (2) where LORD HERSCHELL, L.C., said ([1894] A.C. 207) :

G “Where a contract is entered into between parties residing in different places, where different systems of law prevail, it is a question, as it appears to me, in each case, with reference to what law the parties contracted, and according to what law it was their intention that their rights either under the whole or any part of the contract should be determined. In considering what law is to govern, no doubt the *lex loci solutionis* is a matter of great importance. The *lex loci contractus* is also of importance. In the present case the place of contract was different from the place of its performance.

H It is not necessary to enter upon the inquiry, which was a good deal discussed at the Bar, to which of these considerations the greatest weight is to be attributed, namely, the place where the contract was made, or the place where it is to be performed. In my view they are both matters which must be taken into consideration, but neither of them is, of itself, conclusive, and still less is it conclusive, as it appears to me, as to the particular law which was intended to govern particular parts of the contract between the parties.”

In *Hansen v. Dixon* (1), BRAY, J., came to the conclusion that, in the state of things that he reviewed, he saw nothing to remove the presumption that the contract was to be governed by English law. The learned judge said (96 L.T. 34):

"... there was this additional circumstance—namely, that according to the evidence of the plaintiff which I accept, it was quite clear that it was intended that the marriage should take place in England and that the married home was to be here. I have, therefore, no difficulty in arriving at the conclusion that the intention of the parties was that English law should prevail."

In the present case it was intended that the marriage ceremony should take place in Greece, but every conclusion in the case points to the intention of the parties being that the contract, made in England on the proposal of the defendant, an Englishman, to the plaintiff, who had then come to England, was that she should be his wife in England, and, therefore, their exchange of mutual promises constituted a contract which the parties intended should be governed by English law. I do not see anything, except the mere fact that the ceremony was to be performed in Athens, which could possibly be said to challenge that intention, and that fact alone—that element in the performance of the contract—does not alter the view I have formed that the whole intention of the parties was that the contract was to be governed by English law.

If it is necessary for my decision (though I doubt it), I would say that, while it is true that this peculiar type of contract—the exchange of mutual promises to marry—ends, so far as legal enforcement is concerned, on the performance of the marriage ceremony, none the less the performance which the parties contemplated at the time they exchange mutual promises is not exhausted by the performance of a mere ceremony. I am quite sure that no young woman, when she accepts a proposal of marriage and a contract is formed, would be satisfied if she were told that all the young man is undertaking by the promise is to go through a form or a ceremony with her. What the parties intend is an exchange of mutual promises to become one another's spouses—to become husband and wife with all that that should entail.

There is, however, another point. From the evidence of the Greek lawyers it appears that there is no difference between English law and the Greek code in the law affecting the contract and the contractual obligations, but that there is merely a difference in the remedy. The Greek code gives a cause of action for breach of contract, but limits the damages recoverable to the actual expenditure which was reasonably incurred on account of the contract. As BRAY, J., said in *Hansen v. Dixon* (1), however, the mere fact that the remedy given by the foreign law is different will not disturb the jurisdiction of the English court, and, therefore, for this reason as well, I am satisfied that the decision to which I have come is the right one. In these circumstances, I shall tell the jury that this is a matter which must be considered by them, and I shall direct them accordingly to English law.

Solicitors: *Webb, Justice & Co.* (for the plaintiff); *Moon, Gilks & Moon* (for the defendant).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

Re LATTAS SETTLEMENT. PUBLIC TRUSTEE v. LATTAS.

[CHANCERY DIVISION (Vaisey, J.), March 3, 1949.]

Power of Appointment—Special power—Exercise—Expression in will of intention to exercise—“I give devise and appoint all my property”—Non-objects of power named as substitutional beneficiaries.

A In 1901, by a settlement made in consideration of marriage, after the limitation of life interests to the wife and the husband respectively, a power to appoint the trust funds by deed or will to the children or remoter issue of the marriage was given to the survivor of the spouses. In default of appointment the trust funds were directed to be held in trust for the children of the marriage at 21, or in the case of a daughter at 21 or marriage, in equal shares if more than one. The settlement also contained a covenant by the wife to settle after-acquired property. There was issue of the marriage a son and a daughter. On Oct. 21, 1926, the wife died, and, as the after-acquired property clause in the marriage settlement had not been complied with, a deed dated June 29, 1927, was entered into whereby the mutual rights of the wife's executors and the trustee of the settlement were adjusted and the husband covenanted not to exercise his power of appointment in favour of the remoter issue. On May 21, 1929, by a further deed, to which all interested persons were parties, certain funds were withdrawn from the marriage settlement and re-settled on similar trusts but with extended powers of investment. On Apr. 27, 1943, the daughter died, having reached the age of 21 but without ever having been married. By his will, dated Mar. 13, 1946, the husband, having appointed the son and another to be his executors, gave a pecuniary legacy, and provided: “Subject as aforesaid I give devise and appoint all my property real and personal unto my said son in fee simple and absolutely Provided always that if my said son shall die in my lifetime leaving issue living at my death who shall attain the age of 21 years such issue shall take and if more than one in equal shares the property which their father would have taken hereunder.” The husband died on June 17, 1947. He had no powers of appointment other than those referred to.

F HELD: the will operated as an exercise of the husband's powers of appointment both over the funds remaining in the marriage settlement and those re-settled by the deed of 1929.

Re Mayhew ([1901] 1 Ch. 677; 84 L.T. 761), and *Re Swinburne*, (1884) (27 Ch.D. 696), followed.

[AS TO EXPRESSION OF INTENTION TO EXERCISE POWERS, see HALSBURY, Hailsham Edn., Vol. 25, pp. 543-556, paras. 982-993; and FOR CASES, see DIGEST, Vol. 37, pp. 431-460, Nos. 379-617.]

G Cases referred to:

- (1) *Re Holford's Settlement*, [1944] 2 All E.R. 462; [1945] Ch. 21; 171 L.T. 379; 2nd Digest Supp.
- (2) *Re Mayhew*, [1901] 1 Ch. 677; 84 L.T. 761; 37 Digest 452, 542.
- (3) *Re Teape's Trusts*, (1873), L.R. 16 Eq. 442; 28 L.T. 799; 37 Digest 451, 541.
- (4) *Re Swinburne*, (1884), 27 Ch.D. 696; 37 Digest 453, 550.
- (5) *Re Ackerley*, [1913] 1 Ch. 510; 108 L.T. 712; 37 Digest 454, 562.
- (6) *Re Milner*, [1899] 1 Ch. 563; 80 L.T. 151; 37 Digest 453, 551.
- (7) *Von Brockdorff v. Malcolm*, (1885), 30 Ch.D. 172; 53 L.T. 263; 37 Digest 480, 771.

H ADJOURNED SUMMONS to determine whether, on the true construction of a will, the testator had exercised a limited power of appointment under a

marriage settlement. VAISEY, J., held that the power had been exercised, and directed that a further summons should be taken out *pro forma* to raise a similar question with regard to other funds subject to a re-settlement, and said that he would make the order indicated both on the summons before him and on the further summons. The facts appear in the judgment.

Swingland for the plaintiff, the Public Trustee, trustee of the marriage settlement. A

E. G. Wright for the first defendant, the son.

Tonge for the second defendant, one of the executors of the daughter, who would be entitled in default of appointment.

VAISEY, J. : This summons raises a question whether the will of the testator, Mr. William Latta, operated in relation to certain trust funds as a valid exercise of certain powers of appointment. B

The testator was married in 1901, and by a settlement made in consideration of that marriage certain property was settled on the part of his wife, Mrs. Janet Halley Latta, nee Cuthbertson. The settlement is in common form. It gave to the wife the first life interest, to the husband the second life interest, and, after the death of the survivor of the two persons, the capital was directed to be held in trust for all or such one or more of the issue of the marriage, whether children or remoter issue, as the husband and wife should jointly by deed appoint, and, in default of such appointment, as the survivor of them should by deed or will or codicil appoint, with a trust in default of appointment for the children of the marriage at 21, or in the case of a daughter at 21 or marriage, in equal shares if more than one. It is also material to note that the settlement contained a covenant on the part of the wife to settle her after-acquired property of a value of £1,000 or more with certain exceptions to which I need not refer. The settlement provided that during their joint lives the husband and wife should have power to appoint new trustees. That last mentioned power was exercised in 1913 when the Public Trustee was appointed sole trustee of the settlement in place of the original trustees, one of whom was dead and the other of whom retired. The wife died on Oct. 21, 1926. There was issue of the marriage only two children, a daughter, Margaret Cuthbertson Latta, who is now dead, and a son, Gordon Cuthbertson Latta, the first defendant. The wife did not concur with the testator in any exercise of the joint power of appointment reserved to them by the settlement. After her death it was found that the covenant on her part for the settlement of her after-acquired property had been overlooked or disregarded. To deal with that situation a deed, dated June 29, 1927, was executed. It was expressed to be supplemental to the settlement, and it contained provisions whereby the mutual rights of the wife's executors and the trustee of the settlement were adjusted. The parties to the deed were the testator, Mr. Latta, the daughter and the son, the executors of the wife, and the Public Trustee as trustee of the settlement. In order that the deed might be completely effective the husband released his power of appointment under the settlement so far as that power authorised him to benefit the issue of the marriage more remote than the daughter and the son, but he reserved the power to appoint to the daughter and son or either of them. Certain investments were then transferred to the Public Trustee and were accepted as a complete satisfaction of the wife's obligation to put her after-acquired property into settlement. A further deed dated May 21, 1929, was made between the testator, the son, and the daughter of the first part, the Public Trustee of the second part, and the testator and the son of the third part. The purpose and object of that deed, to which, be it noted, every person who could possibly be interested was a party, was to withdraw some portion of the trust fund from the ambit of the marriage settlement and to re-settle that portion on the same trusts as had C
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previously been applicable to it under the settlement, but with an extended power of investment. That portion of the trust fund was taken out of the Public Trustee's hands as trustee of the marriage settlement and placed in the hands of the testator and the son as trustees on corresponding referential trusts. The clause relevant to the present application is cl. 2 which provides that the testator and the son

A " . . . agree to hold the scheduled investments [*i.e.*, the withdrawn investments] upon such of the trusts and with and subject to such of the powers and provisions of the said [marriage] settlement as in the events which have happened are now subsisting and capable of taking effect,"

but subject to further provisions which are not material for me to state.

B At that point it will be observed that both funds were held (one by the Public Trustee as trustee of the marriage settlement, and the other by the testator and his son under the deed which I have just been describing) on trust in the events which had happened for the testator for life with remainder to the son and the daughter as he should by deed or will appoint and in default of such appointment to the son and daughter in equal shares.

C The daughter died on Apr. 27, 1943, without having been married. She made a will which was proved by her brother and one Charles Aikin Lawford, the second defendant. By that will, as I understand, she benefited certain persons not parties to the present summons. On Mar. 13, 1946, the testator made his will, by which he appointed his son and another person to be executors. He gave a specific legacy of £5,000 and then cl. 3 provides :

D " Subject as aforesaid I give devise and appoint all my property real and personal unto my said son in fee simple and absolutely Provided always that if my said son shall die in my lifetime leaving issue living at my death who shall attain the age of 21 years such issue shall take and if more than one in equal shares the property which their father would have taken hereunder."

E On May 18, 1946, the testator made a codicil in which he increased the amount of the legacy, but in all other respects confirmed his will. He died on June 17, 1947, without having further altered his will which was proved in due course. The settled funds, therefore, which remained under the control of the Public Trustee, the trustee of the settlement at the date of the testator's will and also at the date of his death consisted of the funds originally settled and those brought in by the deed of June 29, 1927, excluding the withdrawn investments. The value of the funds remaining under the control of the Public Trustee is upwards of £30,000. The value of the funds withdrawn and placed in the referential settlement is not disclosed in the evidence. The Public Trustee, the plaintiff on this summons, is in no way concerned with the referential settlement, and the summons relates only to the funds in the hands of the Public Trustee and does not refer to the funds in the referential settlement.

G The point now raised is familiar because testators frequently use expressions which are consistent both with the exercise and with the non-exercise of powers which they possess, and it is always a question of weighing the considerations which are in favour of the view that the power is exercised against the considerations which point the other way. Here the indications on each side are very few and slight. On the one hand, the testator undoubtedly uses the word "appoint." On the other hand, he has included among the objects of his bounty not only his son, who was admittedly an object of both the powers which the testator possessed, but he has purported to benefit by way of substitution the son's issue in the event of the son predeceasing him, which event did not, of course, happen. His power to appoint to the issue of the son had been released by the deed of June 29, 1927, and that release was

emphasised by the testator having covenanted in plain terms not to exercise it in favour of any issue of his remoter than his son and daughter.

There is a wealth of authority on this kind of point. I do not propose to attempt an elaborate review of the cases because I do not think I could do it in any form different from that which appears in my judgment in *Re Holford's Settlement* (1). There I came to the conclusion that, in spite of the fact that there were some indications in the will of an intention to exercise the powers, on the balance of considerations the powers had not been exercised. The case which seems to me to be nearest to the present one and to throw the most light on it is *Re Mayhew* (2). There the testatrix said :

"I appoint devise and bequeath my real estate and the residue of my personal estate to my trustees upon trust to sell or convert the same into money and to pay and divide the proceeds (after paying my debts funeral and testamentary expenses) equally between [four named nephews and nieces] or such of them as shall be living at my decease."

They all survived the testatrix who had a testamentary power to appoint a certain share among her nephews and nieces. Evidence was admitted to show that she had no other power of appointment, and it was held that the power was exercised. I have evidence before me that the testator in the present case had no other testamentary powers of appointment except those to which I have referred, and, so far as I am aware, he never exercised his power of appointment as survivor by any deed. *Re Mayhew* (2) was a decision of FARWELL, J. That very learned judge was notably an authority on all questions relating to powers of appointment. He said the case was near the line and came to the conclusion that the power had been exercised. He said ([1901] 1 Ch. 679), "I start with the fact that the gift is to objects of the power." Then he calls attention to the fact that there was evidence that the testatrix had no other power, and went on (*ibid.*) :

"She uses the words 'I appoint devise and bequeath.' Now, the word 'appoint' is a word of art, *prima facie* having reference to powers only. I do not of course say that if there were no other words of disposition the word 'appoint' in itself would not pass all the testatrix's property. But here I have the three words 'appoint devise and bequeath,' and the word 'appoint' in this collocation necessarily refers to a power. I therefore read the will as if the testatrix had said 'I devise and bequeath, and in exercise of every power enabling me in this behalf I appoint.'"

After saying that he had had some doubt at first whether the word "appoint" might not be satisfied by limiting its reference to any power acquired after the date of the will, he refers to the previous cases of *Re Teape's Trusts* (3) and *Re Swinburne* (4) in both of which it was held there was a sufficient reference to a special power. Then FARWELL, J., pointed out that in the case before him the words "devise and bequeath" would be sufficient in themselves to exercise a general power so that he was only following the general rule and giving effect, so far as possible, to every word used by the testator, saying that the word "appoint" must necessarily refer to a special power. There, putting on the one side the word "appoint" and the fact that the beneficiaries were objects of the power, and setting on the other side the otiose or incorrect direction that the trustees should sell and convert the appointed fund into money and pay the testatrix's debts, funeral and testamentary expenses, the learned judge came to the conclusion that the power was well exercised.

In *Re Swinburne* (4) a decision of PEARSON, J., a testatrix had a testamentary power of appointment among certain nephews and nieces. By her will she gave all the real and personal estate of which she might be seised or possessed

at the time of her death or over which she might have any testamentary power of disposition to trustees on trust for sale and conversion and to stand possessed of the proceeds (which she described as "my said trust funds") on trust to pay costs and expenses and to pay her debts and funeral expenses and certain pecuniary legacies and then on trust as to two one-fourth parts of her trust funds respectively for persons who were objects of the power and
A on trust as to the other two one-fourth parts respectively for persons who were not objects of the power. She declared that, in case of the failure of the trusts thereinbefore declared of any of the one-fourth parts of her trust funds, the one-fourth part, or so much thereof of which the trusts should fail, should be held on the trusts thereinbefore declared of the others or other of the fourth parts of which the trusts should not fail. It was held that the testatrix had
B manifested an intention to exercise the power, and that as to one moiety of the brother's property the power was well exercised. The judgment of PEARSON, J. (27 Ch.D. 702) begins by pointing out that :

"The testatrix has contrived to express her will in such a way as to create as much difficulty as possible in the construction of it. The first question is : Did she intend to exercise at all the special power of
C appointment given to her by her brother's will, or did she only intend to exercise any general power of appointment by will which she might have ? It is conceded that she had in fact no other testamentary power of appointment, and if I come to the conclusion that she did not intend to exercise this special power, I shall in fact strike out of the will the words 'over which I may have any testamentary power of disposition.' I think I
D cannot do that."

The learned judge came to the conclusion that the power of appointment had in all the circumstances been fully exercised.

Among the cases to which I referred in *Re Holford's Settlement* (1), there are several which seem to me to be helpful including *Re Ackerley* (5), *Re*
E *Milner* (6) and *Von Brockdorff v. Malcolm* (7). The last was the case of a will which contained no reference to the power but did include the words "over which at the time of my decease I shall have any beneficial disposing power by this my will." There the gift was made to trustees on trust partly for persons who were objects of the power and partly in excess of the power. It was held that the power was exercised by the will, the trusts so far as they
F were in excess of the power being inoperative.

Here it is contended by counsel for the second defendant that the testator is undoubtedly dealing with the property, both his own property and the property which he was appointing, as one mass, but in both *Re Mayhew* (2) and *Re Swinburne* (4) the same criticism was advanced, and it was, nevertheless, held that the will operated to exercise the power. In my judgment, this testator,
G by using the word "appoint," has used a word to which, if possible, I must give effect. Following the two cases to which I have referred, *Re Mayhew* (2) and *Re Swinburne* (4), I do not think I am justified in saying that that word was inserted merely in case the testator should thereafter be given some power of appointment which did not belong to him at the date at which he made his will. I think that the testator intended to exercise the power of appoint-
H ment in favour of his son, and that that intention extends not only to the funds in the hands of the Public Trustee, but also to the funds in the hands of the son as surviving trustee under the deed of May 21, 1929. I agree that, if the son had predeceased the testator, the substitutional gift to the son's issue could not have operated on the trust fund by reason of the testator's partial release of his power, but I cannot see that there is any difference between a case in which the non-objects are brought in by way of substitutional gift and the case in which there are objects and non-objects mixed up as in *Re*

Swinburne (4). Although, as so many judges have said, in this class of case the dividing line may be narrow and the guidance given by the authorities is none too easy to follow, I think on the whole, regard being had to all the circumstances of the case, that the will did operate to exercise both the powers of appointment which were vested in the testator at the time of his death.

Order accordingly. Costs as between solicitor and client to be paid out of the funds in the hands of the Public Trustee.

Solicitors: *Thompson, Quarrell & Megaw* (for the plaintiff); *Raymond-Barker, Nix & Co.* (for the first defendant); *Boodle, Hatfield & Co.* (for the second defendant).

[Reported by H. McL. MORRISON, Esq., Barrister-at-Law.]

Affirmed. C.A. [1949] 2 All E.R. 238.

EGERTON v. EGERTON.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Barnard, J.), February 18, March 9, 1949.]

Variation of Settlement—Income of trust fund to be paid to wife if marriage undissolved—Power to husband to appoint by will in favour of second wife—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 192.

The husband and wife were married in 1928, and there were no children of the marriage. By cl. 3 of an ante-nuptial settlement, to which the wife was a party, it was provided that after the husband's death, if the intended marriage should be subsisting and undissolved at the date of his death and if the wife should survive him, the trustees were to pay the annual income of the trust fund to the wife during her lifetime. The settlement further provided that, subject to cl. 3, the husband might by deed or will appoint, in favour of any other wife who might survive him, all or any part of the annual income of the fund. On June 27, 1947, the wife was granted a decree *nisi* on the ground of the husband's adultery, and on Aug. 15, 1947, the decree was made absolute. On Aug. 19, 1947, the husband re-married and on Nov. 17 he died, leaving a will dated Sept. 14, 1947. By his will the husband exercised the power of appointment conferred on him by the settlement, partly in favour of the second wife, partly in favour of his sister, and, after the death of the second wife, in favour of his sister's children living at the date of his death. The wife had an annual income of £1,099 and had supported herself since 1931. The husband's only income had been £650 derived from the settlement. The second wife was without income apart from the provision made for her under the will, and the sister had an income of £1,089. On an application by the first wife for a variation of the settlement by directing the trustee to pay the income of the trust fund to her during her life,

HELD: although in a proper case, in which the innocent party could show a change of circumstances, the court might be prepared to vary such a settlement, in view of the terms of cl. 3, of which the wife was aware, the lawfully acquired interests of the beneficiaries under the husband's will, and also the pecuniary means of the various parties and the relative financial position of the husband and wife during their marriage, the settlement ought not to be varied.

[AS TO VARIATION OF SETTLEMENTS, see HALSBURY, Hailsham Edn., Vol. 10, pp. 800-809, paras. 1274-1292; and FOR CASES, see DIGEST, Vol. 27, pp. 517-533, Nos. 5576-5778.]

Cases referred to :

- (1) *Hartopp v. Hartopp & Akhurst*, [1899] P. 65 ; 80 L.T. 297 ; 27 Digest 523, 5650.
- (2) *March v. March & Palumbo*, (1867), L.R. 1 P. & D. 440 ; 16 L.T. 366 ; 27 Digest 517, 5576.
- (3) *Burghley v. Burghley*, (1947), unreported.

A APPLICATION for the variation of a settlement.

The wife, having obtained a decree absolute of divorce, sought to vary an ante-nuptial settlement by directing the trustees of the settlement to pay the income of the trust fund to her during her lifetime. The settlement provided that, if the marriage should be undissolved at the husband's death, the trustees were to pay the income to the wife during her lifetime, but, subject thereto, the husband might by will appoint the income in favour of any other wife. The husband who, before his death, had re-married, by will appointed the income of the trust fund in favour of his second wife (who had no other means), his sister and his sister's children. BARNARD, J., held that in the circumstances the settlement ought not to be varied.

C *Karminski, K.C.*, and *R. J. A. Temple* for the wife.

Beyfus, K.C., and *Roland Adams* for the second wife (a beneficiary under the husband's will), the trustees of the settlement, and other beneficiaries under the will.

Cur. adv. vult.

- D** Mar. 9. BARNARD, J., read the following judgment. The parties were married on Apr. 14, 1928, and there are no children of the marriage. At the time of the marriage the wife was a Mrs. Crawshay, she having divorced her former husband. In May, 1946, the husband petitioned for dissolution of the marriage on the ground of the wife's alleged desertion, and at the hearing on June 27, 1947, the wife, having obtained leave to amend her answer and to charge adultery, was granted a decree *nisi* on the prayer of her answer.
- E** This decree was made absolute on Aug. 15, 1947. On Aug. 19, 1947, the husband re-married, and on Nov. 17, 1947, he died, leaving a will dated Sept. 14, 1947, which has been duly proved. On Mar. 18, 1948, the wife, by leave of the court, she being out of time, filed a notice applying for the variation of an ante-nuptial settlement dated Apr. 13, 1928. The parties to this settlement were the husband, the wife, and trustees. The husband brought into
- F** settlement approximately £18,000, on trust for the annual income thereof to be applied during his lifetime for the benefit of himself, the wife, and any other wife and issue of his, and any person who, if he had died intestate, would have been entitled to the trust fund or the income thereof, as the trustees should in their discretion think fit. By cl. 3 of the said settlement, after the husband's death, if the said intended marriage should be subsisting and undissolved at
- G** the date of his death and if the wife should survive him by seven days, the trustees were to pay the annual income thereof to the wife during her lifetime without power of anticipation during coverture. The settlement provided that, if there were no children or remoter issue of the husband who attained a vested interest under the settlement, the trustees should stand possessed of the trust fund in trust for the husband, and, subject to the provisions of cl. 3, the husband
- H** might by deed or will appoint in favour of any other wife who might survive him, during her life or any less period, all or any part of the annual income of the trust fund. The settlement further gave power to the trustees, in their discretion and at the request of the husband, to raise out of the trust fund any sum or sums not exceeding £5,000 and pay or apply the same to or for the benefit of the husband absolutely. The gross annual income from the trust fund is approximately £650. The trustees paid the annual income to the husband during his life, and at his death this was his only source of income.

By his will, the husband, in the exercise of the power of appointment conferred on him by the settlement, directed that the trustees were to hold the settled fund on trust as to one equal fourth share, both capital and income, for his second wife absolutely, and as to one other equal fourth share thereof on trust as to capital and income for his sister absolutely, and as to the remaining moiety of the said fund on trust to pay the income arising therefrom to his second wife during her life with power for the trustees at their uncontrolled discretion to raise and pay out of the capital thereof any sum or sums not exceeding in the whole £5,000 to or for the benefit of the second wife, and, subject thereto, from and after her death on such of the children of his sister as should be living at the date of his death. The second wife is entirely without means apart from the provision made for her by the will. The first wife, however, has an annual income of about £1,099 and she has entirely supported herself since 1931. It is also clear from her own evidence given at the trial that from the date of her marriage until 1931, when she and the husband parted, the husband, whose only income was the £650 per annum derived from the settlement, was more of a financial liability than an asset. The wife's income, which was derived from her former husband, Mr. Crawshay, on her re-marriage to the husband was reduced by about £1,000 per annum to the said £1,099. The husband's sister, Lady Mary Cecilia Boyd, who is a beneficiary under his will, lives with her husband in Kenya and has an income of about £1,089 per annum. Her husband is apparently of no occupation and has no private means of his own. Lady Mary Cecilia Boyd has three children all of whom are still living and two of whom are under age.

The registrar has recommended the following variation of the settlement :

"That it be ordered that in spite of the appointment contained in the husband's said will, the trustees do during the lifetime of the [first wife] pay to her one fourth part of the income arising from the settled fund instead of the said Lady Mary Cecilia Boyd and that should the [first wife] survive the second wife, they should pay the income of a moiety of the said fund to her for the remainder of her life instead of to the children of the said Lady Mary Cecilia Boyd, but that the discretion of the trustees arising under the said appointment to raise and pay out of the capital of the said moiety sums not exceeding £5,000 to or for the benefit of the second wife be not interfered with, and that the necessary variation or rectification of the said settlement be made accordingly."

The first wife now seeks to have the registrar's report varied by directing the trustees of the settlement to pay the income of the trust fund to her during her life notwithstanding the fact that at the date of the husband's death the marriage was not then subsisting and undissolved. The second wife, the trustees of the settlement, the executors and trustees of the husband's will, and Lady Mary Cecilia Boyd and her three children all oppose any variation of the settlement.

The jurisdiction to vary marriage settlements is derived from s. 192 of the Supreme Court of Judicature (Consolidation) Act, 1925, and this section gives the court a very wide discretion. Counsel for the first wife has referred me to the judgment of GORELL BARNES, J., in *Hartopp v. Hartopp and Akhurst* (1) in which the learned judge said ([1899] P. 72) :

"Now, the guiding principle which will be found running through the cases is, in my opinion, this: Where the breaking up of the family life has been caused by the fault of the respondent, the court, exercising its powers under the above section, ought to place the petitioner and the children in a position as nearly as circumstances will permit the same as if the family life had not been broken up."

No one could quarrel with this statement as a guiding principle, but at the

same time I think it would be wrong to interpret it as meaning that it is a principle which must be applied in every case, regardless of its facts. That would, in my opinion, be placing fetters on the discretion of the court which the legislature never intended. I have also been referred to *March v. March and Palumbo* (2) where SIR J. P. WILDE, the Judge Ordinary, in his judgment, set out (L.R. 1 P. & D. 443) certain matters for consideration, namely :

A "The relative sums contributed by each party, the conduct of each, the total amounts of their joint income, the relation it bears to the requirements of the parties, and their respective prospects of increased income . . ."

I should like to add a further matter for consideration, which is of great significance in the case before me, namely, the precise terms of the settlement which it is sought to vary. The wife was a party to this settlement and was fully aware of the terms of cl. 3, which made it clear that, if her marriage was not subsisting and had been dissolved at the instance of either party before the death of the husband, she had no interest whatsoever in the settlement.

B I am not suggesting that in a proper case, in which the innocent party could show a change of circumstances, the court would not vary a settlement, the terms of which were similar to the terms of this settlement. Such a variation as the wife seeks would put her in a far better financial position than she was ever in during her marriage. On this point counsel for the wife relies on a decision of FINNEMORE, J., in an unreported case of *Burghley v. Burghley* (3), heard on Oct. 24, 1947. There the wife petitioner had received a fortune of £100,000 since the marriage, but, none the less, she sought to vary the settlement in her favour and succeeded on her application. FINNEMORE, J., stated in his judgment that the mere fact that the wife had received this large sum of money was not in itself conclusive evidence that the variation of the settlement was not necessary. I entirely agree, but the case is of little or no assistance to me because the facts were so dissimilar to the facts of the case now before me. As FINNEMORE, J., himself states in the course of his judgment :

E "Every case has to be considered on its own facts, and the principles which are laid down are not intended to be exhaustive for all cases."

In the present case at any time after the presentation of the petition the wife could have given notice of her application to vary this settlement. She did nothing until more than six months after the final decree when she applied under the Matrimonial Causes Rules, 1937, r. 44 (1), for leave to make this application out of time. In the meantime the husband had made a will exercising the power of appointment under the settlement and had then died. On his death his second wife, his sister and her children all lawfully acquired an interest in his estate. Giving due consideration to the terms of cl. 3 of the settlement, the lawfully acquired interests of the second wife, Lady Mary Cecilia Boyd and her children, the pecuniary means of the various parties, and the relative financial position of the husband and the wife during the subsistence of their marriage, I have come to the conclusion that I ought not to vary this settlement.

Application to vary settlement refused.

Solicitors : Peacock & Goddard (for the wife) ; Grover, Humphreys & Boyes (for the second wife, the trustees of the settlement, and beneficiaries under the husband's will).

[Reported by R. HENDRY WHITE, ESQ., Barrister-at-Law.]

Re HUNTINGTON'S SETTLEMENT TRUSTS. STRUTHERS *v.*
MAYNE AND OTHERS.

[CHANCERY DIVISION (Jenkins, J.), March 4, 1949.]

*Settlement—Accruer—Accruer to funds which had not “failed or determined”—
Fund paid absolutely to beneficiary in accordance with trusts of the settlement.*

By a settlement dated Jan. 3, 1903, W.B.H., provided a separate trust fund for each of his four children, Lionel, Kate, Mabel and Elsie. The trustees were directed to hold Lionel's fund on certain trusts until he reached the age of thirty years “And shall if and when the said Lionel shall attain the age of thirty years stand possessed of ‘Lionel's Trust Fund’ in trust for the said Lionel absolutely.” The share of each of the other children was directed to be held on certain trusts, and an accruer clause provided: “Provided always and it is hereby agreed and declared that in case the trusts hereinbefore declared concerning any of the said trust funds namely ‘Kate's Trust Fund’ ‘Mabel's Trust Fund’ ‘Elsie's Trust Fund’ and ‘Lionel's Trust Fund’ shall fail or determine then subject to the trusts powers and provisions herein declared and contained or by law vested in the said trustees or trustee concerning the same trust fund and to every or any exercise of any such powers such trust fund as well as any share or shares accruing or added thereto by virtue of this proviso and the income thereof shall go and accrue by way of addition to the others or other of the said trust funds of which the trusts hereinbefore declared shall not then have failed or determined and if more than one in equal shares and proportions and every such accruing share shall be held on the trusts and subject to the powers and provisions herein declared and contained concerning the said trust fund to which the same shall be added or as near thereto as circumstances will permit And in case the trusts hereinbefore declared of each of the other of the said trust funds shall then have failed or determined the said trustees or trustee shall stand possessed of such trust fund including all additions or accretions thereto under this proviso In trust for . . . A.W.H. his executors and administrators.” On Oct. 22, 1914, Lionel reached the age of thirty, and his share was paid over to him. On July 7, 1944, Lionel died. On Jan. 20, 1948, Mabel died a spinster, thereby bringing the accruer clause into operation.

HELD: the fact that Lionel had become absolutely entitled and had had his share paid to him did not result in the trusts of “Lionel's Trust Fund” having so determined as to exclude the fund from the accruer brought about by the death of Mabel without issue.

[AS TO TRUSTS IN DEFAULT OF ISSUE, GENERALLY, see HALSBURY, Hails-ham Edn., Vol. 29, pp. 608-614, paras. 884-889; and FOR CASES, see DIGEST, Vol. 40, pp. 575-577, Nos. 1104-1122.]

ADJOURNED SUMMONS to determine whether, on the true construction of an accruer clause in a settlement (which excluded from sharing in the accruer trust funds of which the trusts had failed or determined), a fund which had, under the trusts of the settlement, been paid absolutely to a beneficiary was excluded from sharing in the accruing fund. JENKINS, J., held that it was not excluded. The facts appear in the judgment.

R. Cozens-Hardy Horne for the plaintiff, one of the trustees of the settlement.
J. F. Bowyer for the first five defendants, beneficiaries under the settlement.

Baden Fuller for the sixth and seventh defendants, personal representatives of Lionel.

JENKINS, J.: This case concerns the destination of one of the trust funds settled by a settlement dated Jan. 3, 1903, and made by William Balle

Huntington. The scheme of the settlement was to create a separate trust fund of certain specified investments for each of four children of the settlor. I do not think I need go in detail into the settlement trusts declared concerning each share, except to say that they were not of an unusual character. They were trusts for the child and for the child's issue on more or less usual lines. It is, however, to be noted that in the case of the son, Lionel, the trustees were directed to hold his fund on trusts to take effect until he was 21, trusts applicable between the age of 21 and the age of 30 :

"And shall if and when the said Lionel Welby Huntington shall attain the age of thirty years stand possessed of 'Lionel's Trust Fund' in trust for the said Lionel Welby Huntington absolutely."

Lionel attained the age of 30 years on Oct. 22, 1914, and died on July 7, 1944. The defendants in the present proceedings include his executors. One of the four children, Emily Mabel Huntington, died on Jan. 20, 1948, a spinster, and the question which I have to decide concerns the effect of an accruer clause in the settlement having regard to the fact that before the death without issue of Emily Mabel Huntington, thereby bringing the accruer clause into operation with respect to her share, Lionel had become absolutely entitled and had had his share paid over to him under the trust applicable on his attaining the age of 30.

The accruer clause is in these terms :

"Provided always and it is hereby agreed and declared that in case the trusts hereinbefore declared concerning any of the said trust funds namely 'Kate's Trust Fund' 'Mabel's Trust Fund' 'Elsie's Trust Fund' and 'Lionel's Trust Fund' shall fail or determine then subject to the trusts powers and provisions herein declared and contained or by law vested in the said trustees or trustee concerning the same trust fund and to every or any exercise of any such powers such trust fund as well as any share or shares accruing or added thereto by virtue of this proviso and the income thereof shall go and accrue by way of addition to the others or other of the said trust funds of which the trusts hereinbefore declared shall not then have failed or determined and if more than one in equal shares and proportions and every such accruing share shall be held on the trusts and subject to the powers and provisions herein declared and contained concerning the said trust fund to which the same shall be added or as near thereto as circumstances will permit And in case the trusts hereinbefore declared of each of the other of the said trust funds shall then have failed or determined the said trustees or trustee shall stand possessed of such trust fund including all additions or accretions thereto under this proviso In trust for the said Arthur William Huntington his executors and administrators."

It will be observed that the accruer directed by this clause is "by way of addition to the others or other of the said trust funds of which the trusts hereinbefore declared shall not then have failed or determined." The words "shall not then have failed or determined" give rise to the difficulty because, as I have mentioned, Lionel had become absolutely entitled to his share, which had been paid out to him, before the accruer clause took effect with respect to "Mabel's Trust Fund." It is argued that "Lionel's Trust Fund" cannot participate in this accruer inasmuch as it is, within the meaning of the clause, a trust fund of which the trusts had determined before the date of accruer. Obviously the trusts had not failed, but it is said that they had determined because, Lionel having become absolutely entitled, the trustees had paid his trust fund to him so that it was completely out of their hands, they had no further function to perform as trustees with respect to it, and it could not be said that the fund remained in Lionel's hands subject to any trusts whatever.

The effect of that contention, if it prevailed, would be to make the accruer of "Mabel's Trust Fund" an accruer in equal shares between "Kate's Trust Fund" and "Elsie's Trust Fund" to the exclusion of "Lionel's Trust Fund." On the other hand, it is said that, whatever the word "determined" may mean in some contexts, it is clear that here it is not used in the sense I have mentioned. To put it in another way, there has been no determination of the trusts of "Lionel's Trust Fund" in the sense in which the word "determined" is used here.

The argument for the exclusion of "Lionel's Trust Fund" from participation in the accruer derives some support from the forms in PRIDEAUX'S PRECEDENTS IN CONVEYANCING, 23rd ed., dated 1937. The learned editor of that edition includes (vol. 3, pp. 745, 746, 788) specimen forms of accruer clauses. The form of the accruer clause on pp. 745 and 746, which is typical, is this:

"If any daughter (child) of mine shall not have any child who under the trust in default of appointment hereinbefore contained attains a vested interest in (his or) her share, Then subject to the trusts and powers . . . the original share of such daughter (child) of mine, and also any share or shares accruing under this provision, and all accumulations . . . shall accrue to and be held [then follows a general power of appointment] And in default of and subject to any such appointment: In trust for my other children or child (not being daughters (children) or a daughter (child) the trusts for whom and whose issue have failed or determined otherwise than by the absolute payment or transfer of a share) who attain the age of 21 years, or being female marry under that age, and, if more than one, in equal shares."

It will be observed that in that form the accruer is expressed, as in the settlement which I have to construe, to be in favour of the "other children or child not being daughters (children) or a daughter (child) the trusts for whom and whose issue have failed or determined," but after this reference to the failure or determination these words are put in: "otherwise than by the absolute payment or transfer of a share." It is argued that the precedent excludes children the trusts for whom and whose issue have failed or determined, just as the accruer clause in the settlement before me excludes any trust fund of which the trusts hereinbefore declared have failed or determined, but that the precedent, having made that exclusion, goes on to limit it by saying: "otherwise than by the absolute payment or transfer of a share." There are no similar words in the accruer clause here, and it is argued, therefore, that, in the view, at all events, of the draftsman of the precedents, the exclusion of a share the trusts of which have failed or determined would exclude a share which had been paid to someone absolutely entitled, and the words "otherwise than by the absolute payment or transfer of a share" were considered necessary to prevent the reference to determination extending to determination by payment of an absolutely vested share.

I have been referred to a number of editions of PRIDEAUX'S PRECEDENTS and it seems that the words "otherwise than by the absolute payment or transfer of a share" first appeared in the 1913 edition, the editors of earlier editions, apparently, having thought that the desired result could be produced by the simple exclusion from the benefit of the accruer of shares the trusts of which have failed or determined. So far as counsel's researches have gone, the particular form of words seems to be peculiar to PRIDEAUX'S PRECEDENTS, the form in KEY AND ELPHINSTONE'S PRECEDENTS IN CONVEYANCING, and I think also in Mr. ROSE'S CONVEYANCING PRECEDENTS, proceeding on a somewhat different principle, the accruer being made simply to the shares of the other children with a provision to the effect that accruing shares shall be held on the same trusts as the original share. That form, of course, gets over any such difficulty as is now raised, and yet it has the desired result of bringing

the accruing share ultimately over to what I may call the "effective" settled shares, because, although the accruer in the first instance would include a share the trusts of which had failed, the portion accruing to such a share would forthwith accrue over again to the shares the trusts of which were still subsisting. By the use of that form the result is, as desired, to make the accruer be for the benefit of the "effective" shares and no others.

- A The presence in PRIDEAUX'S PRECEDENTS of the words "otherwise than by the absolute payment or transfer" to a person absolutely entitled, no doubt, does give rise to a question because *prima facie* the editors of conveying precedents do not put in words which are mere surplusage, and so the presence of these words in the forms I have quoted does inject a doubt whether the word "determined" may not include determination by absolute payment
- B or transfer. Be that as it may, the question which has to be decided concerns the meaning of the words "fail or determine" in this particular accruer clause. I think in some contexts it might be truly said that the trusts of a settled share have determined when the person entitled has become absolutely entitled and the fund has been paid over to him, but it does not follow that in all contexts the words have that meaning. Here the settlor in the accruer clause refers
- C specifically to "the trusts hereinbefore declared concerning any of the said trusts funds namely 'Kate's Trust Fund' 'Mabel's Trust Fund' 'Elsie's Trust Fund' and 'Lionel's Trust Fund'," and he introduces the accruer clause in case the trusts of any of those specifically mentioned trust funds shall fail or determine. When he says "fail or determine" at that point in the accruer clause he clearly cannot, in my judgment, mean to include determination by
- D payment to somebody absolutely entitled because it cannot have been his intention that when somebody became absolutely entitled the accruer clause should operate and take the share away from him or her. I do not think it is any answer to say that the accruer is made "subject to the trusts powers and provisions herein declared." The fact remains that the accruer is limited to operate with respect to shares the trusts of which have failed or determined,
- E and, if they have failed or determined, then it operates "subject to the trusts powers and provisions herein declared."

Accordingly, in my judgment, the trusts of "Lionel's Trust Fund" cannot have failed or determined within the meaning of that phrase where it first occurs in the accruer clause. It follows that when the phrase occurs again in the passage setting out the destination of the accruing share and one finds

F that the destination is limited to "trust funds of which the trusts hereinbefore declared shall not then have failed or determined," the word "determined" cannot extend to a share paid out to somebody absolutely entitled, for I think that this precisely similar phrase occurring twice in the same clause must be given the same meaning in the two places in which it occurs. I think it is reasonably plain that the settlor is dividing the trust funds into two classes.

- G With regard to trust funds the trusts of which fail or determine, the accruer clause comes into operation against those. On the other hand, with regard to shares the trusts of which have not failed or determined, the accruer clause operates in favour of those. It is to be noted in the ultimate trust the same phrase occurs again: "And in case the trusts hereinbefore declared of each of the other of the said trust funds shall then have failed or determined," the
- H ultimate trust is to take effect. I should have thought it would be very difficult to construe "failed or determined" in that place in the clause as extending to a share paid out to somebody absolutely entitled, for, if that were so, then in all circumstances, so far as I can see, the ultimate beneficiary must be the *cestui que trust* under the ultimate trust, for, unless the settlement were framed so as to go on for ever and thus infringe the rule against perpetuities, there would be bound to come a time when some person or persons became absolutely entitled to the fund and it was paid over to them, and, of course, in that third

passage, in which the words "failed or determined" occur, it is equally true that the meaning to be attributed to them must, according to all ordinary principles of construction, be the same as the meaning they bear where they previously occur.

The precise meaning of the words "fail or determine" is rather difficult to define, but I think that the words "or determine" are added to this common conveyancing phrase so as to meet the case of what may in a sense be termed a partial failure. Frequently clauses of this kind with regard to ultimate trusts are introduced simply by the words "if the trusts hereinbefore declared shall fail," and that I should have thought would in all ordinary circumstances be quite enough, but there is, perhaps, a possibility that it might be argued in certain circumstances that, although the trusts of the fund or of the particular share had come to an end, they could not be said to have failed. A simple reference to failure, it might be argued, is only appropriate to total failure, so that where income has been applied, or powers have been exercised, in favour of a beneficiary entitled to a limited interest or contingently entitled and then the trusts fail, it might be said that the words "shall fail" *simpliciter* would not be appropriate because the trusts have come into operation and have been in operation up to a point and to a certain extent and then have come to an end. All doubts of that sort would be resolved by adding the words "or determined." That makes it clear that such partial failure as I have endeavoured to describe would suffice to bring the accruer or the ultimate trust, whatever it may be, into operation. I think, in this case, the use of the double expression "fail or determine" can be accounted for in that way without pressing the meaning of the word "determine" so as to make it include a share, such as Lionel's share, which had become absolutely vested and had been paid out. I certainly do not think there is anything in the phrase "fail or determine" to constrain me as a matter of language to come to any such conclusion. In the context where the phrase occurs it seems to me reasonably plain that any such conclusion would be the wrong one, as the result which it would produce would, so far as I can see, be in the highest degree capricious in that it would or might exclude from participation in the accruer persons whom one would think the settlor would have most intended to benefit.

For these reasons, notwithstanding the forms which appear in PRIDEAUX'S PRECEDENTS and the ingenious argument presented to me by counsel for the first five defendants, I am of opinion that "Lionel's Trust Fund" should participate in the accruer brought about by the death of Mabel without issue and is not excluded from such participation by the limitation of the trust funds in whose favour the accruer is to take place to the "trust funds of which the trusts hereinbefore declared shall not then have failed or determined." In my judgment, the trusts of Lionel's share had not failed or determined, but there was still in operation the trust for him absolutely, and the fact that the trustees had paid his fund over to him did not bring about a failure or determination of that trust for the purposes of this accruer clause.

Declaration accordingly. Costs of all parties to be taxed as between solicitor and client and paid out of "Mabel's Trust Fund."

Solicitors: *Johnson, Jecks & Colclough* (for the plaintiff and the sixth and seventh defendants); *Young, Jackson, Beard & King* (for the remaining defendants).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

WILSON v. KINGSTON-UPON-THAMES CORPORATION.

[COURT OF APPEAL (Tucker, Asquith and Singleton, L.JJ.), March 2, 3, 1949.]

Highway—Non-repair—Liability of local authority—Non-feasance—Road temporarily repaired by highway authority—Subsequently becoming out of repair.

A A hole in an asphalt roadway was temporarily repaired by the highway authority by filling it with tar-macadam. The road again became in need of repair, and a cyclist riding over the hole was thrown from his cycle and injured.

HELD: the condition of the road was due to non-feasance and not to misfeasance in repairing the road negligently, and, therefore, the highway authority were not liable.

Decision of MORRIS, J. ([1948] 2 All E.R. 780), *affirmed*.

B [AS TO LIABILITY OF A HIGHWAY AUTHORITY FOR NON-FEASANCE AND MISFEASANCE IN THE REPAIR OF A HIGHWAY, see HALSBURY, Hailsham Edn., Vol. 16, pp. 332-336, para. 455; and FOR CASES, see DIGEST, Vol. 26, pp. 398-410, Nos. 1239-1310.]

Case referred to:

C (1) *Andrews v. Merton and Morden Urban District Council*, (1921), 56 L. Jo. 466; 26 Digest 402, 1261.

APPEAL by the plaintiff from a decision of MORRIS, J., dated Oct. 18, 1948 (reported [1948] 2 All E.R. 780).

D The plaintiff, who was thrown from his bicycle and injured owing to the defective condition of the surface of a road, claimed damages from the defendants, the highway authority, on the ground that they had carried out repairs to that part of the highway so negligently that it had again become out of repair by the time of the accident. MORRIS, J., held that the lack of repair of the highway arose from non-feasance and not from misfeasance in repairing the road negligently, and, therefore, the defendants were not liable. The Court of Appeal now confirmed this decision.

E *H. G. Garland* for the plaintiff.

Sir Shirley Worthington-Evans for the defendants.

TUCKER L.J.: The sole question is whether or not the condition of this road was due to non-feasance or misfeasance on the part of the defendants.

F There are no records to show that any repairs have been carried out at this part of the road, but occasionally tar-macadam was used for patching as a temporary measure and MORRIS, J. was satisfied that there was a "patching up" with tar-macadam which would not be recorded in the corporation's records. The law on this matter has been stated by HORRIDGE, J. in *Andrews v. Merton and Morden Urban District Council* (1). I am of opinion there was no evidence to show that this temporary operation of patching was negligently performed. If there was any negligence on the part of the defendants, I should have thought it existed in the failure to substitute for a temporary repair a more permanent repair at an earlier date. I find myself completely in agreement with the way the matter was dealt with by MORRIS, J., and I think this appeal fails.

H ASQUITH, L.J.: I agree.

SINGLETON, L.J.: I agree.

Appeal dismissed with costs.

Solicitors: *J. C. Brookhouse* and *C. L. MacDougall* (for the plaintiff); *William Charles Crocker* (for the defendants).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

Re GUNTER'S SETTLEMENT TRUSTS. OWEN *v.*
PRITCHARD-BARRETT AND OTHERS.

[CHANCERY DIVISION (Vaisey, J.), March 10, 1949.]

Settlement—Exclusion from participation—Exclusion on death of life tenant of “an eldest son entitled for the time being under my will to my real estates for his life”—Exclusion of deceased eldest son who had been life tenant under will. A

In 1901 R.G. settled certain property on trust for his daughter Ursula for life, and thereafter in the events which happened the trustees were directed to stand possessed of the trust moneys “upon trust for all the children of the said R.G. (other than an eldest son or only surviving son or an eldest or only surviving daughter entitled for the time being under his will to his real estates for his or her life) who being a son or sons shall attain the age of 21 years or being a daughter or daughters shall attain that age or marry in equal shares.” By his will, dated June 2, 1905, R.G. devised his real estate to his eldest son, N.G., for life and thereafter to the use of N.G.’s sons and other issue. In September, 1905, R.G. died, and N.G. died in August, 1917. In 1942, Ursula died, whereupon the ultimate trusts of the settlement took effect. B

HELD: on the true construction of the settlement and in the events which had happened the class of children entitled on Ursula’s death under the settlement did not include N.G., he having been entitled during his life to the real estate devised by the will. C

Dicta of SIMONDS, J., in *Re Leeke’s Settlement Trusts* ([1937] 2 All E.R. 566, 567; [1937] Ch. 604, 605; 157 L.T. 482), *applied*. D

[AS TO WHAT CHILDREN ARE PORTIONERS, see HALSBURY, Hailsham Edn., Vol. 29, pp. 617-620, paras. 895-897; and FOR CASES, see DIGEST, Vol. 40, pp. 603-608, Nos. 1394-1433.]

Cases referred to:

- (1) *Ellison v. Thomas*, (1862), 1 De G.J. & Sm. 18; 1 New Rep. 37; 7 L.T. 342; 40 Digest 606, 1425. E
- (2) *Law Union & Crown Insurance Co. v. Hill*, [1902] A.C. 263; 86 L.T. 773; 44 Digest 1117, 9677.
- (3) *Re Leeke’s Settlement Trusts*, [1937] 2 All E.R. 563; [1937] Ch. 600; 157 L.T. 481; Digest Supp.
- (4) *Collingwood v. Stanhope*, (1869), L.R. 4 H.L. 43; 40 Digest 607, 1429. F
- (5) *Duke v. Doidge*, (1746), 2 Ves. Sen. 203 n.; 28 E.R. 131; 40 Digest 603, 1397.
- (6) *Re Fitzgerald’s Settled Estates*, [1891] 3 Ch. 394; 65 L.T. 242; 40 Digest 607, 1427.

ADJOURNED SUMMONS to determine whether on the true construction of a settlement and in the events which had happened the class of children of Sir Robert Gunter entitled to participate in the settlement funds on the death of the life tenant, Ursula Fanny Gunter, included Sir Robert’s eldest son, Sir Nevill Gunter, who had predeceased Ursula. VAISEY, J., held that Sir Nevill was not included. The facts appear in the judgment. G

E. G. Wright for the plaintiff, a trustee of the settlement.

J. F. Bowyer for the first defendant, interested in the residuary estate of a son of Sir Robert Gunter. H

Lindner for the remaining defendants, a child of Sir Robert Gunter, personal representatives of a deceased child and trustees of daughters’ marriage settlements.

VAISEY J.: This summons raises a short but not an easy question as to the proper construction of a certain clause in a settlement made on June 11,

1901, by Sir Robert Gunter. The trusts, so far as it is necessary to describe them, were for one of his daughters, Ursula Fanny Gunter, during her life, and, subject to her life interest and after her decease, in default of her having children (she had none), the trustees were directed to stand possessed of the trust moneys :

- “ . . . upon trust for all the children of the said Sir Robert Gunter
A (other than an eldest son or only surviving son or an eldest or only surviving daughter entitled for the time being under his will to his real estates for his or her life) who being a son or sons shall attain the age of 21 years or being a daughter or daughters shall attain that age or marry in equal shares.”
- I have to decide the meaning and effect of the words in the exception.
- B The settlor, Sir Robert Gunter, made his will on June 2, 1905. So far as it is material to mention the contents of that will, he devised his real estate, subject to certain rent charges and life insurance premiums, to the use of his eldest son, Robert Benyon Nevill Gunter, who was afterwards known as Sir Nevill Gunter, and his assigns during his life without impeachment of waste, and after the death of Sir Nevill Gunter to the use of his sons and other issue
C as therein mentioned. There was an ultimate limitation to the settlor's younger son and his daughters in what is described as the usual form of a strict settlement, the details of which it is unnecessary for me to mention. On Sept. 18, 1905, the settlor died, and his will was duly proved. He had eight children. The first, Sir Nevill Gunter, whom I have already mentioned, survived his father for 12 years and died on Aug. 20, 1917. There was a second son who
D died in 1900 before the date of the settlement, a bachelor and intestate. There was a third son, the defendant, George Gunter, and there were five daughters, including the daughter, Ursula Fanny Gunter. That lady died in 1942, and thereupon the ultimate trusts of the settlement took effect.
- The question I have to decide is whether, on the true construction of the settlement and in the events which happened, the class of children of the settlor between and among whom on the death of the tenant for life, Ursula Fanny Gunter, the trust fund became divisible included or did not include
E Sir Nevill Gunter. I turn back to the excepting words. All the children of Sir Robert Gunter, the settlor, are to participate subject to their attaining 21, or, in the case of the daughters, attaining that age or marrying, with the exception of the eldest son or only surviving son or only surviving daughter
F entitled for the time being under the settlor's will to his real estates for his or her life. What would have happened if Sir Nevill Gunter had died in the lifetime of her father is a question which has not arisen and on which I need express no opinion. I think that the excepting words have to be read, in the events which have happened, as omitting the references to “surviving son or an eldest or only surviving daughter,” because in point of fact Sir Nevill
G Gunter left, as I understand it, male issue who have succeeded to the estates under the will, so that no other son other than Sir Nevill Gunter ever became entitled at any time under the settlor's will to a life estate in the settlor's devised real estate. Omitting the words which appear to me to be irrelevant, the person or persons excepted from the trust is or are the persons who come within the description of an eldest son entitled for the time being under the
H will to the settlor's real estates for his life. One thing is perfectly clear. If I read the words “for the time being” in the natural sense in which those words *prima facie* have to be read in a case of this description, they would refer obviously to the point of time which is mentioned, that is to say, the date of the decease of the tenant for life, Ursula Fanny Gunter. The funds have to be held after her decease in trust for all the children other than the eldest son entitled for the time being under his will to his real estates for his life.

There is a somewhat bewildering mass of authority on this type of problem, and certain authorities have been quoted to me at the Bar. First, there is *Ellison v. Thomas* (1); secondly, *Law Union & Crown Insurance Co. v. Hill* (2); and thirdly, *Re Leeke's Settlement Trusts* (3). I confess that I find these authorities extremely difficult to reconcile, and I am convinced that, if a larger number of authorities had been cited to me than those three, I should have found even greater confusion. There is no doubt that *Ellison v. Thomas* (1) was extraordinarily near to the present case. By a settlement, a sum of money was directed to be raised after the death of the survivor of two persons, and be held in trust for all the children of the tenant for life of hereditaments settled by a contemporaneous deed other than and besides an eldest or only son for the time being entitled under the last mentioned settlement to the estates thereby settled in possession or in remainder immediately expectant on the decease of the survivor of the tenant for life and a prior tenant for life.

It was held :

" . . . that the exclusion applied only to the person who was the eldest son at the time appointed for raising the money, and that the representatives of an eldest son who had died before that period were entitled to participate in the money."

In *Law Union & Crown Insurance Co. v. Hill* (2) the excepting words were "other than and except an eldest or only son for the time being entitled to the possession" of certain estates after the decease of a named person "as tenant for life or any greater estate or interest whatsoever." The named person and the eldest son, being then respectively tenant for life and tenant in tail in remainder of the estates, executed deeds under which the estates were disentailed and sold and the proceeds invested by the trustees under the trust under which the son took a beneficial interest. The testator died in 1875 and the named person, Richard, died in 1899. There it was held that Richard's eldest son was not at his father's death "entitled" to the rents, etc., of the estates within the meaning of the exception clause and, therefore, was not excluded from the succession to the testator's estates.

It is remarkable that *Ellison v. Thomas* (1) does not seem to have been referred to in that case. What is more strange is that in *Re Leeke's Settlement Trusts* (3), before SIMONDS, J., neither of the two earlier cases which I have mentioned, appears to have been cited. It may well be that before SIMONDS, J., a similar discretion was exercised by the learned counsel who argued the matter in selecting only a few of the many authorities which were undoubtedly material for the consideration of the court. I do find, however, in the judgment of SIMONDS, J., in *Re Leeke's Settlement Trusts* (3) some observations which appear to me to be helpful in reaching a conclusion in this present case. SIMONDS, J., in referring to the speech of LORD HATHERLEY, L.C., in *Collingwood v. Stanhope* (4) (L.R. 4 H.L. 52) quoted these words ([1937] 2 All E.R. 566, 567) :

" 'The court, with regard to all questions arising on provisions for children under a marriage settlement, holds that the principal intent to be imputed to the parties (however differently that intent may be expressed, so long as it is not contrary to what is actually found in the settlement) is a desire to provide equality for the children, that one child should not take a double portion, and that no child should be excluded.' So it is that, though an 'eldest' son or an 'elder' son is, by the terms of a settlement, excluded from portions, and a certain son has in nature that character, yet he is not excluded if he does not in fact succeed to the settled estates; for, in such a context, as LORD HARDWICKE, L.C., said, in *Duke v. Doidge* (5) : 'Eldership not carrying the estate along with it is considered not such an eldership as will exclude.' . . . I have,

A in examining the general principles according to which the court construes an exclusion clause, more than once used a loose expression, 'succeeds to the estates,' which, at that stage of my consideration, was accurate enough, but it is now necessary to examine more closely what are the circumstances which, when the date of distribution arrives, enable one to say of a child that he has or has not, or had or had not, such an estate as to exclude him from portions. It is, for instance, clear that it is not necessary, in order that he may be excluded, that he should in fact enjoy an estate in possession in the settled estates at the date of distribution. It is sufficient, as LORD WESTBURY pointed out in *Collingwood v. Stanhope* (4), that the person who is to be excluded should at some time have been entitled to the estate; and, as CHITTY, J., held in *Re Fitzgerald's Settled Estates* (6), it is sufficient to exclude him if, being then entitled to an estate in remainder, he has, with the assistance of his father, the tenant for life, procured for himself, out of the settled estates, a benefit exceeding any share of portions which could come to him."

B In that case the excluded person had, so to speak, an estate in futurity which excluded him from sharing in the portions.

C In the present case Sir Nevill Gunter's life estate had long come to an end when the tenant for life under the settlement died. The problem is whether I must read the clause as excluding "the eldest son entitled at the death of the tenant for life under the settlor's will to his real estates for his or her life," or whether I must read it as excluding "the eldest son who under the provisions of the will had been for a time entitled for his life to the real estates settled by the settlor's will." With a good deal of hesitation I have come to the conclusion that by having become entitled for a time under the will to the settlor's real estates for life Sir Nevill Gunter is effectively excluded by the excepting words from the class of children who were entitled in remainder under the terms of the settlement. It seems to me that I have really ample authority for deciding this case either way, but, looking, as I think SIMONDS, J., invites me to do in *Re Leeke's Settlement Trusts* (3), at the reasonable and probable purpose and intention of this excluding clause, I think the more reasonable view to take is that the class of children who were to participate in this fund does not include any one of them who had in the past or who was at the time entitled to the life estates in the property, and that, in consequence, I must answer the question which I am asked in the summons by declaring that "on the true construction of the settlement and in the events which have happened the class of children did not include the late Sir Nevill Gunter, but that those who are entitled to participate in the funds are the children other than the child deceased at the date of the settlement and other than Sir Nevill Gunter himself."

F Order accordingly. Costs of all parties as between solicitor and client to be taxed and paid out of the fund.

G Solicitors: *Frere, Cholmeley & Nicholsons* (for the plaintiff, first defendant); *Fisher, Dowson & Wasbrough* (for the second, third, fourth, fifth, sixth and seventh defendants); *Stevenson & Couldwell* (for the eighth defendant).

[Reported by H. McL. MORRISON, Esq., Barrister-at-Law.]

BILLINGHAM *v.* HUGHES AND ANOTHER.

[COURT OF APPEAL (Tucker and Singleton, L.JJ., and Birkett, J.), February 15, 16, March 10, 1949.]

Damages—Measure of damages—Loss of future earnings—Deduction of amount representing yearly payments of income tax.

The defendants, who were held liable in damages to the plaintiff, a medical practitioner, for personal injuries caused by their negligence, contended that, in assessing the amount to be awarded in respect of loss of future earnings, there should be deducted an amount to represent the income tax which would have been payable by the plaintiff from year to year had he continued his practice.

HELD: the defendants were liable to the plaintiff for the loss of the gross earnings that he would have received but for their negligence, and no deduction could be made on the ground that those earnings would have been liable to income tax.

Fairholme v. Firth & Brown, Ltd. (1933) (149 L.T. 332), and *Jordan v. Limmer & Trinidad Lake Asphalt Co., Ltd.* ([1946] 1 All E.R. 527; [1946] K.B. 356; 175 L.T. 89), *approved*.

[AS TO MEASURE OF DAMAGES, see HALSBURY, Hailsham Edn., Vol. 10, pp. 119-121, para. 150, and 1948 Supplement; and FOR CASES, see DIGEST, Vol. 17, pp. 135, 136, Nos. 413-421.]

Cases referred to:

- (1) *Fairholme v. Firth & Brown, Ltd.*, (1933), 149 L.T. 332; Digest Supp.
- (2) *Jordan v. Limmer & Trinidad Lake Asphalt Co., Ltd.*, [1946] 1 All E.R. 527; [1946] K.B. 356; 175 L.T. 89; 2nd Digest Supp.
- (3) *M'Daid v. Clyde Navigation Trustees*, 1946 S.C. 462; 2nd Digest Supp.
- (4) *Blackwood v. Andre*, 1947 S.C. 333; 2nd Digest Supp.
- (5) *Inland Revenue Comrs. v. Ballantine*, (1924), 8 Tax Cas. 595; 28 Digest 63, *t.*
- (6) *Inland Revenue Comrs. v. Barnato*, [1936] 2 All E.R. 1176; 155 L.T. 211; 20 Tax Cas. 455; Digest Supp.

APPEAL by the defendants from a judgment of CROOM-JOHNSON, J., dated July 23, 1948, awarding the plaintiff £24,000 as damages for personal injuries caused by the negligence of the first defendant.

The appeal related only to the amount of damages and not to the question of negligence. Before the accident the plaintiff, a medical practitioner, was in general practice and was also a radiologist. As a result of his injuries he had to give up his general practice, but was able after a while to continue as a radiologist. The defendants contended (a) that the amount of damages awarded in respect of loss of future earnings was so excessive as to warrant interference by the Court of Appeal, and (b) that there should be deducted from the sum awarded an amount to represent the income tax which would have been payable by the plaintiff on his yearly earnings if he had continued his practice. The Court of Appeal reduced the damages in respect of future loss of earnings from £20,000 to £10,000, making the total sum awarded £14,000 instead of £24,000, but held that there should be no deduction in respect of the income tax which would have been payable by the plaintiff on his yearly earnings, had he remained in practice. The facts appear in the judgment of TUCKER, L.J.

Berryman, K.C., and *Blain* for the defendants.

Beresford, K.C., and *Pollock* for the plaintiff.

Cur. adv. vult.

Mar. 10. The following judgments were read.

TUCKER, L.J.: This is an appeal by the defendants from a judgment of CROOM-JOHNSON, J., by which he awarded the plaintiff the sum of £24,000

by way of damages for personal injuries caused by the negligence of the first defendant. Negligence is not now in issue and this appeal relates only to the damages which the defendants contend are so excessive as to warrant interference by this court according to the principles governing this matter which are so well known that they do not require repetition.

- A The plaintiff is a doctor, aged 51 who, prior to the accident, practised at Great Waltham, near Chelmsford. He suffered serious injuries, the chief of which consisted of a fracture of the pelvis, fracture of the external tuberosity of the right tibia, with sprain of the internal lateral ligament of the knee joint and haemarthrosis, and contusion of the abdominal muscles causing aggravation of a pre-existing inguinal hernia. It is hardly necessary to add that he also suffered from severe shock. Fortunately he made a wonderful recovery.
- B The fractured pelvis yielded to treatment, and a successful operation for hernia was performed. The accident happened on Nov. 28, 1947, and by Jan. 21, 1948, the agreed medical report showed that his general physical condition appeared satisfactory, and there was no objective evidence of any upset of his nervous system. The serious feature of the case is that the injury to the right tibia and knee joint, not in itself of major severity, occurred at the seat of an extremely severe arthritis produced by an old war injury of 1916 with the result that it now constitutes a permanent and substantial disability rendering him physically incapable of carrying out the arduous duties of a general practitioner. He has, accordingly, been compelled to give up this part of his practice which he had previously carried on in partnership. The plaintiff is, however, a skilled radiologist, and, as the duties of a radiologist are almost entirely sedentary, this branch of medicine will be within his capacity.
- D In arriving at the sum of £24,000, the learned judge stated that he awarded £4,000 in respect of the plaintiff's pain and suffering, loss of amenities and agreed special damage down to the date of trial, and the balance of £20,000 represented compensation for estimated loss of earnings for the remainder of his working life, which the learned judge reckoned at 15 years. He took the loss of earnings at roughly £2,000 a year, making £30,000, and then discounted this by a third to allow for contingencies, for the fact that he would be receiving a large capital sum down, and for his increased earnings as a radiologist.

- The evidence in regard to the plaintiff's professional earnings showed that in the previous three years his average income from the general practice had been £1,900. The plaintiff's partner did not assist in the radiology work, but the fees therefrom formed part of the profits of the partnership. Over the previous three years the total radiology fees had averaged £800 and in the last year had amounted to £1,286, earned in from 15-20 hours a week devoted to this branch of the work. They were derived from two appointments which the plaintiff held at local hospitals. He will now be at liberty to devote the whole of his working time to this specialised branch, and, moreover, will not have to share these fees with his partner, so that, although the loss on the general practice would on these figures amount to about £2,000, there would be a gain of some £400 or thereabouts in the radiology fees. It appears, however, that there is every prospect of an appreciable increase from this source. Even if the X-ray work at these two hospitals is not sufficient to occupy him for more than 15-20 hours a week, it would seem that other similar appointments may be obtained, and it is always open to him to set up as a radiologist on his own account. I cannot think that in assessing his loss of earnings at £20,000 the learned judge can have given sufficient weight to this important factor coupled with the pre-existing serious arthritic condition of the knee, which might in any event have necessitated premature retirement from general practice. This is not the case of a professional man earning large fees who has been put out of practice for the remainder of his

life. Fortunately, he is still able to carry on a highly skilled specialised branch of his work at which he had earned £1,200 in the last year, and to which he can now devote his full time. It is, of course, a grievous blow to him to have to give up his general practice, and it will in all probability, at any rate at first, seriously affect his earnings, but, none the less, I think the figure of £20,000 is so greatly in excess of a proper estimate of his loss that I would reduce it to £10,000, which, with the sum of £4,000 attributable to the other matters referred to above, would reduce the total sum to £14,000, subject to a further consideration with which I will now deal.

It is contended on behalf of the defendants that the sum ultimately arrived at should reflect the fact that it is not subject to income or sur-tax, whereas the fees which the plaintiff would have received would have been reduced by the incidence of these taxes. It is, I think, significant that, although income tax rose to 5s. in the £ in the year 1916-17 and has never since gone below 4s. this point was never raised in any reported case in this country until 1933 when it was rejected by DU PARCQ, J., in *Fairholme v. Firth and Brown, Ltd.* (1). After an interval of thirteen years and with the introduction of the "P.A.Y.E." regulations [made under the Finance (No. 2) Act, 1940, s. 11], it was again raised before ATKINSON, J., in *Jordan v. Limmer & Trinidad Lake Asphalt Co., Ltd.* (2), and met a similar fate. Neither of those cases was taken to this court, and we are, accordingly, called on to deal with it for the first time.

Fairholme's case (1) was a claim for damages for wrongful dismissal, but I can see no distinction in principle between that case and the present. It can, no doubt, be said in a case of damages for wrongful dismissal that it is difficult to see why the party who has broken his contract should benefit from his breach by paying less by way of damages than if he had paid the salary due under his agreement with the plaintiff, but considerations of this kind are irrelevant to the only question involved in the assessment of damages, whether for breach of contract or tort, namely: What is the sum required so far as possible financially to effect *restitutio in integrum*? Where, therefore, loss of salary or earnings is the basis of the claim for damages, whether for breach of contract or in tort, the same considerations must apply. In the present case, the plaintiff, but for his accident, would have earned £x in fees in any year ending Apr. 5. On Jan. 1 in the following year, a sum would become due to the Inland Revenue in respect of those fees, which sooner or later would presumably be paid. In the next year, these fees would affect the incidence of sur-tax. In the meanwhile, the plaintiff would have had the use of the money. It would have belonged to him. His patients could have been sued if they did not pay, and he would have recovered against them judgment in full without any deduction in respect of income tax. On what principle, then, can the defendants, who have rendered the earning of these fees impossible, be heard to say that the loss should be estimated, not at the sum which the plaintiff would have received from his patients, but at a lower figure based on an estimate of tax which he would have been called on to pay at some future date? It seems to me, apart from authority and apart from the practice which has prevailed for so many years, that *restitutio in integrum* requires the plaintiff to be put in the position in which he would have been *vis-à-vis* his patients, that is, to receive his fees in full, and that questions of his ultimate liability to the revenue authorities are matters which do not concern the defendants. It is possible that different considerations might arise in cases under the "P.A.Y.E." regulations, such as that before ATKINSON, J., in *Jordan v. Limmer & Trinidad Lake Asphalt Co., Ltd.* (2), where the plaintiff never would have received his wages in full, but I am not to be taken as casting any doubt on the correctness of the decision of the learned judge in that case.

We have been referred to two cases in Scotland. In one of them, namely,

M'Daid v. Clyde Navigation Trustees (3), LORD SORN, Lord Ordinary, decided that the incidence of income tax should be taken into consideration in the assessment of damages, and in the other, namely, *Blackwood v. Andre* (4), LORD KEITH, Lord Ordinary, took the contrary view, and refused to follow the decision of LORD SORN. In my view, the two English cases, *Fairholme v. Firth & Brown, Ltd.* (1), and *Jordan v. Limmer & Trinidad Lake Asphalt Co., Ltd.* (2), were rightly decided. It seems to me that the fallacy, if I may respectfully say so, of the contrary view is that it proceeds on the basis that the court can inquire into what happens to the money after it has become the income of the recipient. Where tax is deductible at source, it is true that that part of the income is only notional income, but where, as in this case, the money would have been received free from deduction, the gross sum would have become in law and in fact part of the plaintiff's income. For these reasons, I would make no further deduction from the sum of £14,000. I would, for the reasons previously stated, allow this appeal and substitute the sum of £14,000 for the sum of £24,000 awarded by the learned judge.

SINGLETON, L.J. [after stating the facts, as set out by TUCKER, L.J., and holding, for the same reasons as TUCKER, L.J., that the sum of £10,000 should be substituted for the sum of £20,000 awarded by the learned judge in respect of loss of earnings in the future:] When the case was before the court of first instance, no argument was put forward to the effect that the judge, in assessing damages, must have regard to the fact that the plaintiff would have had to pay income tax on his yearly earnings. Indeed, the figures agreed as out-of-pocket loss included a sum for loss of earnings without any such deduction. Before this court counsel for the defendants submitted that the incidence of income tax, and sur-tax in a case to which it applied, ought to be remembered in any such assessment. It is right to say that, in arriving at a sum of damages in respect of loss of future earnings, the court must make the best estimate it can of future loss. If the basis of calculation is £2,000 a year, and income tax is 9s. in the £, it is obvious that a plaintiff may recover on this head more than his actual pecuniary loss. Equally, it can be said that, if a wrongdoer can claim the benefit of a high rate of tax, or of the fact that a plaintiff was a sur-tax payer, he escapes some portion of his liability because of the financial position of the injured party. It is difficult to see why he should be allowed to do so.

It is surprising that this question has not come up for consideration in the Court of Appeal until now. It is of great importance. ATKINSON, J., had to consider a similar point in *Jordan v. Limmer & Trinidad Lake Asphalt Co., Ltd.* (2), and he decided that, where a plaintiff in an action for damages for personal injuries claims, as an item of special damage, the amount of wages lost owing to his incapacity for work, in assessing the sum to which he is entitled no regard must be paid to the fact that a weekly sum for income tax is deducted from his wages, and the sum awarded must be the full rate of wages for which provision is made by the terms of his contract of employment. In so deciding, the learned judge followed the decision of DU PARCQ, J., in a wrongful dismissal claim, *Fairholme v. Firth and Brown, Ltd.* (1), and he pointed out ([1946] K.B. 359; [1946] 1 All E.R. 528) that:

"... it may be that the inland revenue authorities may consider that they are entitled to make an assessment on a plaintiff who has recovered damages which include loss of wages, but that is a matter for them."

That was an instance of wages actually lost before the date of trial. In the argument before this court, it was assumed that the sum of £20,000, being an award of general damages, was not subject to a claim for income tax. It may well be that in such a case the Revenue ought to have a remedy of

some kind, for if, through negligence on the part of a defendant, damages are sustained by the person injured and by the State, the negligent party ought not to reap any benefit or to escape full responsibility for the damage because of the incidence of tax on the injured party. And if it is said that the Revenue does not, or may not, suffer, as some one else will do the work and so pay the tax, still it is to be remembered that an injury which prevents a man from working is the cause of loss to the State. In a case in which the out-of-pocket loss of an injured plaintiff is assessed or agreed, and the sum includes an amount of £x for loss of earnings for a period up to the date of trial, I see no sound reason why the Revenue should not have a claim to tax on that amount. It is money which the plaintiff would have earned had he not been prevented from working; it is paid by the wrongdoer instead of by the employer; there is no difficulty in arriving at the amount—it is generally agreed. If the plaintiff keeps the whole of it, he is financially in a better position than he would have been if he had continued to work, in which case his earnings would have been subject to tax. True, it is awarded as part of a sum of general damages, and in such a case income tax is not usually chargeable: see *Inland Revenue Comrs. v. Ballantine* (5), and also *Inland Revenue Comrs. v. Barnato* (6). The question of damages in respect of the loss of future earnings is much more difficult. I am content to assume that in neither case can income tax be recovered from a successful plaintiff in such a case. Whether some alteration in the law is desirable is not a matter for this court. It is not without interest to observe that the defendants agreed the out-of-pocket loss and only raised the question which they raise in this appeal when they came to this court, and, of course, they do not seek to go behind their agreement on the loss of earnings up to the date of trial.

Towards the end of his judgment in *Jordan's* case (2), ATKINSON, J., said ([1946] K.B. 359; [1946] 1 All E.R. 528):

"Therefore, although the argument that the plaintiff will be getting more, if no deduction is made, than he would have got if he had not been injured, is, as I have said, an attractive one, I think the practice of ignoring this result is now too well established for a judge of first instance, at any rate, to interfere with it."

Some three months before the decision of ATKINSON, J., the question had arisen in Scotland in *M'Daid v. Clyde Navigation Trustees* (3). The report of that case was not before ATKINSON, J. In that case LORD SORN, Lord Ordinary, held that, where loss of earnings became a factor in assessing an award of damages to a pursuer, if these earnings would have been liable to taxation that fact should be taken into consideration and some deduction should be made in respect of this liability. There is much in the reasoning of LORD SORN which appeals to me. If the assessment of damages is based on the gross loss of earnings of an injured person (and if no portion of the sum awarded is subject to income tax) it seems to me that the assessment is not based on the pecuniary loss sustained. In other words, if the calculation was precisely accurate arithmetically, a plaintiff would recover more than his pecuniary loss. The question again came up for consideration in Scotland in *Blackwood v. Andre* (4), when LORD KEITH, Lord Ordinary, expressed a directly opposite view to that of LORD SORN in *M'Daid v. Clyde Navigation Trustees* (3), holding that, in assessing the damages due to an injured pursuer, the court has no concern with the incidence of taxation, and, where loss of earnings is a factor in the assessment, no deduction can be made on the ground that these earnings would have been liable to tax.

Though the principle has always been to seek to arrive at the pecuniary loss of the individual, the practice in the courts of this country has consistently been not to have regard to income tax in the assessment of damages, and

A to alter the practice now would lead to great confusion and would add immeasurably to the difficulty of assessing damages and in the direction to be given to a jury. Consider the cases of four different men each earning £2,000 a year. A. has no other income, but has a wife and young children. B. is a bachelor with an investment income of £2,000 a year. C. has a farm on which he makes a loss of £500 a year which can be set off against his other income for tax purposes. D. by covenant or otherwise has disposed of half his income. If each of those four men is injured and away from work for a year, is the assessment of pecuniary loss to be on a different basis in each case because the amount of tax payable by each on his earned income differs? A man's income is his own and he can do with it what he likes. Income tax is a charge on the person, and not on property or gains. By the Income Tax Act, 1918, s. 1, it is to be charged "in respect of all property, profits, or gains," and, under sched. D., 1 (a) (ii), tax is to be charged in respect of the gains to any person from employment or vocation. No question arises in this case under the regulations made under the "P.A.Y.E." system [under the Finance (No. 2 Act) Act, 1940, s. 11], and their effect was not fully argued, but I think it is right to say that I do not see that they have changed the basic position. Income tax remains a charge on the person, and not on his profits or gains from his employment or on his property. In my opinion, the claim of the defendants that tax should be taken into consideration in assessing damages should be rejected. I do not think that the court ought to alter what has been the recognised practice for so long. It is for the revenue authorities to consider whether the law as it stands meets such cases. I am in favour of allowing the appeal to the extent of reducing the damages to the sum of £14,000.

BIRKETT, J. [after stating the facts]: The conclusion to which I have come is that, when all the factors are considered, and, particularly, the fact that the plaintiff, happily, has ready to his hand the lucrative work of a radiologist, to which he can devote the whole of his time, and from which his earnings may quite reasonably be expected to increase greatly beyond his past earnings, the amount of £20,000 is much too high and ought to be reduced. I would allow the £4,000 awarded by the learned judge in respect of pain and suffering and loss of amenities to stand, but I would reduce the sum of £20,000 to the sum of £10,000 and make the judgment £14,000 instead of £24,000.

Apart from the general submission on behalf of the defendants that the sum of £24,000 awarded by the learned judge was excessive, a further submission was made that the damages awarded to the plaintiff, whatever their amount, should be calculated, so far as the loss of future earnings was concerned, by deducting some amount to represent the taxation which would have been imposed on the plaintiff's earnings had he continued his practice from year to year. In my opinion, the answer to this submission is that, when assessing the damages of an injured taxpayer, the court has no concern with the incidence of taxation. It is a little extraordinary, and, perhaps, a little illuminating, to observe that in all the years that judges and juries have been assessing damages for loss of earnings and earning capacity only four cases have come before the courts when the point was expressly raised, two in England and two in Scotland. In *Fairholme v. Firth and Brown, Ltd.* (1), DU PARCQ, J., said (149 L.T. 333):

"... in assessing the damages this suggested deduction ought not to be made."

The true view, in his opinion, was that it was the employers' duty to pay the salary agreed. The employee was under a duty to the Crown to pay the tax on his income, including his salary. The incidence and extent of the tax were matters between the Crown and the employee, and were no concern of the

employer. In *Jordan v. Limmer and Trinidad Lake Asphalt Co., Ltd.* (2), ATKINSON, J., adopted the view taken by DU PARCQ, J. The English decisions, therefore, are both one way. In Scotland in *M'Daid v. Clyde Navigation Trustees* (3), LORD SORN, Lord Ordinary, held that the tax should be deducted when assessing damages, although it was recognised in the judgment that very great practical difficulties would occur in so doing. But, later in *Blackwood v. Andre* (4), LORD KEITH, Lord Ordinary, expressly disagreed with the decision of LORD SORN and refused to follow it. For my part, I think the essence of the decision lies in the words of LORD KEITH when he said (1947 S.C. 334):

"The court, in my opinion, has no concern with the incidence of taxation in assessing the damages of an injured taxpayer."

I am content to say that I am of the same opinion. If it were otherwise and the court, in all cases of this nature, had to concern itself with the incidence of taxation when assessing damages, great difficulties, and, as I think, considerable injustice, would arise. In many cases the court would be without the material on which to form a considered view, and without the means of compelling the material to be produced.

In the present case, if the plaintiff had not been injured and disabled, he would have continued to earn fees from his general practice, and they would have been paid to him, of course, without any deduction of tax and without reference to tax of any kind. The question of taxation would only arise when the fees had been paid, and when the plaintiff had brought into account any other sources of income and had settled the allowances to which he was entitled. The amount of tax he would have to pay might differ from year to year, but with all these things the defendants certainly have nothing to do, and are, equally certainly, not entitled to say that, as wrongdoers, they should receive an abatement of the damages they ought to pay by deducting tax, solely for their benefit. The State would certainly lose, and the measure of the State's loss would be the measure of the defendants' gain. The plaintiff, in common with all other plaintiffs in the like case, is entitled to restitution, as far as it can be achieved, restitution for the loss which he has sustained as the result of the injury he has suffered at the hands of the defendants. The loss which he has suffered is the power to earn fees from his patients in his general practice, and his right to receive those fees from his patients without deduction of any kind. In my opinion, the defendants are liable to the plaintiff for the loss of the gross earnings he would have received but for their negligence, and they are not entitled to say that the damages they must pay ought to be reduced by the deduction of tax. I would allow this appeal, and reduce the damages to £14,000.

Appeal allowed with costs.

Solicitors: *The Treasury Solicitor* (for the defendants); *Patersons, Snow & Co.*, agents for *Gepp & Sons*, Chelmsford (for the plaintiff).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

DUDLEY AND DISTRICT BENEFIT BUILDING SOCIETY v. EMERSON AND ANOTHER.

[CHANCERY DIVISION (Vaisey, J.), March 8, 1949.]

Rent Restriction—Tenant—Dwelling-house subject to mortgage—Lease by mortgagor—Mortgagor's statutory power of leasing excluded—Default in payment of instalments due under mortgage—Position of tenant—Law of Property Act, 1925 (c. 20), s. 99 (1)—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), s. 3 (1).

By a mortgage, dated Dec. 5, 1946, the mortgagor charged a dwelling-house, to which the Rent Restrictions Acts applied, with the payment by weekly instalments of the sum secured and interest thereon. The mortgage contained *inter alia* a clause expressly excluding the mortgagor's power of leasing under the Law of Property Act, 1925, s. 99 (1), and the mortgagee was empowered to enter into possession of the property on default of payment of a certain number of weekly instalments. In January, 1947, F.G. occupied the house under a tenancy agreement with the mortgagor. The weekly instalments due under the mortgage having fallen into arrears, the mortgagee claimed possession of the property, but the claim was resisted by F.G. on the ground that he was the lawful tenant of the house and entitled to the protection of the Rent Restrictions Acts.

HELD: the clause in the mortgage excluding the mortgagor's power of leasing under the Law of Property Act, 1925, s. 99 (1), did not deprive the mortgagor of the power of granting a lease apart from the statute, and, although the lease was not binding on the mortgagee, the tenancy was lawful, and, at the relevant time (*i.e.*, at or just before the time of the mortgagee's claim to possession), F.G. was lawfully in possession of the property to an extent sufficient to justify his claim to protection under the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3 (1).

Iron Trades Employers Insurance Assocn., Ltd. v. Union Land and House Investors, Ltd. ([1937] 1 All E.R. 481; [1937] Ch. 313; 156 L.T. 322), and *Norman v. Simpson* ([1946] 1 All E.R. 74; [1946] K.B. 158; 174 L.T. 279), *applied*.

[AS TO LEASING POWERS OF MORTGAGORS, see HALSBURY, Hailsham Edn., Vol. 23, pp. 330-333, paras. 494-496; and FOR CASES, see DIGEST, Vol. 35, pp. 334-337, Nos. 768-793.]

Cases referred to:

- (1) *Iron Trades Employers Insurance Assocn., Ltd. v. Union Land and House Investors, Ltd.*, [1937] 1 All E.R. 481; [1937] Ch. 313; 156 L.T. 322; Digest Supp.
- (2) *Norman v. Simpson*, [1946] 1 All E.R. 74; [1946] K.B. 158; 174 L.T. 279; 2nd Digest Supp.
- (3) *Martin v. Watson & Egan*, [1919] 2 I.R. 332; 35 Digest 698, *q*.

ADJOURNED SUMMONS by mortgagees, under R.S.C., Ord. 55, r. 5A, asking for delivery of possession of the property, a dwelling-house, subject to the mortgage.

The first defendant, the mortgagor, did not enter an appearance, but the second defendant, who was in occupation of the house, under a tenancy agreement granted to him by the mortgagor, claimed the protection of the Rent Restrictions Acts. VAISEY, J., held that, although the lease granted by the mortgagor to the second defendant was not, on the facts of the case, binding on the mortgagees, the second defendant's tenancy was lawful and he was entitled to the protection of the Rent Restrictions Acts. The facts appear in the judgment.

J. W. Mills for the mortgagees.

Heathcote-Williams for the second defendant.

The mortgagor did not appear.

VAISEY, J. : This case raises a point which it is surprising to find has not been decided long ago. The action is one in which the Dudley and District Benefit Building Society are the plaintiffs, and Edward Emerson and Fred Goodlad are defendants. The relief sought is an order that the defendants and each of them do deliver up to the plaintiffs possession of certain property at Walsall which was subject to a mortgage, dated Dec. 5, 1946, and made by Edward Emerson, the first defendant, in favour of the plaintiffs. The plaintiffs, therefore, are the mortgagees, the first defendant, Edward Emerson, is the mortgagor, and the second defendant, Fred Goodlad, claims to be a tenant of the property under a tenancy agreement granted to him by Emerson. The terms of the mortgage, so far as they appear to be relevant to the question which I have to determine, are that there was a covenant on the part of Edward Emerson to pay to the plaintiffs the sum of £1,020, with interest thereon as therein mentioned, with a provision that that sum and the interest thereon should be paid off by weekly instalments of £1 14s. each. Preceding that covenant there was a charge by Edward Emerson, as mortgagor of the property, in favour of the plaintiffs. The mortgage contained a definite provision that at any time before the mortgage should have been discharged it should be lawful for the plaintiffs, without any further consent by the mortgagor, to do all or any of a number of specified things, including the entry into possession of the property, subject, however, to the proviso that the plaintiffs should not exercise the power of entering into possession unless and until the mortgagor should have made default for a period in payment of the instalments due under the mortgage. The only other clause of the mortgage to which I need refer is cl. 7 which expressly excludes the Law of Property Act, 1925, s. 99 (1). That sub-section enacted that mortgagors of land while in possession should have power from time to time to make leases of the mortgaged property or any part thereof.

An officer of the plaintiffs has sworn an affidavit in support of this application, which is made by summons under R.S.C., Ord. 55, r. 5A, and he says, among other things, that on the application for the advance of the £1,020 the mortgagor stated that the property was for his immediate occupation. The officer in question further deposes that, to the best of his knowledge and belief, the mortgagor has never been in occupation of the property, that only twelve weekly instalments under the mortgage have been paid, and there are now 91 weeks of instalments in arrear. The total amount owing on the security of the mortgage with interest thereon, calculated up to the date of the swearing of the affidavit, was something more than the original advance, that is to say, £1,074 11s. 9d. The mortgagor has been duly served with the proceedings, but he has not appeared and he does not, apparently, desire to resist the plaintiffs' claim for possession, but the second defendant says that he is entitled to the protection of the Rent Restrictions Acts on the ground that he is the properly constituted tenant of the property from the mortgagor and has been so since January, 1947. He exhibits the rent books which were issued to him by the mortgagor, he says that he has paid the rates and the water rates and has always been willing to pay the rent in respect of the property, and he asks leave to defend the action and claims the protection of the Rent Acts.

The standard rent of the house was 16s. 6d. per week, and there is no doubt that, if the second defendant is entitled to the protection of the Acts, the rental and rateable value of the property are such as to bring the case within that protection. The main statutory provision on which the second defendant relies is the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3 (1), which reads thus :

A "No order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply or for the ejectment of a tenant therefrom shall be made or given unless the court considers it reasonable to make such an order or give such a judgment, and either (a) the court has power so to do under the provisions set out in sched. I to this Act; or (b) the court is satisfied that suitable alternative accommodation is available . . ."

Nothing arises under the terms which will enable the court to give such an order or judgment, and I think it must be admitted that, if the second defendant is a tenant within the meaning of that section, he is entitled to resist the plaintiffs' claim.

B I do not get much assistance from the definition clause, s. 12 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. Section 12 (1) (f) provides :

"The expressions 'landlord,' 'tenant,' 'mortgagee,' and 'mortgagor' include any person from time to time deriving title under the original landlord, tenant, mortgagee, or mortgagor."

C As I read that section, it merely adds to the *prima facie* meaning of the word "landlord" any person from time to time deriving title under the original landlord, to the meaning of the expression "tenant" any person from time to time deriving title under the original tenant, and so with the expressions "mortgagee" and "mortgagor." It does not seem to me that I can read D that definition as being intended to describe someone as a tenant who derives title under an original mortgagor. Nor do I get any help under s. 12 (1) (g), which defines the "landlord" as including, in relation to a dwelling-house, a person who would but for the Act be entitled to possession of the dwelling-house, and further states that the expressions "tenant and tenancy" include sub-tenant and sub-tenancy, and the expression "let" includes sub-let.

E Several cases have been cited to me, and I would refer first to *Iron Trades Employers Insurance Assn., Ltd. v. Union Land and House Investors, Ltd.* (1). There FARWELL, J., considered what was the operation and effect of a tenancy or lease granted by a mortgagor who was not in the position, as the mortgagor here is not in a position, to bind the mortgagee by the creation of such a lease or tenancy. In that case there was a charge on certain freehold properties

F to the plaintiffs, and the defendants covenanted with the plaintiffs that they would not, without certain previous consents, exercise the power of leasing or agreeing to lease conferred by the Law of Property Act, 1925, s. 99, on a mortgagor while in possession. By a tenancy agreement dated a week after the legal charge, the defendants, *i.e.*, the mortgagors, granted a yearly tenancy of part of the premises included in the legal charge. The plaintiffs, G the mortgagees, were not asked for and did not give their consent to the execution by the defendants of the tenancy agreement and no counterpart thereof had at any time been delivered to the plaintiffs in accordance with s. 99 (11) of the Act of 1925. It was held there that the defendants, in granting the lease, were not exercising their statutory power, and that, consequently,

H they did not commit any breach of the covenant against such leasing which was contained in the legal charge. During his judgment, FARWELL, J., pointed out that, quite apart from the Act of 1925 and the corresponding, though not altogether identical, provisions of the Conveyancing Act, 1881, a mortgagor had always possessed the power to grant a lease which was binding on himself and those deriving title under him, although not binding on the mortgagee. The learned judge pointed out ([1937] Ch. 317; [1937] 1 All E.R. 484) that any lease granted by the mortgagor to some third party would be in no way binding on the mortgagee and as between the lessee and the mortgagee would

create no estate or interest, but so far as the mortgagor, who had granted the lease, was concerned

“ . . . it was binding upon him as against the lessee, and he was estopped from disputing it and as against the mortgagor or against any one other than a person having a title paramount to the mortgagor, *e.g.*, the mortgagee, such a lease was good and the lessee was entitled to the benefit conferred thereby . . . ”

Later in his judgment, the learned judge said ([1937] Ch. 321 ; [1937] 1 All E.R. 486) :

“ As I have said, the Conveyancing Act, 1881, did not in my judgment destroy any power which the mortgagor had to grant a lease which would not be binding on the mortgagee, although binding as between himself and the lessee, and I am unable to find anything in the Act of 1925 which has any such effect.”

He pointed out that s. 99 of the Act of 1925 did not in terms state that the only power of granting leases was to be the statutory power, and the learned judge could see nothing to suggest that it was intended to deprive the mortgagor of the power of granting a lease apart from the statute, although that lease was not binding on the mortgagee. He then considered the terms of the covenant which was supposed to have been broken in that case and came to the conclusion there was no breach because the tenancy which had been granted was not, and did not purport to be and could not operate as, the grant of a lease by which the mortgagee was bound, but I read that judgment as being clearly indicative of the view of FARWELL, J., that a lease granted by a mortgagor while in possession—and the lease in the present case to the second defendant was so granted—stands in a very different position from a lease which was granted by a complete stranger or somebody who had no shadow of title to the property that he was attempting to demise.

Therefore, when I approach the proposition of deciding whether the second defendant was lawfully or unlawfully in possession of the property, I am led to the conclusion, by the reasoning of the case to which I have just referred, that it is more accurate to describe his possession as lawful than as unlawful. True it is that it was not binding on the mortgagee, but I venture to think, when one looks at the scope and intention of the meaning of the Rent Restrictions Acts, that is by no means conclusive of the matter.

I have said that this case, in my judgment, depends on whether at the relevant time the possession of the second defendant was lawful. What is that relevant time ? For that I look at the judgment of the majority of the Court of Appeal in *Norman v. Simpson* (2), and, as I understand it, the conclusions which were reached by SCOTT, L.J., and MORTON, L.J., were that the relevant time was at or just before the assertion of the paramount title by the person who claims possession. Here, although it seems rather a curious conclusion at which to come, I venture to think that the second defendant was lawfully in possession to an extent sufficient to justify his claim to protection under the Rent Restrictions Acts. After all, the position of a sub-tenant, for which the Acts make special provision bringing the sub-tenant into direct contractual relationship with the lessor of the head tenant, is sufficiently analogous to the present position not to warrant any great surprise at the consequences of the conclusion to which I have come. I refer to s. 15 (3) of the Act of 1920 which says :

“ Where the interest of a tenant of a dwelling-house to which this Act applies is determined, either as the result of an order or judgment for possession or ejectment, or for any other reason, any sub-tenant to whom the premises or any part thereof have been lawfully sub-let shall, subject to the provisions of this Act, be deemed to become the tenant of the land-

lord on the same terms as he would have held from the tenant if the tenancy had continued."

It was pointed out on behalf of the plaintiff society that that expression "deemed to become" was rather indicative that some special provision was necessary in order to create the artificial relationship, but, however that may be and however strange may be the consequences of the conclusion to which

A I have come, it seems to me that, if the test really is the legality or otherwise of the second defendant's tenancy, I am bound to hold that his tenancy and his occupation of the premises under the tenancy is and was lawful.

A point was taken under the attornment clause in the mortgage, to which I need not refer in particular, and if that particular clause had been operative, I think it would have given rise to some very interesting considerations, but,

B as the attornment was only of such part of the property as was in the occupation of the mortgagor, and as the evidence is that the mortgagor was never in occupation of the property or any part of it, I think that no reliance can be placed on that clause or on any consideration which arises out of it.

Martin v. Watson (3), an Irish case, is cited by the editors of *LAW NOTES* in their treatise, *RENT AND MORTGAGE INTEREST RESTRICTIONS*, 21st ed.,

C p. 94, as authority for the proposition which I have here had to consider, viz. :

" . . . that the lessee of a mortgagor claims under him and gets the benefit of the Act as against the mortgagee, though the lease be void as against the mortgagee."

I am bound to say that, if that were so, and if *Martin v. Watson* (3) did so decide, I should feel very much disposed to follow it and let that be an end of the matter, but when I look at the report, I find it rather difficult to get

D that positive finding out of the facts and out of the decision. The summons must be dismissed with costs.

Order accordingly. Plaintiffs to pay the taxed costs of the second defendant. Plaintiffs' costs against the first defendant to be taxed and added to the security.

E Solicitors: *Marcy, Russell Cook & Co.*, agents for *Hooper & Fairbairn*, Dudley (for the mortgagees); *Miller & Smiths*, agents for *C. L. Hodgkinson & Benton*, Walsall, Staffs. (for the second defendant).

[Reported by H. McL. MORRISON, Esq., Barrister-at-Law.]

Re WATKINS (deceased). HAYWARD v. CHATTERTON AND OTHERS.

[CHANCERY DIVISION (Roxburgh, J.), March 3, 1949.]

G *Family Provision—Reasonable provision for maintenance of dependant—Dependant incapable by reason of mental disability—Will made on footing that State would provide for dependant—Inheritance (Family Provision) Act, 1938 (c. 45), s. 1 (1).*

H By his will, dated May 14, 1947, a testator gave his freehold house to L., a stranger in blood, and left the residue of his estate to trustees on trust as to capital and income for such of his three children as were living at his death in equal shares. The testator died on Oct. 25, 1947, and was survived by three daughters, his wife having predeceased him. His daughter M. had gone through a form of marriage, but the marriage had been annulled and she had been a patient in a private mental hospital since Mar. 15, 1945, and was incapable of maintaining herself. M.'s private means amounted to about £140 a year, and during his life

the testator had provided £250 a year for her upkeep in the hospital. The provision for her which he made by his will would produce £72 a year, while the cost of her maintenance was about £360 a year. Evidence was given that, in view of the provisions of the National Health Service Act, 1946, the testator intended to leave the State to take care of M. and that he would only be responsible until the day to be appointed under the Act for its commencement. On an application by M. under the Inheritance (Family Provision) Act, 1938, for reasonable provision to be made for her maintenance out of the testator's estate,

HELD: the testator was entitled to distribute his estate on the footing that M. could and should take advantage of the provisions of the Act of 1946, and, therefore, the provision made for her by his will was reasonable having regard to her existing needs.

[AS TO PROTECTION OF TESTATOR'S FAMILY, see HALSBURY, Hailsham Edn., Vol. 34, pp. 439-445, paras. 486-505; and FOR CASES, see DIGEST, Supp.]

ADJOURNED SUMMONS by which the plaintiff applied under the Inheritance (Family Provision) Act, 1938, s. 1 (1), for reasonable provision to be made for her out of the testator's estate.

The testator had made his will on the footing that the State would provide for the plaintiff, a patient in a mental hospital, under the National Health Service Act, 1946, and, therefore, he had not provided for the full cost of her maintenance. ROXBURGH, J., held that the provision made by the testator was reasonable. The facts appear in the judgment.

Plowman for the plaintiff.

J. H. A. Sparrow for the first and second defendants, the executors.

Milner Holland, K.C., and *Newsom* for the third defendant, Mrs. Ada Lucas, a specific legatee.

Peter Foster for the fourth and fifth defendants, the sisters of the plaintiff.

ROXBURGH, J.: This is an interesting case under the Inheritance (Family Provision) Act, 1938, s. 1 of which provides:

"(1) Where, after the commencement of this Act, a person dies domiciled in England leaving (a) a wife or husband; (b) a daughter who has not been married, or who is, by reason of some mental or physical disability, incapable of maintaining herself; (c) an infant son; or (d) a son who is, by reason of some mental or physical disability, incapable of maintaining himself; and leaving a will, then, if the court on application by or on behalf of any such wife, husband, daughter or son as afore-said (in this Act referred to as a 'dependant' of the testator) is of opinion that the will does not make reasonable provision for the maintenance of that dependant, the court may order that such reasonable provision as the court thinks fit shall, subject to such conditions or restrictions, if any, as the court may impose, be made out of the testator's net estate for the maintenance of that dependant."

The testator made his will on May 14, 1947. He appointed John Arthur Chatterton and John Decker to be his executors, and he devised and bequeathed to the defendant, Ada Lucas, the wife of William Haslam Lucas, free of all duties the freehold residence known as "Downside," Roedean Road, Brighton, and "my furniture and effects of household use or ornament therein and belonging thereto." He devised and bequeathed the residue of his estate to the defendants, John Arthur Chatterton and John Decker, on trust for sale and conversion and to hold the proceeds thereof

"Upon trust as to both capital and income for such of my three children Jean Elizabeth, Mary Eleanor and Ruth as are living at my death and

attain the age of 21 years or marry under that age in equal shares provided that if any of my said children shall predecease me leaving issue living at my death such issue if and when they attain the age of 21 years or marry under that age shall take by substitution and if more than one in equal shares."

A The testator died on Oct. 25, 1947, domiciled in England, and his will was proved on Apr. 24, 1948. The testator's wife predeceased him. The testator and his wife had three daughters all of whom have been married. Two of the daughters are the defendants, Jean Elizabeth Chatterton, wife of the defendant, John Arthur Chatterton, and Ruth Fortune. About them I know nothing more than that they are children of the testator. The third of the daughters was the plaintiff, Mary Eleanor Hayward. She was married, but her marriage was annulled. I do not think it necessary for me to say anything about the circumstances of the annulment except that they were such that she was not in a position to obtain, and did not obtain, any maintenance from her former husband.

C At the date of this summons the plaintiff was about 38 years of age. She is a patient at St. Andrew's Hospital, Northampton, a private mental hospital, suffering from schizophrenia, and there is no doubt that she is a daughter of the testator who is, "by reason of some mental . . . disability, incapable of maintaining herself". She first entered this hospital on Mar. 15, 1945, as a voluntary patient, but since May 28, 1945, she has been detained there. When she went into the hospital the testator was abroad and did not himself select the institution.

D In 1929, the legatee, Mrs. Lucas, was living apart from her husband and became associated with the testator whose wife at that time was in a mental home. The testator could not then have obtained a divorce because his wife's state of health was not a ground for divorce. When, in 1938, it became possible for the testator to obtain a divorce, that was not done. About 1930 the testator purchased the lease of the house "Downside," and in May, 1930, he and Mrs. Lucas moved into that house which was partly furnished by Mrs. Lucas and was intended for a joint home for the testator and Mrs. Lucas. During the years in which Mrs. Lucas lived with the testator he was often ill and she nursed him. He made her some gifts, but not in any sense extravagant gifts. She seems to have done a great deal for the testator. There is no doubt that she and he were on most affectionate terms. Mrs. Lucas says :

G "I am well acquainted with the deceased's three daughters, and we were all on very friendly terms, the eldest daughter choosing me as god-mother to her first baby. The deceased gave them all good general and professional educations, and, having done that, expected them to look after themselves. He often said : 'I teach my birds to fly and expect them to do so.' Further in the case of the plaintiff who married a man without means the deceased bought and stocked a chemist shop in London for her. This business was allowed to dissipate and run itself out through neglect and lack of interest. During the war years her husband became a commissioned officer, and later we learned that their marriage had been annulled. Shortly afterwards we heard she had been taken ill with pneumonia and the deceased again subscribed for her maintenance and also paid the rent of her flat in London. Soon after we had news that she had gone as a voluntary patient to St. Andrew's Hospital, Northampton, for which deceased was again called upon to pay. Undoubtedly, all this added worry had a very depressing effect on the deceased and his desire to go on living entirely left him. Some three months before the deceased died Mr. Chatterton came to Downside on business connected with the plaintiff. The deceased then informed him in my hearing that he was

a poor and sick man, that he had no intention of keeping the plaintiff all her life, that she had been married for ten years and no one ever assisted him in similar circumstances, and that as the State were nationalising all hospitals the State must take care of her and that it was his intention to carry on only until that time. He left no doubt whatever as to his intentions in the matter."

The solicitor who prepared the will in question, after explaining the instructions which he received, states :

"On May 14 the testator called at my office and executed the engrossment of the will in the form in which it had been sent to him. I have a distinct recollection that I referred in conversation with him on this occasion to the increase in succession duty contained in the Budget proposals which were then before Parliament and pointed out that the devise of Downside to Mrs. Ada Lucas free of all duty would put a heavy burden on the residuary estate. At that time I had no clear idea what the value of the estate would be, but I was under the impression that it would be greater than turned out to be the fact. I have an equally distinct recollection that the testator told me plainly that he had no desire to vary the provisions of the will. He said that Ada Lucas was the one person whom he desired above all else to benefit from his will, that she had done a great deal for him in recent years, that she could look to no one but himself to provide for her, that she had shewn far more concern for his comfort and happiness than any of his daughters, and that two of his daughters had husbands to provide for them. As to the third daughter the testator said that she was in a mental home and must take her chance."

A good deal of play has been made with that phrase "must take her chance," but I think I ought to read it in connection with the statement which he made to Mr. Chatterton very shortly afterwards. I take it that what the testator meant was this : "My daughter is in St. Andrew's Hospital. It may be taken over by the State or it may not. If it is taken over by the State, she will remain in St. Andrew's Hospital at the cost of the State. If it is not taken over by the State, St. Andrew's Hospital cannot put a detained person out into the street. They will have to make arrangements for her reception in a home which has been taken over by the State." That is what I think he meant by saying "she must take her chance." Then the statement goes on :

"He further said that he had paid hundreds of pounds a year for the support of his wife in a mental home (as to my knowledge was the fact), and he added that he did not consider it his duty to do the same thing after his death for his daughter, who, in any event, had inherited some money from her mother and would receive a share of his residue. The testator stated these points to me with great clarity and force."

The National Health Service Act, 1946, was passed on Nov. 6, 1946, that is to say, before the date of the will. Section 1 provides :

"(1) It shall be the duty of the Minister of Health (hereafter in this Act referred to as 'the Minister') to promote the establishment in England and Wales of a comprehensive health service designed to secure improvement in the physical and mental health of the people of England and Wales and the prevention, diagnosis and treatment of illness, and for that purpose to provide or secure the effective provision of services in accordance with the following provisions of this Act. (2) The services so provided shall be free of charge, except where any provision of this Act expressly provides for the making and recovery of charges."

Section 3 provides :

"(1) As from the appointed day, it shall be the duty of the Minister to provide throughout England and Wales, to such extent as he considers necessary to meet all reasonable requirements, accommodation and services of the following descriptions, that is to say: (a) hospital accommodation."

A By s. 79: "... 'hospital' means any institution for the reception and treatment of persons suffering from illness or mental defectiveness," and " 'Illness' includes mental illness." So the testator knew that an Act had been passed which provided for the maintenance of his daughter free of charge so long as her disability continued, but he did not know when the appointed day was going to be, for the day was not appointed until after his death, he having died on Oct. 25, 1947. During the testator's lifetime he paid £250 a year, or thereabouts, for the maintenance of the plaintiff at this hospital. B Mr. Peers, the receiver of the plaintiff's estate, in his affidavit, says:

C "The minimum cost of maintaining the plaintiff at the said hospital is at present £327 12s. 0d. per annum without allowing for any extra comforts or other incidentals. The actual cost of maintenance for the year ending on June 30, 1948, was £367 1s. 6d. as is shown by my second account as such receiver as aforesaid. I am informed by the medical superintendent of the said hospital by letter dated May 7, 1948, that the Minister of Health has disclaimed the said hospital, and that there will, therefore, be no change in its administration in consequence of the National Health Service Act, 1946, coming into operation on July 5, 1948."

D The plaintiff's own resources are: (i) investments in court derived from her mother's estate producing an income of about £50 per annum; (ii) a profit rental of about £90 per annum from the sub-letting of a flat at 414, Park West, Marble Arch. Mr. Peers says:

E "The said sum of £90 per annum is, however, very precarious because the plaintiff's lease of the flat is terminable on three months' notice and during her incapacity she could not avail herself of the protection under the Rent Acts should her tenancy be determined. The existing sub-tenancy is a furnished letting. I estimate that the income available for the plaintiff's maintenance in the said hospital is about £230 per annum short of her requirements."

F The testator's net estate is approximately £23,341, subject to any order I may make as to the costs of these proceedings. The estimated income of the plaintiff in respect of her one-third share of the residuary estate of the testator is £72 per annum. If I take the income of the net estate as being £700 per annum, and then [under s. 1 (3) (b) of the Act of 1938] take half of that, which would be £350 per annum, and deduct from that £72 per annum, I am left with £278 G per annum which is the maximum which I could award to the plaintiff under this Act. The exact value of the devise to Mrs. Lucas cannot be ascertained because the exact value of the house cannot be ascertained without selling it, but I think it would be approximately true to say that it is worth about £400 per annum to her. So that what the testator did was to give Mrs. Lucas property which, when realised, would produce for her approximately £400 per annum and H leave to each of his three daughters a share of residue which would produce approximately £72 per annum.

The question which I have to determine is whether I ought to say that his will does not make a reasonable provision for the maintenance of the plaintiff. The first and largest question is whether it was reasonable for the testator to make provision for the plaintiff on the footing that she could and should be maintained free of charge under the National Health Service Act, 1946, because it is quite certain that if he was unreasonable in proceeding on that footing he

has not made reasonable provision for her. In my judgment, he was entitled to make provision on that footing. No doubt, people who have private means of their own are still free to choose between accepting the benefits of the National Health Service Act and paying substantial sums for the preservation of their liberty of choice, but it is too late in the day to say that it is humiliating anybody to suggest that they ought to take advantage of the State facilities. In other words, I think that this testator was entitled, if he was so minded, to distribute his estate on the footing that his daughter could, as she certainly could, and should take advantage of the provisions of the National Health Service Act, 1946. On that footing, apart from the interim period to which I will refer, the provision which he made was, in my judgment, entirely reasonable having regard to her existing needs. There is, apparently, no hope for her recovery, and what she has, plus a third of the residue which might well, in the case of a lady situated as this lady is, be applied in the purchase of an annuity, is sufficient for her. A

The only matter which remains is the interim period. The testator did not know how long it would be before the hospitals were taken over by the State because at the date of his death the appointed day had not been announced, but he had no reason to suppose that it was going to be a long period. The Act had been passed and though the £90 which the plaintiff has from Park West is undoubtedly precarious, it has not come to an end. The testator had made a very substantial payment to the home almost immediately before his death, and for some reason which is not explained the receiver had accumulated a balance of £140. Therefore, the moneys available were quite sufficient to maintain this lady at this home during the interim period between the testator's death and the appointed day without recourse to any capital. If some slight recourse to capital had been necessary, it could have been made against the capital of one-third of the residue. B C D

If I am right in my view that the testator was entitled to act on the footing that his daughter could and should take advantage of the National Health Service Act, it seems to me impossible to hold that the will did not make reasonable provision for her maintenance. As this question of the effect of the provisions of the National Health Service Act, 1946, is rather one of principle, and as, therefore, this matter might be considered elsewhere, I think I should add that, if I had come to the conclusion that the will did not make reasonable provision for the maintenance of the plaintiff, I should have made some additional provision for her in respect of the period between the testator's death and the period, say, of three months after the date of this order, that being a reasonable period for her removal to some State institution. E F

Order accordingly. Plaintiff to pay the costs as between party and party of the third defendant. The executors to raise and pay their own costs out of the estate in due course of administration. No other order as to costs.

Solicitors : Godden, Holme & Co. (for the plaintiff) ; Burton, Yeates & Hart (for the first, second, fourth and fifth defendants) ; Bartlett & Gluckstein (for the third defendant). G

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

THE SOBIESKI.

[COURT OF APPEAL (Bucknill, Cohen and Singleton, L.JJ.), December 13, 14, 15, 16, 1948, January 31, March 7, 1949.]

Shipping—Collision—Ship in convoy, escorted by naval escort, and vessel on crossing course—Escort vessels equipped with radar and linked with convoy by radio-telephone communication—Failure of senior officer to warn convoy—Liability for contributing negligence—Application of Maritime Conventions Act, 1911 (c. 57), s. 1 (1).

In the early morning of Apr. 13, 1945, S.S. Esperance and S.S. Sobieski collided in the English Channel. The Esperance, having been detached from an up-channel convoy, was making her way, in dense fog, towards the Nab Tower in order to enter the Solent. The Sobieski was the commodore ship of a fast two-ships convoy proceeding from the Solent to Havre with troops and escorted by five naval craft, the senior escort officer, L., being on board H.M.C.S. Loch Alvie. The escort vessels were fitted with radar and the Sobieski was not, but the Sobieski and the other vessel in the convoy and each of the escort vessels were linked by radio-telephone communication. It was the duty of escorts, besides giving the convoy protection against enemy attack, to keep a radar watch for surface vessels which might involve the units of the convoy in the risk of collision, and it was the practice for the senior naval officer to advise the commodore of any alteration of course which he might consider necessary to avoid other traffic. After the escorts joined the Sobieski's convoy and about twenty minutes before the collision, the Loch Alvie's radar picked up a surface vessel, unquestionably the Esperance, and, after further reports of its movements, L. formed the view that there was a probability that it would be necessary to advise the Sobieski to make an alteration of course, but, before he had decided to communicate with the Sobieski and about ten minutes before the collision, an enemy submarine was detected, and, in accordance with routine orders, the Loch Alvie went into the attack and, with other units, dropped depth charges, as a result of which her radar apparatus was temporarily put out of action and remained so until after the collision. On discovering that the radar was out of action, L. sent a signal, about five minutes before the collision, to another unit of the escort asking whether the Sobieski was "standing into danger" and after a delay of several minutes was answered in the negative. In the meanwhile, the Sobieski, which had heard signals for a pilot (sent out, in fact, by the Esperance), had signalled by radio-telephone to the Loch Alvie asking whether the signals were from her, to which the Loch Alvie replied in the negative. The Sobieski had not stopped her engines on first hearing the signals from the Esperance, nor did she stop them or slow down until the Esperance came into view about thirty seconds before the collision. The Esperance had not been sounding the recognised fog signal, a single prolonged blast at intervals.

Claims alleging negligence were made by the Esperance and the Sobieski against each other. The Sobieski also claimed against L. for negligence in respect of the damage sustained by the Sobieski in the collision. The Court of Appeal (reversing the finding of the court below) found both the Sobieski and the Esperance guilty of negligence and apportioned the blame between them. The final question to be determined was whether L. could be held liable to the Sobieski.

HELD : (i) L. owed a duty to the Sobieski to exercise reasonable care in the performance of his duty to inform the ship of any unexpected dangers to her which he could detect by radar ; he failed to perform that duty ; and so he was guilty of negligence which contributed to the collision.

(ii) the *Loch Alvie* was not at fault as a result of L. failing to warn the *Sobieski*, and, therefore, the Maritime Conventions Act, 1911, had no application, and the claim of the *Sobieski* against L. failed at common law because of the contributory negligence of the ship.

Decision of PILCHER, J. ([1948] 1 All E.R. 78), reversed in part.

[FOR THE MARITIME CONVENTIONS ACT, 1911, ss. 1 (1), 9 (4), see HALSBURY'S STATUTES, Vol. 18, pp. 485, 488.]

Cases referred to :

- (1) *The Vernon City*, [1942] P. 61 ; 167 L.T. 393 ; 2nd Digest Supp.
- (2) *Australia (Owners) v. Nautilus (Cargo Owners), The Australia*, [1927] A.C. 145 ; 135 L.T. 576 ; 41 Digest 994, 8788.
- (3) *The Cairnbahn*, [1914] P. 25 ; 110 L.T. 230 ; 41 Digest 799, 6597.
- (4) *The Rockabill, King Orry Owners v. Rockabill Owners & Mersey Docks and Harbour Board, Rockabill Owners v. Mersey Docks and Harbour Board*, [1937] 1 All E.R. 191 ; *sub nom.*, *The Rockabill*, [1937] P. 93 ; 156 L.T. 296 ; Digest Supp.
- (5) *The Glaucus and City of Florence*, [1948] P. 95.

APPEAL by the plaintiffs and CROSS-APPEAL by the defendants from a judgment of PILCHER, J., delivered on Nov. 10, 1947 (reported [1948] 1 All E.R. 78).

The plaintiffs, the owners of the S.S. *Esperance*, her master, officers and crew, claimed in negligence against the owners of the S.S. *Sobieski* and against Commander Layard, the naval officer in charge of the *Sobieski's* escort, but on the plaintiffs' discontinuing their action against Commander Layard, the owners of the *Sobieski* counterclaimed in negligence against both the plaintiffs and Commander Layard. Commander Layard put in a defence denying negligence and alleging contributory negligence. PILCHER, J., held that both the *Esperance* and the *Sobieski* were free from blame for the collision, but this finding was reversed by the Court of Appeal, who found both vessels guilty of negligence, and apportioned the blame as to three-fifths against the *Sobieski* and two-fifths against the *Esperance*. PILCHER, J., also found Commander Layard negligent and held him personally liable, as a servant of the Crown, to the owners of the *Sobieski* for his negligent failure to perform the public duties which he was under a duty to perform. The Court of Appeal, while affirming the decision of PILCHER, J., that Commander Layard owed a duty to the *Sobieski* which he had negligently failed to perform, held that he was not liable in law on account of the contributory negligence of the *Sobieski*. The appeal first came before the Court of Appeal on Dec. 13, 1948, and a judgment was delivered on Jan. 31, 1949, but, as no argument had been addressed to the court as to the effect of the Maritime Conventions Act, 1911, it was ordered that the case should appear in the list again, if the parties so desired, for argument. The case again came before the court on Mar. 7, 1949, when the court heard argument and delivered a further judgment. The facts appear in the headnote.

R. F. Hayward, K.C., and *Bucknill* for the *Esperance*.

Porges, and *Vere Hunt* for the *Sobieski*.

Carmichael, K.C., and *Naisby, K.C.*, for Commander Layard.

Cur. adv. vult.

Jan 31. **BUCKNILL, L.J.**, read the following judgment. I have been authorised by **COHEN, L.J.**, to say that he has read the judgment I am about to deliver and agrees with it.

These appeals are from a judgment of PILCHER, J., delivered on Nov. 10, 1947, in respect of a collision, at about 1.38 a.m., on Apr. 13, 1945, between the French steamship *Esperance* and the Polish steamship *Sobieski* in the

English Channel about 6 miles S.S.E. of the Nab Tower. The *Esperance* is a single-screw steamship of 5,072 tons gross register, 351 feet long, and was bound from Gibraltar to the Solent laden with cotton. The *Sobieski* is a twin screw motor-vessel of 11,030 tons gross register, 512 feet in length, and was bound from the Solent to Havre with troops. There was a dense fog, with no wind, and the tide was setting to the westward with a force of about $1\frac{1}{2}$ knots.

- A When the owners of the *Esperance* in due course delivered to the defendants, the owners of the *Sobieski*, their statement of claim in respect of this collision, the defendants in their defence, besides denying negligence and alleging negligence in the navigation of the *Esperance*, alleged that the senior officer of the escort to the *Sobieski* was negligent and thereby caused the collision. Subsequently, the defendants ascertained that the senior officer of the escort
- B was Commander Layard, R.N., D.S.O., and they then, by way of counter-claim, sued him in respect of the damage sustained by them in the collision. Commander Layard delivered a defence denying negligence and also alleging negligence on the part of the *Esperance* and the *Sobieski*. After hearing the evidence of the master of the *Sobieski*, the master of the *Esperance*, and Commander Layard, the learned judge decided that the collision was solely
- C caused by the negligence of Commander Layard and that neither the *Sobieski* nor the *Esperance* were guilty of negligent navigation. All three parties have appealed, the owners of the *Esperance* and the owners of the *Sobieski* appealing from that part of the judgment which found the other ship free from blame. [His LORDSHIP reviewed the evidence, found both vessels guilty of negligence, apportioned the blame as to three-fifths to the *Sobieski* and as to two-fifths
- D to the *Esperance* and continued:] The question whether Commander Layard was guilty of negligence which caused or contributed to the collision relates to the claim by the *Sobieski* against him. I think that, in the circumstances, he had a duty to those in charge of the *Sobieski* to exercise reasonable care in the performance of the task which he had undertaken to perform, namely, to inform the master of any unexpected dangers to his ship, which he could
- E detect by his radar, but of which the master remained ignorant in the fog. Commander Layard had knowledge, through his radar, of the position of the *Esperance* in the fog as a potential danger to the *Sobieski* some twenty minutes before the collision. To his knowledge that danger continued and increased during the next ten minutes, and, so far as Commander Layard knew, was never terminated. He also knew that the *Sobieski* was steaming at a speed
- F which was very excessive in the dense fog but for the safety afforded her and other ships by careful use of the radar on the escort vessel, *Loch Alvie*. The next question, therefore, is whether Commander Layard failed in that duty. I agree on this point with the conclusion reached by PILCHER, J., but, speaking for myself, I think that the more serious negligence of Commander Layard was in his failure to give any warning of the presence of the *Esperance*
- G to the *Sobieski* by radio-telephone after the *Loch Alvie*'s radar was put out of action. I think that Commander Layard's failure to warn the *Sobieski* contributed to the collision, because the *Sobieski* was navigating without any accurate knowledge of the *Esperance*'s position, and was proceeding in reliance on getting a warning, which she, in fact, never received, but should have received. The burden of having to find Commander Layard to blame is
- H lightened by the fact that both our assessors advise us that good seamanship required him to report the *Esperance* to the *Sobieski* as soon as he became aware of the risks created by her presence. Their advice agrees with the opinion expressed by the elder brethren to the learned trial judge.

The position, therefore, as between the owners of the *Sobieski* and Commander Layard is that their negligence and his negligence caused the collision between the *Sobieski* and the *Esperance*. If the claim of the owners of the *Sobieski* against Commander Layard could be dealt with under the Maritime Conventions

Act, 1911, it would be possible to make an apportionment of the damage done to the Sobieski, but, subject to argument on the point, I do not think that the Act applies to such a case as this. The Law Reform (Contributory Negligence) Act, 1945, came into force on June 15, 1945, and would appear not to apply to this case, in which the damage occurred on Apr. 13, 1945. It, therefore, seems that the common law applies to the claim of the owners of the Sobieski, and that this claim fails on the ground of their contributory negligence. As no argument took place before this court as to the legal consequences of a finding that the Sobieski, the Esperance and Commander Layard were to blame, I think that the case should appear in the list again for argument, if the parties desire it, on which occasion the question of costs of all parties can be considered.

SINGLETON, L.J. : I agree.

Mar. 7. Further argument having been addressed to the court,

BUCKNILL, L.J. : We have listened to argument by counsel on behalf of both ships, but the conclusion to which I have come is that the Maritime Conventions Act, 1911, does not apply to this case. Counsel for the Sobieski, in support of his argument that the Act did apply, put forward four points. He said that the Loch Alvie was to blame for the collision and that Commander Layard was responsible for the fault of the Loch Alvie. He also argued that the four other vessels in the escort were to blame for the collision, and that Commander Layard was responsible for their fault. So far as the four other vessels were concerned, I can see no evidence to support the contention that they were to blame for the collision, and, therefore, the point that Commander Layard is responsible for their fault goes, but there is something to be said for the first two points, namely, that the Loch Alvie was to blame for the collision and that Commander Layard was responsible for her fault. The point turns on s. 1 (1) and s. 9 (4) of the Maritime Conventions Act, 1911, and I will read the material parts of those two sections. Section 1 (1) provides :

"Where, by the fault of two or more vessels, damage or loss is caused to one or more of those vessels, to their cargoes or freight, or to any property on board, the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault."

WARRINGTON, J., pointed out ([1914] P. 34) in *The Cairnbahn* (3), that :

"... the Maritime Conventions Act personifies the vessel, treating it at one time as the actor, at another as suffering damage or loss, and at another as liable to make good such damage or loss. The truth is, of course, that for the purpose of ascertaining the legal effect, the word in one context connotes those responsible for the navigation of the vessel ; in another those who are interested in her, her cargo or freight ; and in another those who are in law answerable for the conduct of those in charge."

Section 9 (4) provides :

"This Act shall apply to any persons other than the owners responsible for the fault of the vessel as though the expression 'owners' included such persons, and in any case where, by virtue of any charter or demise, or for any other reason, the owners are not responsible for the navigation and management of the vessel, this Act shall be read as though for references to the owners there were substituted references to the charterers or other persons for the time being so responsible."

The first question is : Was there any fault in the navigation of the Loch Alvie ? The evidence was that Commander Layard was the senior officer in

charge of the escort. He had undertaken, so far as the Sobieski was concerned, that he would give her warning of any obstruction in the Channel which the radar apparatus of the Loch Alvie detected but which the Sobieski would not know about because of the fog. Commander Layard was not in charge of the navigation of the Loch Alvie in any way. That is quite clear from the fact that when those in charge of the Loch Alvie's azdic picked up some object which might be a hostile submarine, the commander of the Loch Alvie, without consulting Commander Layard, dashed in to drop his depth charges and in so doing put the radar apparatus of the Loch Alvie out of use. It is impossible to suggest that Commander Layard was in charge of the navigation of the ship, or that the ship was in fault because Commander Layard failed to use the radio-telephone which he could have used to warn the Sobieski that the radar apparatus on the Loch Alvie had picked up the Esperance or later on to warn the Sobieski that the radar had ceased to work and that he was no longer able to give the warning to the Sobieski which the radar would have enabled him to give.

There are no reported cases which throw much light on this particular point. *The Rockabill* (4) is rather a different case, because there the question was whether the Mersey Docks and Harbour Board was partly to blame for giving certain instructions to the Rockabill to leave the dock and go out into the Mersey at a time when there was a risk of collision with the King Orry which was coming down from the Princes Landing Stage. The Court of Appeal in that case agreed with the judgment of BUCKNILL, J., that the Maritime Conventions Act, 1911, did not apply to the claim against the Mersey Docks and Harbour Board assuming that the Rockabill was partly to blame and the dock authorities were also partly to blame for the navigation of the Rockabill in going out into the river at an improper time and colliding with the King Orry. SCOTT, L.J., in his judgment in the Court of Appeal, said ([1937] P. 109; [1937] 1 All E.R. 195):

"But assuming that [the Dock Board] were guilty of negligence as found by the learned judge, then I agree that under the Maritime Conventions Act there is nothing to alter the old common law position which confers freedom from liability on the defendant in a case of this sort where the accident is contributed to by the negligence of the plaintiff . . ."

We have been referred to *The Glaucus and City of Florence* (5), a recent decision by PILCHER, J. In that case PILCHER, J., in the course of his judgment, said ([1948] P. 99):

"I think that the contention put forward by the owners of the Glaucus is justified in principle. If, as was very often the case in convoys navigating under war conditions, there had been on board the Glaucus a naval officer acting as commodore of the convoy it is difficult to see how the owners of the Glaucus could have been made responsible for any damage occasioned by a negligent order given by such commodore acting within the scope of his authority as commodore of the convoy and in his capacity as such commodore. No doubt the master of a ship in convoy always remains responsible for the safety of his own ship but, in assuming the office of commodore of this convoy, Captain McCarthy undertook duties and responsibilities quite outside the duties which normally fall on the master of a ship."

For these reasons, in my view, the Maritime Conventions Act, 1911, does not apply with reference to the claim of the Sobieski against Commander Layard, and that claim fails by reason of the fact that the common law, and not the Maritime Conventions Act, applies and the fact that the Sobieski was guilty of negligence.

COHEN, L.J. : I agree.

SINGLETON, L.J. : I agree.

Appeal by Commander Layard allowed. Damage as between Esperance and Sobieski apportioned. Each party to pay his own costs.

Solicitors: *Waltons & Co.* (for the owners of the *Esperance*); *Constant & Constant* (for the owners of the *Sobieski*); *Treasury Solicitor* (for Commander Layard).

[Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.]

FREDERICK BERRY, LTD. v. ROYAL BANK OF SCOTLAND.

[KING'S BENCH DIVISION (Lord Goddard, C.J.), February 18, 24, 1949.]

Landlord and Tenant—Covenant—Covenant against fixing nameplate without consent—Consent not to be unreasonably withheld—Construction—Reasonableness of refusal.

A lease of the third floor of a building, the property of a bank occupying the ground floor, with the right for the tenants to use the entrance to the building and the stairs leading up to the demised premises, contained the following covenant: "the tenant will not hang out or exhibit any sign-board or other advertisement whether on the demised premises or at the main entrance to the building without first obtaining the approval and consent of the bank such consent not to be unreasonably withheld." A small nameplate with the tenants' name and description was attached to the side of one of several columns at the front of the building near the letter box, and a large plate similarly inscribed was placed in the lobby immediately inside the main door, through which, in business hours, it was plainly visible from the opposite side of the street. The tenants now wished to exhibit a larger nameplate on one of the columns, but the landlords withheld their consent. The tenants contended that the covenant entitled them to affix a nameplate outside the building although the landlords had power to object to a particular notice or its position on reasonable grounds.

HELD: (i) on the true construction of the covenant there was no implied undertaking that the landlords would give their consent unless they had a reasonable ground for refusing it.

(ii) it was for the tenants to show that the landlords' refusal was unreasonable.

Dictum of SLESSER, L.J., in *Lambert v. Woolworth & Co., Ltd.* ([1938] 2 All E.R. 675; [1938] Ch. 906; 159 L.T. 322), explained.

(iii) in the circumstances, the landlords' refusal was not unreasonable and the tenants were, therefore, not entitled to succeed.

[AS TO RESTRICTIVE COVENANTS AS TO USER, see HALSBURY, Hailsham Edn., Vol. 20, pp. 225-233, paras. 247-255; and FOR CASES, see DIGEST, Vol. 31, pp. 151-175, Nos. 2867-3079.]

Cases referred to:

(1) *Treloar v. Bigge*, (1874), L.R. 9 Exch. 151; 31 Digest 379, 5259.

(2) *Smith v. Harwich Corpn.*, (1857), 2 C.B.N.S. 651; 22 J.P. 55; 7 Digest 339, 35.

(3) *Ideal Film Renting Co. v. Nielsen*, [1921] 1 Ch. 575; 124 L.T. 749; 31 Digest 380, 5263.

(4) *Shanly v. Ward*, (1913), 29 T.L.R. 714; 31 Digest 382, 5276.

(5) *Lambert v. Woolworth & Co., Ltd.* (No. 2), [1938] 2 All E.R. 664; [1938] Ch. 883; 159 L.T. 317; Digest Supp.

ACTION for a declaration.

By a lease, dated May 28, 1947, the landlords, the Royal Bank of Scotland, demised to the tenants the third floor of a building situate at No. 64, New Bond Street, London, for a term of five years, with liberty for the tenants to use the entrance, lift, stairs and passages of the building for the purpose of passing to and from the demised premises. The lease contained the following covenant:

"... the tenant will not hang out or exhibit any signboard or other advertisement whether on the demised premises or at the main entrance to the building without first obtaining the approval and consent of the bank such consent not to be unreasonably withheld."

The tenants claimed a declaration that, on the true construction of the covenant, they were entitled to affix a nameplate at the main entrance to the building and that the consent of the landlords to their doing so had been unreasonably withheld. LORD GODDARD, C.J., held that there was no implied covenant that the landlords would give their consent in the absence of reasonable ground for refusing it, and gave judgment for the defendants.

C. H. Duveen for the tenants.

Glyn-Jones, K.C., and *Teague* for the landlords.

Cur. adv. vult.

Feb. 24. LORD GODDARD, C.J., read the following judgment. By a lease dated May 28, 1947, the landlords demised to the tenants the third floor of premises at No. 64, New Bond Street, for a term of five years from June 24, 1947, at a rent of £250 per annum. The lease also granted to the tenants the right to use the entrance, staircase, and so forth, at the demised premises. The lease contained a covenant by the tenant not to hang out or exhibit any signboard or other advertisement on the said third floor or at the main entrance of the said premises without first obtaining the consent of the landlords, such consent not to be unreasonably withheld.

The tenants had occupied the premises under an earlier lease from the landlords expiring immediately before the lease of May 28 took effect, the only material difference between the two being that in the earlier lease the restrictive covenant with regard to signboards and advertisements did not contain the words "or at the main entrance of the said premises." The tenants are desirous of exhibiting a nameplate on the outside northern pillar of the main entrance so as to indicate to passers-by that they are carrying on business on the premises, the ground floor of which is wholly occupied by one of the landlords' branch banks, and they seek a declaration that the landlords are not entitled to withhold their consent to such a notice being exhibited.

The only questions that I have to decide are whether the tenants are entitled to call upon the landlords to give their consent, and, if so, whether the latter have reasonable grounds for refusing it. If a tenant takes only an upper floor of a building and has no more than a right to use the entrance hall for the purpose of approaching the premises demised, he must stipulate for the right to put a nameplate outside the premises other than on that part demised to him, if he desires this convenience. It is said that on the true construction of the covenant to which I have referred, the tenants have been granted that right though the landlords have reserved to themselves the power to object to a particular notice or its position on reasonable grounds. I cannot so construe the covenant.

The question that falls for decision here has usually arisen in relation to the right to assign or sub-let or to the user of premises. In all those cases, in the absence of a restrictive covenant, a tenant can assign his lease or use the

premises as he likes, and where the lease has only contained a restrictive covenant by the tenant it has always been held that the right of the tenant is to apply for permission, and, if refused, to assign or use the premises as he chooses and defend any action that is brought against him by showing that the withholding of consent is unreasonable. A good illustration of this will be found in *Treloar v. Bigge* (1), a case which has often been cited and I think never disapproved, and the same principle seems to me to underlie *Smith v. Harwich Corpn.* (2). In neither case would the court imply a covenant by the defendants that they would give consent. No doubt, there have been cases in which there has been an express covenant by the lessor not unreasonably to withhold his consent: for example, *Ideal Film Renting Co., Ltd. v. Nielsen* (3); and, if there is such a covenant, the lessee can not only disregard an unreasonable refusal, but can also bring an action for damages if it is withheld. In the present case it is conceded that, unless there is at least an implied covenant by the lessors, the tenants could have no right to put up the plate on the outside of the premises. I do not find it necessary to go through the many cases in which positive or negative covenants have been held to be, in the substance, negative or positive respectively. I cannot find there is here an implied covenant that the landlords would give their consent unless they had a reasonable ground for refusing it. The words with regard to the withholding of the consent would operate, and, therefore, a meaning can be given to them if the tenants desired to put up a notice or sign outside the third floor.

That is enough to dispose of the case, but, lest it should go further, I ought to express my opinion on whether the consent was unreasonably withheld if the tenants are in a position to demand it. Let me say, in the first place, that, in my opinion, it is for the tenants to show that the refusal was unreasonable and not for the landlords to prove that it was not. This was distinctly held by the Court of Appeal in *Shanly v. Ward* (4). I was referred to a *dictum* of SLESSER, L.J., in *Lambert v. Woolworth & Co., Ltd.* (5), in which he said ([1938] 2 All E.R. 675):

“ . . . the onus of proving that the withholding is unreasonable is on the tenant, but, if the landlord gives no reason, but merely refuses, that in itself, I think, puts upon him the duty of showing that his action was reasonable.”

The other members of the court did not express any view on this subject, and, in any case, I do not think that the *dictum* of the Lord Justice means any more than that, if the landlord gives no reason, the court would more readily imply that the withholding was unreasonable.

So far as any evidence was given on the subject by the landlords their refusal was, in the main, based on what was said to be their considered policy not to allow any plates other than their own to be fixed on the outside of their buildings. That a plate would be a convenience to the tenants is, I think, clear, but, though a request may be reasonable, that does not mean that a refusal to grant it is necessarily unreasonable.

The day after the hearing I took the opportunity of seeing the outside of the premises for myself. On my visit, I made careful observation of other shops and business premises in both Old and New Bond Streets, and noticed that, while there is some diversity of practice, by far the larger number of buildings in which separate businesses are carried on above the ground floor have plates or notices in one form or another bearing the names of the persons or firms who are trading above the street level. The question is not what other landlords may or may not do, but whether the landlords are acting reasonably in refusing their consent in this case. I extended my tour of observation so as to include several other banks in the neighbourhood, including Piccadilly

and St. James' Street. Though several of these adjoin premises which do bear plates announcing that businesses are carried on above the ground floor, not one of these banks bears any such plates or notices on the outside of their premises, so it seems that the landlords' practice conforms to that of other banks in the West End. Then, looking at the landlords' bank, which, be it noted, is a corner building with several columns on both fronts similar to the one to which the tenants desire to fix their plate, I do think it would mar the symmetry were this permitted, but there is a small plate bearing the tenants' name and description at the side of this column by the letter-box, doubtless mainly for the information of the postmen. Though referred to somewhat disparagingly as a sort of visiting card, it is a good deal larger than an ordinary trade card. It is perfectly legible and it catches the eye at once. In addition, there is a large plate with the tenants' name and description in the lobby immediately inside the door, which remains open in business hours, and into which persons having business with the bank or anyone else in the building, must enter. In daylight, at any rate, the plate is clearly visible from the other side of Bond Street. How the witnesses who were called by the tenants failed to see both, let alone one, of these plates when they found themselves outside No. 64 passes my comprehension. In my opinion, it is not unreasonable for the bank to feel that they have given the tenants all the publicity that they can reasonably require on the ground floor, and, accordingly, their refusal to sanction the additional plate is by no means unreasonable. The action fails and must be dismissed with costs.

Judgment for the defendants with costs.

Solicitors: *Forsythe, Kerman & Phillips* (for the tenants); *B. P. Webster* (for the landlords).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

Re A.B. (An Infant).

[CHANCERY DIVISION (Vaisey, J.), March 16, 1949.]

Adoption—Grandchild—Illegitimate child of daughter aged sixteen—Adoption of Children Act, 1926 (c. 29), s. 1 (1).

A husband and wife sought to adopt, under the Adoption of Children Act, 1926, s. 1 (1), the illegitimate child of their daughter, a girl of sixteen.

HELD: an order authorising the adoption by married persons of an illegitimate grandchild could be made in special circumstances, but only with great caution and never as a matter of course, for normally an adoption presupposed a complete and final separation between the child and its natural parents whereas in the circumstances of the present case the child and its mother must inevitably remain in association to a greater or less degree and it was impossible to exclude the risk of grave psychological strain and emotional disturbance arising therefrom in the future with consequences to them both which might be serious.

[AS TO ADOPTION ORDERS, see HALSBURY, Hailsham Edn., Vol. 17, pp. 680-684, paras. 1408-1413.]

SUMMONS asking for an order authorising the applicants, a husband and wife, to adopt the illegitimate child of their daughter under the provisions of the Adoption of Children Act, 1926. The summons was heard in chambers, but VAISEY, J., thought it desirable to give his judgment in open court. He granted the order, but stressed the fact that, in such a case, an adoption order should only be made in special circumstances.

Salt, K.C., and *H. E. Francis* for the applicants.

W. F. Waite for the Official Solicitor.

Cur. adv. vult.

Mar. 16. **VAISEY, J.**, read the following judgment. An interlocutory application in this matter relating to a point of procedure and the order made thereon by **ROXBURGH, J.**, have already been reported ([1948] 2 All E.R. 727). For that reason and also because proceedings under the Adoption of Infants Act, 1926, are conducted in chambers so that little information about the practice is afforded to the profession and the public, I have thought it desirable that the order which I am about to make in the present case should be made in open court.

The facts, as already disclosed in the report, are briefly as follows. The applicants, husband and wife, wish to adopt, under the provisions of the Act, the illegitimate child, a girl of a few months old, of their own daughter, who at the time of the child's birth was not yet 16 years of age. I have been supplied with particulars of five cases in which the adoption by married persons of an illegitimate grandchild of theirs has, in the special circumstances of each case, been sanctioned by this court. Similar orders have doubtless been made in county courts and courts of summary jurisdiction. I do not for a moment suggest that orders of that description are outside the scope of the Act. I think, however, that they should be regarded as exceptional and made with great caution. Normally, an adoption presupposes a complete and final separation between the child and its natural parents. The child looks thenceforth to the adopters as its parents, and the natural parents, relinquishing all their parental rights and duties, step, as it were, for ever out of the picture of the child's life. In the present case, on the other hand, the child and its natural parent must inevitably remain in association to a greater or less degree, and it is impossible to exclude the risk of grave psychological strain and emotional disturbance arising therefrom in the future, with consequences to them both which might be serious. The ostensible relationship of sisters between those who are, in fact, mother and child is unnatural, and its creation might sow the seeds of grievous unhappiness for them both, and, indeed, for the adopters themselves. Every case must, however, be judged on its own facts, dealt with on its own merits, and decided on a balance of considerations, and it is sufficient for me to say here that in the present case I have resolved to make the order asked for. Various undertakings on the part of the adopters with regard to the future were offered to me, all with the best intentions, but I prefer not to accept them, because my principal reason for making the order is my belief that I can rely with confidence on the good sense and good judgment of the adopters to handle the situation as it develops with wisdom and discretion. Let them never forget that they owe a continuing and inescapable duty to the young mother as well as to the child who will always be hers, however much my order may purport to make it theirs, and let them reconcile the claims on them with anxious care. If difficulties arise, they can always make the child a ward of court, and the mother, too, so long as she is under age. I am accepting the latter's written consent as sufficient, notwithstanding her youth, in preference to dispensing with it as I have power to do.

I would only repeat that I by no means wish to encourage this type of application, and my decision in this case should be read as expressing my opinion that, while such an order as I am now making is authorised in special circumstances, it ought never to be made as a matter of course. The order will be in the usual form, and I will direct that the child be registered in the names selected by the adopters and as born on the date appearing in the certificate of her birth.

Order accordingly.

Solicitors: *Gibson & Weldon*, agents for *Bowcock & Pursaill*, Leek (for the applicants); *The Official Solicitor*.

[Reported by **H. McL. MORRISON, Esq.**, Barrister-at-Law.]

WARMAN v. SOUTHERN COUNTIES CAR FINANCE CORPORATION, LTD. (W. J. AMERIS CAR SALES, Third Party).

[KING'S BENCH DIVISION (Finnemore, J.), March 2, 1949.]

Contract—Warranty—Breach—Damages—Hire-purchase agreement—Seller lacking title—Right to set off against damages reasonable hiring charges.

A In September, 1947, the hirer entered into a hire-purchase agreement with the S.C. Corporation in respect of a motor-car, undertaking to pay £155 as an initial payment and a sum of £9 18s. "rent" each month. After paying the requisite number of instalments the hirer was to have the option of purchasing the car for 1s. In January, February, and March, 1948, the hirer received letters from the L.F. Corporation or their solicitors claiming that the car was their property, and in April, on the day on which he made his final payment to the S.C. Corporation, he was served with a writ by the L.F. Corporation. He had ignored all communications from the L.F. Corporation, and did not inform the S.C. Corporation of the claim made against him. The L.F. Corporation were, in fact, the true owners, the S.C. Corporation having received the car in good faith from another firm, who were themselves ignorant of any defect in their title. The hirer handed over the car to the L.F. Corporation, and now claimed damages from the S.C. Corporation.

HELD : (i) although at the time of making his final payment the hirer was aware that there was doubt whether the S.C. Corporation were the owners, he was entitled to rely on their warranty of ownership because the warranty was given and became effective at the date of the agreement and not when the final payment was made.

(ii) the S.C. Corporation, having failed to carry out the term which was the foundation of the agreement—the sale of the car, were liable for breach of warranty, and, the car not having been theirs to deal with, they were not entitled to any reduction of damages by way of set-off or counterclaim in respect of hiring charges for the period during which the hirer had had the use of the car.

[AS TO MITIGATION OF DAMAGES, see HALSBURY, Hailsham Edn., Vol. 10, pp. 113-115, paras. 143, 144; and FOR CASES, see DIGEST, Vol. 17, pp. 124-128, Nos. 324-361.]

F Case referred to :

(1) *Karflex, Ltd. v. Poole*, [1933] 2 K.B. 251; 149 L.T. 140; Digest Supp.

ACTION for damages for breach of contract.

G The plaintiff was the hirer of a car from the defendants under a hire-purchase agreement. Unknown to the defendants, who had acquired the car in good faith from third parties—themselves ignorant of any defect in their title—the car was the property of another hire-purchase firm to whom it had to be returned. The defendants contended that, in assessing damages for breach of warranty, an allowance should be made for the reasonable charge of hiring the car during the seven months in which the plaintiff had used it. FINNEMORE, J., held that no such allowance could be made. The facts appear in the judgment.

H *Mattar* for the plaintiff, the hirer.

Stanley Rees for the defendants.

Kenneth Jones for the third party.

FINNEMORE, J. : In this case Mr. Cyril Ernest Warman, the plaintiff, is suing the defendants, the Southern Counties Car Finance Corporation, Ltd., for damages amounting to £294 17s. 3d. The dispute arises out of a hire-purchase agreement in the usual form which was entered into by the parties

on Sept. 13, 1947, concerning a Hillman 10 horse-power saloon car. The car came from a firm called W. J. Ameris Car Sales who are brought in as third parties.

Under the agreement a sum of £155 was paid by the hirer, the plaintiff, as an initial payment to the defendants and the plaintiff agreed to take the vehicle on hire and to pay each month the sum of £9 18s., and when he had paid the requisite number of instalments, he was to pay another 1s. and the car then became his property. Clause 11, provided : A

"It is further agreed that if and when the total rent payable under cll. 1 and 2 hereof shall have been paid to the owners, the hirer shall have the option of purchasing the said vehicle and accessories for the sum of one shilling, but no option shall arise in the case of termination of hiring under cll. 8 or 9 hereof." B

The plaintiff paid the £9 18s. a month until April, 1948, and on Apr. 22, according to the booklet recording the payments, he was credited with a final payment of £58 8s., so that the car then ostensibly became his property. It appears, however, that, in fact, the car was not the property at any time of the defendants. Some time previously it had been the property of another hire-purchase company called the London Finance Corporation. They had hired it to another individual who, without paying any money after the initial deposit, passed it on to the third parties, and so it came to the defendants who had no title to it whatever. There is no question of *mala fides* in this case. The defendants legitimately believed that they were the owners of the car, and, so believing, they entered into the hire-purchase agreement with the plaintiff. All three parties acted perfectly honestly and properly, and, as in so many of these cases, it is a question which of several innocent parties has to pay for the wrong-doing of somebody else. In May, 1948, the car was handed by the plaintiff to the London Finance Corporation, who, it is common ground, were the true owners of it at all material times. That being the case, the plaintiff says : "I am entitled as damages to the money which I have lost through this transaction. I paid the defendants a considerable sum of money for this car, which has been taken from me, and I want my money back." C
What, in law, he is asking for is damages for the breach of the agreement, and, in particular, for damages for breach of the express warranty, as it must be treated, that the defendants were the owners of the car. D E

Counsel for the defendants has taken every point he possibly could. He says, first, that there was no warranty regarding the title on the sale because the sale took place on Apr. 22, 1948, when the final payment was made, and before that time the plaintiff had cause to believe that there was something wrong with the title. He had had a number of letters, including at least one solicitor's letter, and on the very day on which he sent the money order for the final payment (Apr. 20) he received a writ claiming the car from him. F
It is said, therefore, that he could not then have been relying on any warranty given by the defendants that they were the owners of the car because he either knew, or, at least, was put on grave suspicion, that they were not the owners. G
If the final payment alone constituted the sale, there might be a serious point, but the agreement was made between the parties in September, 1947. There was then an agreement to sell subject to the plaintiff's making certain payments, and he ultimately made those payments. I do not think it would matter if, when there was still some payment to be made before the machinery of the contract was complete, the plaintiff had known positively that the car really belonged to another party. I think he would be entitled to say : "That is nothing to do with me. I made a binding agreement with the defendants in which they gave me this warranty that they were the owners. I am paying them the money which is due to them in order to be able to assert my rights, H

and I still rely, as against them, on the agreement of September, 1947." It can be put in another way, and that is that, when the agreement was entered into and an option to purchase was given, as from the moment when the hire-purchase agreement had been signed the plaintiff would have been entitled in law to have paid the whole of the balance at once and had the ownership there and then vested in him. The defendants were clearly unable to give him

A the proper title at any moment from the time of the contract up to Apr. 22 when the final payment was made by him and received by the defendants. It is plain that there was a breach of the agreement which continued throughout and that the title for which the plaintiff had contracted was never given to him and could never have been given to him because it was never the defendants' to transfer. Once he had made his agreement, I do not think
B it matters if he did know positively in April that the title in the car was in somebody else, but I do not think the evidence goes that far. It is hardly necessary to say that the mere fact of receiving a claim from another party, or even of a writ having been issued, does not prove that party's claim to be sound, and that is all there was.

C Counsel for the defendants raised a somewhat similar point when he said that the damage here flowed, not from the breach by the defendants, but from the plaintiff's own conduct—in other words, it is argued that when the plaintiff received these letters from the London Finance Corporation and their solicitors in January, February and March, 1948, he ought at once to have asked the defendants for an explanation. Had he done so, it is suggested, they would have been able to arrange with the London Finance Corporation to pay off the
D balance on the other hire-purchase agreement and so save the plaintiff's position. Whether that would have happened or not I do not know, because when that situation did arise as between the defendants and the London Finance Corporation and when that suggestion was made by the defendants to them, they flatly rejected it. Even so, there was no duty that I can see for the plaintiff to have gone to the defendants for an explanation. It might have
E been a sensible thing to do, but there was certainly no call, and certainly no legal responsibility of any kind, on him to do so. He did take legal advice and go to the third parties from whom he had got the car and tell them about it. He also consulted the Automobile Association who advised him at all costs to continue making the payments, and he did so. I cannot see any unreasonable conduct on his part, and I do not think it can be said that any of the damage
F flows from his acts. The damage flowed from the fact that the defendants purported to hire and sell to him something which, although they did not know it, was not theirs to hire or to sell.

The last point is more difficult. The defendants contend that, if they are liable in damages to the plaintiff, an allowance should be made against the amount thereof of a sum equal to a reasonable charge for the hire of the car
G by the plaintiff for the period during which he had possession. In his judgment in *Karflex, Ltd. v. Poole* (1), GODDARD, J., referred to this very problem but expressed no view. He said ([1933] 2 K.B. 265):

H "I am expressing no opinion as to what might be the position if a person who was not in fact the owner, but who honestly believed he was the owner of property let out on hire-purchase, was faced with a counterclaim by a hirer who had enjoyed the use of the property, we will say, for half the time that the hire-purchase agreement was contemplated to run, to recover all the money he had paid without making some allowance for the use of the chattel. It will be time enough to decide that when the question arises."

A hire-purchase agreement such as this is in law an agreement in two parts. It is an agreement that, for a certain length of time, the hirer shall rent the

car. If, during the period or at the end of the period the hirer does not wish to buy the car, he is not bound to do so. On the other hand, the essential part of the agreement is that the hirer has the option to purchase it, and it is common knowledge—and I suppose, commonsense—that when people enter into a hire-purchase agreement they enter into it not only for the purpose of hiring, but also for the purpose of purchasing by what are, in effect, deferred payments. If at any stage the option to purchase goes, the whole value of the agreement to the hirer goes with it. If he wanted to make an agreement merely to hire a car he would make it, but he enters into a hire-purchase agreement because he wishes to have the right to purchase the car. That is the whole basis of the agreement. I should have thought that, if the defendants are unable to carry out the contract, they are not entitled to claim on a sort of *quantum meruit* by saying: “Although we could not carry out the agreement and could not give you the title to this car, you did have the use of it for six or seven months and you must pay us the hiring charges for those months.” Another way of looking at the matter is that since the car was not at any time the property of the defendants, they cannot call on the plaintiff to pay them money for the hire of it. I should have thought it was plain that, if A purports to hire a car to B and delivers to B a car which belongs, not to himself, but to C—a car to which A had no right whatever in law—and B does not pay the hiring charges, A would have no possible claim for them. It is difficult to see how he would ever frame his case. How could he come into court and say: “I claim money from B arising out of my hiring to him C’s car, to which I have no right.” I cannot conceive that any court would direct B to pay A money for the use of somebody else’s car, and I do not see here how the defendants can claim any money from the plaintiff for the use of someone else’s car. That is what their claim comes to.

I, therefore, take the view that it is not open to the defendants to claim, either by way of set-off or counterclaim, money which is expressed in this hire-purchase agreement to be for the hire of the car for the months during which the plaintiff had the use of the car, it not being the defendants’ car at all. I think that there has been a breach of this agreement and the plaintiff is entitled to recover damages, and those damages amount to the sum of £294 17s. 3d. as claimed by him.

[HIS LORDSHIP then held the third party liable to the defendants on similar grounds.]

Judgment for the plaintiff against the defendants with costs. Judgment for the defendants against the third party.

Solicitors: *Amery-Parkes & Co.* (for the plaintiff); *E. W. Parkes*, agent for *Farrington & Winterton*, Brighton (for the defendants); *Ruston, Clark & Ruston* (for the third party).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

BROCK AND OTHERS v. WOLLAMS.

[COURT OF APPEAL (Bucknill, Cohen and Denning, L.JJ.), March 16, 1949.]

Rent Restriction—Death of tenant—"Member of the tenant's family"—Adopted daughter—De facto adoption—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 12 (1) (g) (as amended by Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), s. 13, and Increase of Rent and Mortgage Interest (Restrictions) Act, 1935 (c. 13), s. 1).

In 1912 the defendant, then a child of five, went to live with the tenant of a dwelling-house within the scope of the Rent Restrictions Acts. She was never legally adopted by the tenant and his wife, but she lived with them as their adopted daughter until her marriage in 1939, and she returned to the house in 1942 on her becoming a widow and remained with the tenant in the house until his death in February, 1948. In an action by the landlord for possession of the house, the defendant claimed the protection of the Rent Restrictions Acts on the ground that she was a "member of the tenant's family" within the meaning of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (1) (g) (as amended by the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 13, and the Increase of Rent and Mortgage Interest (Restrictions) Act, 1935, s. 1).

HELD: the word "family" in s. 12 (1) (g) of the Act of 1920 was used in the ordinary popular sense of the word and included an adopted child, whether or not there had been a legal adoption, and, therefore, if the deceased tenant was a statutory tenant at the time of his death, the defendant was entitled to the protection of the Rent Restrictions Acts.

Salter v. Lask ([1925] 1 K.B. 584; 132 L.T. 830), approved.

Dictum of WRIGHT, J., in Price v. Gould (1930) (143 L.T. 334), applied.

[AS TO STATUTORY TENANTS, see HALSBURY, Hailsham Edn., Vol. 20, pp. 334, 335, paras. 400, 401, and 1948 Supplement; and FOR CASES, see DIGEST, Vol. 31, pp. 575, 576, Nos. 7226-7255, and Supplements.]

Cases referred to:

- (1) *Salter v. Lask*, *Lask v. Cohen*, [1925] 1 K.B. 584; 132 L.T. 830; 31 Digest 563, 7107.
- (2) *Price v. Gould*, (1930), 143 L.T. 333; 94 J.P. 210; Digest Supp.
- (3) *Snow v. Teed*, (1870), L.R. 9 Eq. 622; *sub nom.*, *Sum v. Teed*, 23 L.T. 303; 44 Digest 888, 7455.
- (4) *Thynne v. Salmon*, [1948] 1 All E.R. 49; [1948] 1 K.B. 482.

APPEAL by the defendant, the *de facto* adopted daughter of the deceased tenant, from an order of His Honour JUDGE TUDOR REES, made at Uxbridge County Court, on Sept. 7, 1948, granting to the plaintiffs, the trustees of the deceased landlord, possession of a dwelling-house subject to the Rent Restrictions Acts. The Court of Appeal now held that a child adopted *de facto* was a "member of the tenant's family" within the meaning of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (1) (g) (as amended), and, therefore, if the deceased tenant was a statutory tenant at the time of his death, the defendant was entitled to the protection of the Rent Restrictions Acts. There being insufficient evidence to show whether the deceased was a contractual or a statutory tenant, the case was remitted to the county court judge for a decision on that point. The facts appear in the judgment of BUCKNILL, L.J.

Sieve for the adopted daughter of the deceased tenant.

Widgery for the trustees of the deceased landlord.

BUCKNILL, L.J. : This is an appeal from a judgment of His Honour JUDGE TUDOR REES given on Sept. 7, 1948, in favour of the plaintiffs, the trustees of David Collett (deceased), who was the landlord of certain premises known as 62, Park Lane, Harefield, in the county of Middlesex. The defendant, Edith Emily Wollams, claims the protection of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (1) (g), and that she is entitled to remain in possession of the house as a member of the tenant's family. Section 12 (1) (g) of the Act of 1920 [as amended by s. 1 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1935] provides :

"The expression 'landlord' also includes in relation to any dwelling-house any person, other than the tenant, who is or would but for this Act be entitled to possession of the dwelling-house, and the expressions 'tenant and tenancy' include sub-tenant and sub-tenancy, and the expression 'let' includes sub-let; and the expression 'tenant' includes the widow of a tenant who was residing with him at the time of his death, or, where a tenant leaves no widow or is a woman, such member of the tenant's family so residing as aforesaid as may be decided in default of agreement by the county court."

Section 12 (1) (g) of the Act of 1920 was amended by the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 13, which provides that s. 12 (1) (g) shall not :

"... apply to any such member unless he was residing with the tenant for not less than six months immediately before the death."

In 1912 the defendant went as a child of five or six years of age to live in this house. At that time Mr. Lofty was the tenant. How long Mr. Lofty had been living there before 1912 we do not know. He was a married man, but we do not know when he was married. The defendant continued to live there with Mr. Lofty and his wife, and was adopted by Mr. Lofty. In 1939 she married a man named Wollams who was an invalid and died three years after the marriage. Mr. Lofty died in February, 1948. It is not quite clear what Mrs. Wollams did after her husband had died, but we were informed by counsel, and I think it must be so having regard to s. 13 of the Act of 1933, that she went back to live with Mr. Lofty. She said in evidence that she was always regarded as his daughter. Mr. Lofty's son, Stanley, who was called as a witness, said that he remembered the defendant coming to live with them and that he always looked on her as a sister. There was no legal adoption. On those facts the learned judge found that the defendant was not a member of the deceased tenant's family.

This matter has not been much considered by the superior courts. There is no decision of the House of Lords or Court of Appeal on the point, and the only other reference to "family," so far as I know, in the Rent Restrictions Acts is in the Act of 1933, s. 3, which provides :

"(1) No order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply or for the ejectment of a tenant therefrom shall be made or given unless the court considers it reasonable to make such an order or give such a judgment, and . . . (b) the court is satisfied that suitable alternative accommodation is available for the tenant or will be available for him when the order or judgment takes effect. (3) . . . accommodation shall be deemed to be suitable if it consists . . . (b) of premises to be let as a separate dwelling on terms which will, in the opinion of the court, afford to the tenant security of tenure reasonably equivalent to the security afforded by the principal Acts in the case of a dwelling-house to which those Acts apply, and is, in the opinion of the court, reasonably suitable to the needs of the tenant and his family . . ."

I know of no decision which throws any light on the meaning to be given to the word "family" in that sub-section. All one can say is that that section was passed thirteen years after the Act of 1920, and the same word "family" is used.

The first case which throws some light on this matter is *Salter v. Lask* (1), where the question was whether the husband of a tenant was a member of the tenant's family. *SALTER, J.*, said ([1925] 1 K.B. 587) :

"In this case, at the time she died, Mrs. Lask was living on the premises with her husband and a child nine years old, and the question is whether the husband comes within the words of s. 12 (1) (g) of the Act of 1920, 'such member of the tenant's family.' In my opinion he does. It may have to be determined some day what limit is to be put on these words 'tenant's family,' whether they are equivalent to 'household' or whether they are limited as meaning blood relations, and in either case what members of the class respectively are indicated. But I am quite satisfied that the husband of a deceased statutory tenant is a member of that tenant's family."

The matter was also considered in the judgment of *WRIGHT, J.*, in *Price v. Gould* (2). The issue there was whether brothers and sisters of a tenant were to be included in the word "family." *WRIGHT, J.*, said (143 L.T. 334) :

"It has been said in a number of equity cases, relating principally to wills or to settlements under powers of appointment, that the word 'family' is a popular, loose, and flexible expression, and not a technical term. It has been laid down that the primary meaning of the word 'family' is children, but that primary meaning is clearly susceptible of wider interpretation, because the cases decide that the exact scope of the word must depend on the context and the other provisions of the will or deed in view of the surrounding circumstances. Thus, in *Snow v. Teed* (3) it was held that the word 'family' could be extended beyond not merely children but even beyond the statutory next-of-kin."

WRIGHT, J., went on to say (*ibid.*) that :

"I hold that in the section now under consideration the word 'family' includes brothers and sisters of the deceased living with her at the time of her death. I think that that meaning is required by the ordinary acceptance of the word in this connection, and that the legislature has used the word 'family' to introduce a flexible and wide term."

The primary meaning of the word "family" is "children." If, however, the word "family" is interpreted in a flexible and wide way, as *WRIGHT, J.*, suggested in *Price v. Gould* (2), it seems to me that in the ordinary, popular sense of the word the defendant would be considered the child of the man with whom she had lived, except for three years of her married life, ever since she was five years of age. That, I think, is all that there is to be said on the matter, except, perhaps, in regard to the question of the policy which underlies s. 12 (1) (g) of the Act of 1920. If the policy is similar to that which deals with alternative accommodation and is to protect a member of the family who has been residing with the tenant for six months or more before his death, I think that the defendant clearly comes within the meaning to be given to the word "family." In the course of argument I asked what was to be the position of an illegitimate child of the wife or of the husband who had lived all his life with his father or mother. Surely the Act was intended to cover a case of that kind, and, if so, I cannot see why, giving the word "family" its ordinary, popular meaning, an adopted child should not be included. I think that the question what is the meaning of the word "family" is not entirely one of fact, but must be a question largely of law.

There was, however, a preliminary point with which the learned judge should have dealt, and that was whether Mr. Lofty, at the time of his death, was a contractual tenant or a statutory tenant, because, if he was a contractual tenant, under the decision of the Court of Appeal in *Thynne v. Salmon* (4), s. 12 (1) (g) of the Act of 1920 does not apply. On the other hand, the sub-section would apply if he was a statutory tenant. There is no reliable evidence on this matter. I am not prepared to deal with that point on the scanty material we have before us, and, therefore, in my view, the case must go back for the county court judge to decide whether or not this is a case in which the section can be applied, having regard to the rule laid down in *Thynne v. Salmon* (4). This appeal must be allowed and the case remitted to the county court judge on that point.

COHEN, L.J. : I am of the same opinion. Counsel for the landlords submitted that there were only two possible meanings of the word "family" in s. 12 (1) (g) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920—the first "relations by blood or marriage" and the second "household," including all living on the premises, relatives, servants and lodgers. He excluded, and, I think, rightly, the second sense. I do not think it can have been the intention of the legislature to protect servants and lodgers, but I am not prepared to hold that the two meanings suggested by counsel for the landlords are exhaustive. I think that there is a third meaning. I respectfully agree with what was said by **WRIGHT, J.**, in *Price v. Gould* (2) in the passage which my Lord has already read. I think the question the learned county court judge should have asked himself was: Would an ordinary man, addressing his mind to the question whether Mrs. Wollams was a member of the family or not, have answered "Yes" or "No"? To that question I think there is only one possible answer, and that is "Yes." To accept the narrow view put forward by counsel for the landlords would mean excluding children legally adopted under the Adoption of Children Act, 1926. I do not think that can be so, and I think that the ordinary man would not distinguish between a legally adopted child and a child adopted *de facto* in 1912 who lived with her adopted parents until her marriage in 1939 and returned to the house, as her home, in 1942, when she was widowed. Counsel for the landlords suggested it was a question of fact, but I can only say that, in my opinion, if the judge had directed his mind to the proper question, there was only one answer to the question before him and there was no evidence to support the conclusion at which he arrived. If, therefore, the late Mr. Lofty was a statutory tenant, the defendant was entitled to succeed, but it was argued in the court below that Mr. Lofty was a contractual tenant. In view of his conclusion on the point with which I have already dealt, the judge did not find it necessary to decide the second question, and we have, therefore, to make up our minds whether we can say that the evidence is so conclusive that we can reach a conclusion, or whether we must send the matter back for decision. I agree with my Lord that the appeal should be allowed and the matter go back, at the plaintiffs' risk, to the court below that the point which the learned judge left undecided may be dealt with.

DENNING, L.J. : I agree. It seems to me that "members of the tenant's family," within s. 12 (1) (g) of the Act of 1920, include not only legitimate children but also step-children, illegitimate children, and adopted children, whether adopted in due form of law or not. If, therefore, at the time of his death, Mr. Lofty was a statutory tenant, his adopted daughter, Mrs. Wollam would be entitled to the protection of the Rent Restrictions Acts. It is said, however, by the landlords that Mr. Lofty was a contractual tenant and not a statutory tenant, and, therefore, according to the decision in *Thynne v. Salmon* (4), she cannot claim the protection of the Acts. There is no finding

- by the county court judge on that point, and it must go back to him to make a determination on it. It will depend on whether at some time in the distant past the contractual tenancy was determined by a notice to quit. I think it important to say that the decision in *Thynne v. Salmon* (4) only applies when it is quite clear that there is a contractual tenancy which has not been determined. Any other view would deprive the members of a tenant's family of
- A a protection which Parliament clearly intended them to have. In many of these cases the original tenancy was created many years ago, and it is often impossible for the present landlord and tenant to say whether, in years past, there has been a notice to quit or a notice of increase which is to be deemed to be a notice to quit. It is well known, however, that in a large number of cases the tenants did become statutory tenants, and, in the absence of any
- B express evidence covering the point, a judge may find a sufficient indication simply from the figure which is being paid for rent. Take the present case. The house has been controlled ever since 1915 when the first Rent Restrictions Act came into force. It was let at a very low rent. The same tenant was in occupation from 1912 until his death. The one indication in the case is that the rent being paid before he died was the sum of 7s. 4½d. That is not a sum
- C which is likely to have been arrived at when the parties were bargaining for a contractual tenancy or even bargaining for a contractual increase. The odd figure of 7s. 4½d. makes it probable that at some time there was a statutory increase, and, as no such increase would have been valid unless there had been a statutory notice of increase in due form, it is to be presumed that such a statutory notice of increase was given, and, once that presumption is made,
- D it follows that there was a statutory tenancy because a statutory notice of increase has the same effect as if there had been a valid notice to quit. That is the sort of indication on which judges may have to act when they deal with these cases years after the original tenancy was created. In this case the judge, on finding that the rent is 7s. 4½d., may infer that there was a notice of increase at some time or another, and, if so, that Mr. Lofty was a statutory tenant and
- E his adopted daughter would be protected by the Acts. I agree with the order proposed by my Lord.

F *Appeal allowed. Case remitted to the county court judge on the question whether the deceased tenant was, at the time of his death, a statutory tenant. Defendant to have the costs of the appeal up to the time of the granting of the poor person's certificate, and thereafter costs appropriate to a poor person. Costs of the hearing below to be reserved to the trial judge.*

Solicitors: *C. R. Enever, Freeman & Co.* (for the adopted daughter); *Champion & Co.*, agents for *Turberville Smith & Co.*, Uxbridge (for the trustees).

[*Reported by C. N. BEATTIE, Esq., Barrister-at-Law.*]

R. v. PADDINGTON AND ST. MARYLEBONE RENT TRIBUNAL.
Ex parte BELL LONDON AND PROVINCIAL
 PROPERTIES, LTD.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Birkett, JJ.).
 March 2, 3, 4, 18, 1949.]

Rent Control—Furnished house—References to tribunal by local authority— A
Reference of 555 flats by local authority—Validity of reference—Taking into
account by tribunal of matters not discussed at hearing—Powers and duties
of tribunals—Furnished Houses (Rent Control) Act, 1946 (c. 34), s. 2 (1).

The landlords owned a block of 555 flats, the majority of which were
 let on short tenancies. At the material time 182 were let furnished, 208
 were occupied by statutory tenants under the Rent Restrictions Acts, B
 124 were let unfurnished at rents controlled under the said Acts, three were
 let as business premises, one was vacant, and the remaining 37 were let
 unfurnished and were not subject to the said Acts. The leases were all in the
 same form, the landlords covenanting to supply gas and electricity. Certain
 services and articles were specified in the leases as to be supplied by the
 landlords, but without any covenant to that effect, and other amenities C
 not mentioned in the leases were, in fact, supplied. On Feb. 27, 1948,
 the landlords received notification that an application had been made
 to a rent tribunal by the local authority under the Furnished Houses
 (Rent Control) Act, 1946, s. 2, for consideration of the rents of all the
 flats. The application had been made by the local authority pursuant
 to their policy that where two or more reductions of rent had been made D
 by the tribunal in respect of any property, all other contracts of letting
 to which the Act applied relating to such property should be referred
 to the tribunal. Reductions had been made in respect of two of the land-
 lords' flats. On Apr. 20, 1948, the tribunal made orders reducing the rents of
 eight of the furnished flats. The landlords now moved for an order of
certiorari to bring up and quash the eight orders made and for an order E
 prohibiting the tribunal from proceeding with the application in respect
 of the remaining flats.

HELD: the purpose of the Act of 1946 was to protect tenants and to
 deal with individual cases where hardship existed; the action of the
 borough council in referring the whole of the flats to the tribunal when
 they had not received any complaints from the tenants and had made F
 no enquiry whether or not all the flats were furnished or the tenants
 entitled to services rendered by the landlords, and no enquiry whether
prima facie any one of the rents charged was unfair, was not a genuine
 exercise of the power conferred on them by the Act; and the reference
 was, therefore, wholly vitiated.

In giving their decision in the eight cases in which orders were made, G
 the tribunal stated that one of the factors which they took into account
 was that the flats were not up to modern standards because in no flat
 was the ceiling more than eight feet from the floor. Members of the tribunal
 had ascertained this fact by personal observation on inspection of the
 premises, and the point was not mentioned during the hearing.

HELD: even if the reference to the tribunal had not been invalid, the H
 fact that the landlords had been given no opportunity of dealing with
 the question whether the flats were up to modern standards was sufficient
 ground for quashing the order.

Board of Education v. Rice ([1911] A.C. 179; 104 L.T. 689), *applied*.

Per cur.: "If premises are let furnished or if the landlord has contracted
 in the case of either furnished or unfurnished premises to supply or render
 services, the tribunal can only consider whether the rent is fair for that

which the landlord has contracted to give. If he breaks his contract, that cannot be used as a ground for reducing the rent because the law does not allow a reduction of rent by way of damages. If, however, the landlord lets premises, but does not contract to give or render any services, the tribunal will have jurisdiction only if the premises are let furnished. If they are, the tribunal, in considering what is a fair rent, must take into account the services and amenities which the landlord, in fact, is supplying and the tenant enjoying, and which there is every reason to suppose will be continued, as obviously a tenant would be willing to pay a higher rent with the amenities and services than without them, and it is just that he should. So, too, if the premises are let furnished or unfurnished, but the landlord contracts to supply certain services and does, in fact, supply, though without obligation to do so, other services and amenities. In either of those cases, if the landlord ceases for whatever reason to continue the supply of all or any of what I may call the non-contractual services, the tribunal can reduce the rent to what would be fair with the contractual services plus such non-contractual services as he may continue to render, because, though the landlord commits no breach of contract, the tenant has a less valuable holding, and one for which a lower rent would be appropriate. In short, the rent ought to be fixed *rebus sic stantibus*."

R. v. Hampstead and St. Pancras Furnished Houses Rent Tribunal. Ex p. Ascot Lodge, Ltd. ([1947] 2 All E.R. 12; [1947] K.B. 973; 176 L.T. 560) and *R. v. Paddington and St. Marylebone Rent Tribunal. Ex p. Bedrock Investments, Ltd.* ([1947] 2 All E.R. 15; [1947] K.B. 984; 176 L.T. 562), explained.

[FOR THE FURNISHED HOUSES (RENT CONTROL) ACT, 1946, s. 2, see HALSBURY'S STATUTES, Vol. 39, pp. 230-232.]

Cases referred to :

- (1) *R. v. Paddington and St. Marylebone Rent Tribunal. Ex p. Bedrock Investments, Ltd.*, [1947] 2 All E.R. 15; [1947] K.B. 984; 176 L.T. 562; 111 J.P. 367; 2nd Digest Supp.
- (2) *Biddulph v. St. George's, Hanover Square*, (1863), 3 De G. J. & Sm. 493; 2 New Rep. 212; 8 L.T. 558; 27 J.P. 579; 38 Digest 46, 270.
- (3) *Dormer v. Newcastle-upon-Tyne Corpn.*, [1940] 2 All E.R. 521; [1940] 2 K.B. 204; 163 L.T. 266; 104 J.P. 316; 2nd Digest Supp.
- (4) *Thomson v. Clanmorris (Lord)*, [1900] 1 Ch. 718; 82 L.T. 277; 32 Digest 320, 57.
- (5) *Board of Education v. Rice*, [1911] A.C. 179; 104 L.T. 689; 75 J.P. 393; 42 Digest 614, 141.
- (6) *R. v. Hampstead and St. Pancras Furnished Houses Rent Tribunal. Ex p. Ascot Lodge, Ltd.*, [1947] 2 All E.R. 12; [1947] K.B. 973; 176 L.T. 560; 111 J.P. 349; 2nd Digest Supp.

MOTION for an order of *certiorari* by landlords to bring up and quash eight orders made by the respondent rent tribunal on May 5, 1948, under the Furnished Houses (Rent Control) Act, 1946, whereby they ordered that the rent of eight flats owned by the landlords should be reduced. The landlords also moved for an order prohibiting the tribunal from proceeding with other references in respect of flats owned by them. The orders of *certiorari* and prohibition issued. The facts appear in the judgment of the court.

Sir Valentine Holmes, K.C., and *Derek Walker-Smith* for the landlords.
The Solicitor-General (Sir Frank Soskice, K.C.) and *H. L. Parker* for the rent tribunal.

H. I. Willis for the borough council.

Cur. adv. vult.

Mar. 18. **LORD GODDARD, C.J.**, read the following judgment of the court. Counsel moves on behalf of Bell London and Provincial Properties, Ltd., for an order of *certiorari* to bring up eight orders made by the Rent Tribunal for Paddington and St. Marylebone on May 5, 1948, under the Furnished Houses (Rent Control) Act, 1946, whereby they ordered the rents of flats Nos. 29, 77, 92, 136, 189, 207, 614 and 623 Park West, W.2, of which the applicants are the landlords, to be reduced. He also moves for an order prohibiting the tribunal from proceeding with references relating to any other flats at Park West made or purporting to be made by the Paddington Borough Council to the tribunal. The questions raised by these motions are of great public interest and importance, especially to the owners of blocks of flats, and it is satisfactory, therefore, that the case has been fully argued for the tribunal and for the borough council who both opposed the motions.

The facts, which, to say the least, are unusual, are fortunately not in dispute. Park West is a large modern building containing 555 flats. Its situation may be described as at the junction of Kendal Street and Edgware Road not far from the Marble Arch. The majority of the flats are let on short tenancies, and, in fact, the eight in respect of which orders have been made are all let for three months only. To a great many of them the provisions of the Rent Restrictions Acts apply, so that the rents are controlled. At the material time 182 flats were let furnished, and of the rest 208 were occupied by statutory tenants (that is, by persons holding over at controlled rents under the provisions of the Acts), 124 were let unfurnished at rents controlled under the Acts, three were let as business premises, one was vacant, and the remaining 37 were let unfurnished and were not subject to the Acts. All the leases are in the same form and under them the landlords covenant to supply gas and electricity. The leases set out a variety of services and things which the landlords say they will supply, but subject to their right to withdraw them at any time without notice, so there is no covenant to supply them, and there are a variety of services which are, in fact, supplied, such as lifts, refuse collection and a swimming pool which are not mentioned in the leases. In short, the tenants have the advantages and amenities usually found in blocks of high class flats in the West End of London, with every reason to expect that they will continue to enjoy them during the occupancy though the landlords do not bind themselves to supply them. As a matter of business and common sense the landlords will, of course, do their best to give these services, knowing full well that, if they do not, their chance of letting at remunerative rents would be greatly imperilled.

It is worth noticing here that since it has been decided both in this court and the Court of Appeal in *R. v. Paddington and St. Marylebone Rent Tribunal, Ex p. Bedrock Investments, Ltd.* (1) that these tribunals cannot reduce rents below the standard rents and as vacancies and business premises are not within the Act of 1946, there would seem to be no conceivable purpose or good reason for referring 336 of these flats to the tribunal. However, although in February, 1948, the landlords seem to have been on the best of terms with their tenants' on Feb. 27 they received from the tribunal forms, known as F.R.4, in respect of each flat in the block, notifying them that an application had been made to them by the local authority to consider the rent of flat number so and so, and each notice was accompanied by Form F.R.4A requiring the lessor under severe penalties to give the information specified in the form. At the same time there were served on each of the tenants two forms addressed to them, not by name, but as the occupier of such and such a flat. We need not describe or particularise them, for the tenants for whose assistance and protection these forms were presumably served—and, no doubt, under the regulations they were quite properly served by the tribunal—one and all just ignored them. So 2,220 forms were sent out and the expenditure on paper and postage, to

say nothing of the clerical labour involved, must have been quite considerable.

How then did this all come about? It seems that in the summer of the previous year two tenants of flats at Park West had referred their agreements to the tribunal and obtained a reduction of rent. On what grounds the tribunal acted in those cases we were not informed. Those applications seem to have escaped the recollection of the manager of the flats, as he said in his affidavit that no tenant had ever complained of his rent, but of the merits or grounds on which reductions were granted we know nothing. For present purposes they are, doubtless, immaterial, but we now learn from the affidavit of the chairwoman of the public health committee of the borough council, to which the council had delegated their powers under the Act, that on Dec. 3, 1947, and again on Jan. 14, 1948, the committee decided as a matter of policy that in the case of any property in respect of which two or more reductions of rent had been made either before or after Dec. 3, 1947, by the tribunal, all other contracts of letting to which the Act applied (mark those last five words) relating to such property should be referred to the tribunal. Accordingly, they instructed the town clerk to refer by a single reference all the contracts in Park West to which the Act applied. It is only fair to the town clerk to say that we were informed by counsel that he advised that a single reference was bad. He has filed no affidavit and all we know is that on Feb. 3, by a notice known as F.R.1, a reference was made to the tribunal. It is in these terms: "I hereby apply to the tribunal to fix the rent payable for the premises described below." Then the form provides a space for the address of premises, stating whether the premises consist of the whole or only part of a house, and the address given is simply "Park West, W.2." A second space is for the insertion of the name of the person to whom the premises are let. This is filled in as follows:

"All contracts of tenancy within the above-mentioned property to which the F.H. (R.C.) Act, 1946 applies, other than those contracts previously referred to the tribunal (scheduled over-leaf)."

The schedule contains the numbers of two flats, 457 and 359, which are the two that we have already mentioned as having been previously referred. The applicants' name and address is given as that of the person by whom the premises are let, and the fourth space on the form is for the purpose of stating whether the premises are let with (a) use of furniture and (b) services. No answer was given to that requirement.

It was in consequence of that so-called reference that the first 2,220 forms were sent out. We may here state that neither the counsel for the tribunal nor counsel for the borough council contended that that reference was good. Counsel for the tribunal said that he did not attempt to support it because it did not give the names of the lessees as the regulations which prescribed this form required. That is an exceedingly narrow ground, and, as will be found from the judgment of this court, in their opinion, far more serious grounds exist for impugning the validity of that reference. The next thing that happened was that, apparently because the town clerk's opinion prevailed, though here again the matter has not been explained, the borough council proceeded to make individual references of each flat. Form F.R.1 was sent to the tribunal in 302 cases, though whether they were all sent in on the same day we do not know, nor does it matter. On Mar. 22 the tribunal sent to the landlords 46 letters saying: "I am directed by the tribunal to request you to return the enclosed form F.R.4A, duly filled in and completed by Apr. 5, 1948," so 46 more forms, F.R.4A, were sent, and thereafter batches of 86, 84 and 89 were sent in, all dealing with different individual flats, making a total of 305 and as, apparently, two notices were sent to each tenant, something like 1,200 more documents of one sort or another were served either on the landlords

or on the tenants. In the references which were sent to the clerk to the tribunal the forms were now filled in so as to give a number to each flat as the address, a lessee's name was filled in, and in the space where the person applying to the tribunal has to state whether the premises are let with use of furniture and/or services, the answer "Yes" is given both as to furniture and as to services. We have not seen, naturally enough, all these forms of reference, but counsel for the borough council told us that they were all in exactly the same form. Where the town clerk got the names of the occupants of the flats we do not know. Except for the affidavit from the chairwoman of the public health committee, which informed the court of the policy adopted by the council to which we have already referred, the council have not thought fit to file any evidence. What does appear, however, is that in many cases the names of the lessees of the flats are wrongly given, in some cases former lessees are mentioned, in others lessees are shown as occupying flats which were at the time, in fact, vacant. All flats are shown as furnished, irrespective of whether they were let with furniture or not, and most were not.

It is, therefore, perfectly clear that no sort of inquiry or investigation could have been made by the borough council before referring all these flats to the tribunal. It is certainly regrettable that documents of this nature, which institute proceedings and must put landlords to great trouble and considerable expense, should be prepared in this way without any real regard to the accuracy of the information sent to the tribunal. It is clear, indeed, that this purported reference of individual flats was in substance nothing more than the block reference made in February, though it might, we suppose, be described as an endeavour to comply with the letter of the Act while letting the spirit take care of itself. It is, however, right to say that, these references having been made, it is difficult to see that the tribunal could have done anything except act on them, though at the risk of serious depletion of their stock of forms. We do not propose to deal in detail with the correspondence which took place between the landlords and the tribunal beyond saying that we think it was regrettable that the tribunal never let them see the block reference in the first place nor do we understand what reason there was for the refusal.

To complete the history, on Apr. 20 the tribunal considered the eight cases in which orders were made, and in each case those flats were furnished. It has been contended before us that there can be no ground for a *certiorari* in respect of those flats, at least on the ground that there was no proper reference. It is said that there were here flats which clearly came within the Act, and, therefore, that the tribunal had not only jurisdiction, but were, indeed, bound to hear the cases in relation to them. In our opinion, however, if there was no proper reference the proceedings were bad *ab initio*, and, although it may well be that the tribunal did not know that the proceedings were bad, if they were they had no jurisdiction to adjudicate. The first question we have, therefore, to consider is whether or not there ever was a valid reference in any of these cases.

The material section of the Act is s. 2 (1) and (2). Omitting words which are immaterial for the purpose of this case, sub-s. (1) provides :

"Where a contract has . . . been entered into whereby one person . . . grants to another person . . . the right to occupy as a residence a house or part of a house . . . in consideration of a rent which includes payment for the use of furniture or for services . . . it shall be lawful for either party to the contract or for the local authority to refer the contract to the tribunal for the district, and where any such contract (hereinafter referred to as 'a contract to which this Act applies') is so referred to the tribunal, they may by a notice in writing served on the lessor require him to give to them, within such period . . . as may be specified in the notice,

such information as they may reasonably require regarding such of the prescribed particulars relating to the contract as are specified in the notice."

Sub-section (2) provides :

A "Where any contract to which this Act applies is referred to a tribunal . . . the tribunal shall consider it and, after making such inquiry as they think fit, and giving to each party . . . an opportunity of being heard, or, in his option, of submitting representations in writing, shall approve the rent payable under the contract or reduce it to such sum as they may, in all the circumstances, think reasonable, or may, if they think fit in all the circumstances, dismiss the reference, and shall notify the parties and the local authority of their decision in each case."

B Other sections of the Act provide for the local authority keeping a register of the tribunal's decisions, and by s. 4 it is made unlawful to require or receive payment of any sum in excess of the rent entered in the register, and, in addition, it is provided that any excess may be recovered. A person who requires or receives any payment in contravention of the section is liable to
C a fine not exceeding £100 and imprisonment for a period not exceeding six months.

In considering whether there has been a valid reference by the local authority, it is necessary, in our opinion, to consider whether on the facts of this case there has been a valid and *bona fide* exercise of the powers conferred by Parliament on them. That the court can interfere with the exercise of powers
D by local authorities is not, we think, open to doubt. In *Biddulph v. St. George's, Hanover Square* (2), TURNER, L.J., said (3 De G. J. & Sm. 502) :

" . . . I am far from thinking that this court has not power to interfere with public bodies in the exercise of powers which are conferred on them by Act of Parliament. I take it that it would be within the power and the duty of this court so to interfere in cases where there is not a
E *bona fide* exercise of the powers given by Parliament ; and I should be very sorry to be supposed to entertain the notion that public bodies, under the general powers given to them by Act of Parliament, can do whatever they think right."

The question also incidentally arose in *Dormer v. Newcastle-upon-Tyne Corpn.* (3).
F In that case under a local Act the corporation were authorised to place and maintain in any street any posts, rails, or other fence for the protection of passengers and traffic. The Court of Appeal held that there had been a perfectly proper use of the corporation's powers, but, in dealing with an argument which was advanced that, unless some limitation were put on their powers, the corporation could erect a high close-boarded fence in front of
G private premises, I said ([1940] 2 All E.R. 527) :

" . . . if, in the exercise, or purported exercise, of that power, the corporation put up a close-boarded fence ten or twelve feet high along the edge of the path, it might very well be that the frontagers . . . could say : 'This is not the sort of thing which Parliament ever intended that you should have the right to do. It is not an exercise of the powers which
H have been given to you, because, while you are purporting to exercise that power, in fact you are doing something entirely different '."

Now we approach the consideration of this Act bearing in mind the words of LINDLEY, M.R., in *Thomson v. Lord Clanmorris* (4) where he said ([1900] 1 Ch. 725) :

" . . . in construing any . . . enactment, regard must be had not only to the words used, but to the history of the Act, and the reasons

which led to its being passed. You must look at the mischief which had to be cured as well as at the cure provided."

The object of this Act is well known. It is to protect tenants who, at a time when accommodation was and is exceedingly difficult to obtain, were and are exposed to the risk of being charged exorbitant rents, but it is an Act designed for the protection of the tenants and not for the penalising of landlords. It was passed at a time when the housing position was such that there was often no real freedom of contract between landlord and tenant and the latter had to pay what was demanded. No doubt, it was for this reason that Parliament did not confine the Act only to lettings below a certain rent. At the same time it does not follow that all landlords are rapacious, or that all rents are, at a time when demand exceeds supply, necessarily unreasonable. No doubt, the reason why it was provided that cases might be referred by a local authority was because it was recognised that there might be tenants who would hesitate themselves to refer the case for fear of the consequences that might befall them, but it could never have been intended that local authorities could refer cases respecting which they had neither received complaint from the tenant nor had made any inquiry whether there was a *prima facie* case or anything to indicate that there was any unfairness in the rent charged. The borough council in question have decided as a matter of policy that in the case of any property in respect of which two or more reductions in rent had been made, all the contracts of letting to which the Act applied relating to such property should be referred to the tribunal. This may be a perfectly proper course to take in respect of certain cases, as, for instance, one or two houses in the same ownership all of which are let out in separate tenements to poor or working class persons, but to apply this policy to 555 flats without any inquiry, or, indeed, knowledge, whether the Act applies or not is an entirely different matter. If any such wholesale reference could be regarded as a legitimate exercise of their powers, it follows that the borough council could refer the whole of the tenancies in the borough of Paddington to the tribunal, and that whether there had been any previous reduction or not.

It was never intended that this Act should provide for general rent fixing throughout a district. The purpose is to deal with individual cases where hardship exists or may be reasonably supposed to exist. The result of the action of the borough council in this case is that a great number of tenancies have been referred regardless of whether the premises are furnished or unfurnished and without making any inquiry whether they are or not, regardless of whether any relief could be obtained by reason of the application of the Rent Restrictions Acts to the flats, regardless of whether the premises are occupied as dwelling-houses or business premises, and regardless also of the wishes of the tenants which surely ought, at least, to be taken into account. It is one thing for a local authority to act for the protection of tenants who may be unable to take care of themselves, but it is quite another thing for them to act in the case of those who may be presumed to be capable and competent to act in their own interest and who may have the greatest dislike for any interference with their contract of tenancy. It is worth noticing in this connection that the result of a reduction is that it would not only be a criminal offence for the landlord to receive rent at the unreduced figure, but it would equally be an offence for the tenant to pay it as he would thereby be aiding and abetting an offence, and, if he offered it, he would be guilty of inciting the landlord to commit an offence, and yet there must be many tenants who, having found a flat that suits them and having agreed to pay what they regard as a reasonable rent, would resent being told that they were no longer entitled honourably to carry out obligations into which they have deliberately entered and which they have neither the desire nor the intention of evading.

In our opinion, the action of the borough council in referring the whole of

these flats in the manner they have done is not a genuine exercise of the powers conferred on them by the Act, and we cannot refrain from saying that it is regrettable that in the form of reference information purports to be given to the tribunal which is quite inaccurate and has been given without the slightest attempt to see that it was accurate. We refer more particularly to the statement on all the forms that the flats were furnished when it now appears that the great majority were not, and we call particular attention to the fact that no evidence has been filed by the borough council to offer any explanation of this. In our opinion, these considerations vitiate the whole reference, and the fact that the tribunal picked out eight flats which do happen to have been furnished does not turn an invalid reference into one which is valid. No more attempt had been made by the council to consider whether there was any ground for referring those cases than in any other. The proceedings at the hearing were truly remarkable. The council called no evidence. They did not put forward a single argument. Their representative merely informed the tribunal that, as there had been two previous references by tenants, the council had commenced referring the remainder of the contracts of tenancy to the tribunal. When witnesses were called by the landlords not a single question in cross-examination was addressed to them. We have not been informed of any facts relating to the two previous cases in which reference was made or the grounds on which the tribunal granted a reduction. It may very well be that they acted on the same view of the Act as that on which they acted in the cases now before the court and which, in the opinion of this court, is erroneous. However that may be, we cannot agree that in the circumstances of this case the mere fact that two tenants had of their own motion complained and obtained some relief is any justification for this wholesale reference by the council.

That is really enough to dispose of this case, but there are other grounds on which it is said that *certiorari* should be granted. It appears that before the tribunal entered on the hearing there was an inspection of the flats by the members. In giving their decision the tribunal said :

" In fixing the rents of the various flats it is not out of place to point out that these flats are not up to modern standards. In no single flat is the ceiling more than eight feet from the floor. This is less than is required by present day standards."

It appears from the affidavit of the chairman of the tribunal that during the course of the inspection they had some conversation with a Mr. Marshall, described as the manager of Park West, and another member of the staff, and that one or other of them, it is not clear which, agreed that the height of the ceiling, which was measured, was less than that required by present day standards. It is no part of the duty of this court to review a finding of fact by the tribunal, though it is certainly remarkable that it should be found that flats of this description, erected, as we were informed, very shortly before the late war, the plans of which must have been passed and approved by the London County Council, do not conform to present day standards when it is notorious that the building of this class of flats has not been allowed since the war, but not a word was said by anybody during the hearing, or at any time before the decision was given, as to this being a ground for reduction of rent. In fact, it took the advisers of the landlords entirely by surprise, and surely in common fairness, if this was to be considered by the tribunal, they ought to have given the applicants some opportunity of dealing with it. That this could ever have been in the minds of the borough council in referring these matters it is impossible to suppose and, as we have already said, not a single word was said by the representative of the borough council as to any of the grounds on which the tribunal was invited to act. In our opinion, to

take into account a matter of this kind, of which no sort of intimation had been given to the landlords, brings this case exactly within the decision of the House of Lords in *Board of Education v. Rice* (5), the judgments in which are so well known that we need not set them out. On that ground alone we think that the eight determinations in this case, even if the references were unobjectionable, would have to be quashed.

Other grounds were put forward by counsel for the applicants, among them that, as the tribunal had given a reasoned decision, he could attack the orders on the ground that they were bad on their face. We do not think it necessary to give any decision on this point, which would involve the consideration of a large number of cases, and any opinion we might express on it might, in view of the matters with which we have already dealt, be said to be *obiter*, though, of course, if this case should go higher the point will remain open and can be taken in another court. A B

In giving the decision of the tribunal, the chairman said that before recent judgments of this court it had been their practice to take into account in their calculations the value of the services actually provided by the landlord. After quoting passages from my judgment in *R. v. Hampstead and St. Pancras Furnished Houses Rent Tribunal, Ex p. Ascot Lodge, Ltd.* (6) and from the judgments of myself and ATKINSON, J., in *R. v. Paddington and St. Marylebone Rent Tribunal, Ex p. Bedrock Investments, Ltd.* (2), he said that, in consequence of those judgments, they were unable to allow for the other services as they would wish to do. With all respect we think the tribunal has misunderstood what was said. I thought I had made myself clear and can only be sorry if I did not. In the first place, it must be remembered that both those cases were dealing with what was necessary to give the tribunals jurisdiction to hear the cases, and, in my opinion, the *dictum* of ATKINSON, J., in the *Bedrock* case (1), on which reliance was placed, dealt only with this matter. It was laid down that an unfurnished flat did not come within the jurisdiction of the tribunal by reason of the landlord rendering services in fact unless the lease contracted or covenanted to give them. When I went on to express an opinion for the guidance of the tribunal, I pointed out that, if a landlord had contracted to give certain services and had broken his agreement, the tribunal could not reduce the rent on that account because the tenant's remedy was then to obtain damages and the law does not permit a reduction of rent by way of damages. I repeated this in the *Bedrock* case (1) and said further that the tribunal could not reduce the rent, and, of course, I meant one that was otherwise fair, because the lease did not provide for something that in the negotiations the landlord had said he intended to provide. In other words, the tribunal could not act as a court of rectification. D E F

As counsel for the tribunal invited us to express an opinion as to the true interpretation of the Act for the guidance of tribunals, let me again endeavour, with the concurrence of the other members of the court, to make this matter clear. In our opinion, if premises are let furnished or if the landlord has contracted in the case of either furnished or unfurnished premises to supply or render services, the tribunal can only consider whether the rent is fair for that which the landlord has contracted to give. If he breaks his contract, that cannot be used as a ground for reducing the rent because the law does not allow a reduction of rent by way of damages. If, however, the landlord lets premises, but does not contract to give or render any services, the tribunal will have jurisdiction only if the premises are let furnished. If they are, the tribunal, in considering what is a fair rent, must take into account the services and amenities which the landlord, in fact, is supplying and the tenant enjoying and which there is every reason to suppose will be continued, as obviously a tenant would be willing to pay a higher rent with the amenities and services than without them, and it is just that he should. So, too, if the premises are G H

let furnished or unfurnished, but the landlord contracts to supply certain services and does, in fact, supply, though without obligation to do so, other services and amenities. In either of those cases, if the landlord ceases for whatever reason to continue the supply of all or any of what I may call the non-contractual services, the tribunal can reduce the rent to what would be fair with the contractual services plus such non-contractual services as he may continue to render, because, though the landlord commits no breach of contract, the tenant has a less valuable holding, and one for which a lower rent would be appropriate. In short, the rent ought to be fixed *rebus sic stantibus*.

The result is that an order of *certiorari* will issue to bring up and quash the determination of the tribunal in respect of the eight flats above mentioned, and an order will issue prohibiting the tribunal from proceeding to inquire into the remainder of the 302 flats at Park West referred to them by the borough council. The borough council will pay the costs of these proceedings.

Order accordingly.

Solicitors: *Simmons & Simmons* (for the applicants); *Solicitor, Ministry of Health* (for the tribunal); *Town Clerk, Paddington* (for the borough council).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

D SEBEL PRODUCTS, LTD. v. COMMISSIONERS OF CUSTOMS AND EXCISE.

[CHANCERY DIVISION (Vaisey, J.), March 9, 16, 1949.]

Purchase Tax—Money paid under mistake of law—Payment while liability subsists.

In an action in the Chancery Division the plaintiffs claimed a declaration that one of the products of their manufacture was exempt from purchase tax, but on May 11, 1948, while the action was pending, they paid to the Commissioners of Customs and Excise the amount of tax which would be due if they were held liable. On July 2, 1948, VAISEY, J., decided the claim in the plaintiffs' favour and they were given liberty to apply for an account of the tax paid by them. In an application made under the liberty to apply the plaintiffs asked for an account of tax paid by them and the refund of the amount found due, but the commissioners resisted the application on the ground that the sums paid by the plaintiffs had been paid voluntarily under a mistake of law, and, were, therefore, irrecoverable.

HELD: (i) in view of the provisions of the Crown Proceedings Act, 1947, s. 21 (1), the commissioners in an appropriate case were entitled to refuse to refund money paid to them voluntarily under a mistake of law, but

(ii) on the facts of the present case, the intention of the plaintiffs when paying the money and of the commissioners when receiving it was that it should be refunded if the plaintiffs were successful in the pending action, and, therefore, the plaintiffs were entitled to repayment.

[AS TO MONEY PAID VOLUNTARILY UNDER A MISTAKE OF LAW, see HALSBURY, Hailsham Edn., Vol. 23, pp. 166-169, paras. 243-249; and FOR CASES, see DIGEST, Vol. 35, pp. 158-163, Nos. 543-586.]

Cases referred to:

(1) *William Whiteley, Ltd. v. R.* (1909), 101 L.T. 741; 35 Digest 159, 556.

- (2) *National Pari-Mutuel Assocn., Ltd. v. R.*, (1930), 47 T.L.R. 110; Digest Supp.
 (3) *Re Tyler, Ex p. Official Receiver*, [1907] 1 K.B. 865; 97 L.T. 30; 29 Digest 385, 3083.

ADJOURNED SUMMONS to determine whether the defendants, the Commissioners of Customs and Excise, who had received payment of money as purchase tax at a time when the taxpayers' liability to pay the tax was *sub judice*, they subsequently being held not chargeable to the tax, were entitled to retain the money as having been paid voluntarily under a mistake of law. VAISEY, J., held that the defendants were not so entitled and ordered them to repay the money. The facts appear in the judgment.

Hald, K.C., and *J. P. Graham* for the plaintiffs.

H. L. Parker (John Ellison with him) for the defendants.

Cur. adv. vult.

Mar. 16. VAISEY, J., read the following judgment. The plaintiffs claimed a declaration that one of the products of their manufacture, known as a "Mobo Rocker Swing," was not liable to purchase tax on the ground that it was a "swing" within the meaning of that word as used in the exempting provision of the Finance Act, 1947, sched. V. The defendants, the Commissioners of Customs and Excise, disputed the claim, and contended that the tax was leviable. The claim was decided by me on July 2, 1948, and by an order of that date I made the appropriate declaration in the plaintiffs' favour, ordered the defendants to pay to the plaintiffs their costs, and gave liberty to the plaintiffs to apply for an account of the purchase tax already paid by them or otherwise as they might be advised. The plaintiffs, by a summons dated Nov. 12, 1948, now ask, under the liberty to apply, for an account of the purchase tax which they have paid, although they were not liable to pay it, to the defendants in respect of their Mobo Rocker Swings; for payment or repayment of the amount found due; and for the costs of the application. The defendants seek to resist these claims on the ground that the amount of the tax was paid by the plaintiffs voluntarily under a mistake of law, and is, therefore, according to well settled principles, irrecoverable.

When the question of the liability of these articles to purchase tax was, in and after December, 1947, under friendly discussion between the respective representatives of the parties, it was at first suggested that the matter should be tested by the plaintiffs withholding the tax and the defendants suing them for the recovery of it. A second proposal was that one sale should be made without charging or accounting for the tax, and that proceedings should be brought in respect of that one sale. There were obvious objections to both these courses, and the present action was instituted, and it followed the course and resulted in the conclusion already described. On May 11, 1948, incautiously, and to some extent inexplicably, the plaintiffs paid to the defendants the amount of the purchase tax which would (if the plaintiffs' claim in the action had failed) have been owing to the defendants in respect of the purchase tax on a number of Mobo Rocker Swings, the exact amount so paid being £1,919 5s. 5d. Some of those Rocker Swings had been sold at prices which included the tax to members of the public who cannot be traced, and the plaintiffs now claim to recover only so much of the £1,919 5s. 5d. as is attributable to the rest of the Rocker Swings, which either have been or will be sold at prices exclusive of purchase tax. The figure has been agreed, so that, if the plaintiffs are entitled to relief on this application there need be no account, but only an order for the payment or repayment of the agreed sum.

The chairman of the plaintiffs' board of directors has sworn an affidavit that his own clear understanding was that the money paid (on a date after the action had been set down for trial) would be refunded or accounted for

by the defendants in the event (which happened) of the decision in the action being in the plaintiffs' favour, and of his own belief, first, that the defendants' representative, a Mr. Barnett, shared that understanding, and also, secondly, that Mr. Barnett was entitled to agree to such an arrangement so as to bind the defendants. Mr. Barnett is on the staff of the solicitor for the defendants, and the extent of his authority in the matter is unknown to me and may be somewhat difficult to define. He also has sworn an affidavit disclaiming the understanding attributed to him and denying that, so far as he himself is concerned, any agreement for the repayment of the money was ever made.

It is not as a rule easy to find the person who in a government department is he whose authority enables him to bind that department as party to an agreement or to waive on behalf of that department any of its legal rights.

In the present case I cannot find that there was here any express agreement in the matter, even assuming that Mr. Barnett had power to make one. The question here must, in my judgment, be put from a somewhat different angle, and I ask myself, first, with what intention the plaintiffs paid the money, and, secondly, with what intention the defendants received it? If the intention was the same on both sides, the result, in my judgment, was that an agreement was made between the parties by implication. The intention of the plaintiffs was, to my mind, clear. They expected to recover the money if they won their action. What was the intention of the defendants? It is irrelevant to speculate on what, if anything, was in the mind of the clerk or other subordinate officer who actually received the money or in the mind of the officer who paid it into the bank to the defendants' credit, and I must assume the existence of some person in the defendants' employment who accepted and appropriated the money with a full knowledge of all the facts, particularly the discussion which had preceded the institution of the action and the pending of the action itself, who knew and realised that the right of the defendants to receive the money was at the moment *sub judice*, and, indeed, on the point of coming before this court for decision. What would that hypothetical person have thought about it? In my judgment, he would inevitably have come to the conclusion, as a matter of necessary inference, that the plaintiffs were paying and the defendants accepting the money subject to repayment if the action resulted in the plaintiffs' favour. If, however, he had entertained any doubt on the matter, I feel sure that he would as a matter of courtesy have refused to accept the money until the position had been made clear to him. What is, to my mind, incredible, is that he could ever have supposed that the money was being either paid by the plaintiffs or received by the defendants on the footing that the defendants were to keep it in any event. I come, therefore, to the conclusion that the intentions of the plaintiffs and the defendants were identical. In other words, I find that there was an agreement.

An alternative short answer to the problem might be that the plaintiffs cannot possibly be said to have been under a mistake as to the law at a time when they were in the very act of asking the court to tell them what the law was. I need not, however, enlarge on this point.

By the Crown Proceedings Act, 1947, s. 21 (1), the defendants are placed in the same position as the ordinary subjects of the Crown and I see no reason why they should not in appropriate cases refuse to refund money paid to them voluntarily under a mistake of law as the revenue authorities were held to be entitled to do in the case of *William Whiteley, Ltd. v. R.* (1) and *National Pari-Mutuel Asscn., Ltd. v. R.* (2). At the same time I cannot help feeling that the defence is one which ought to be used with great discretion, and that for two reasons. First, because the defendants, being an emanation of the Crown, which is the source and fountain of justice, are, in my opinion, bound to maintain the highest standards of probity and fair dealing comparable with those which the courts, which derive their authority from the same source

and fountain, impose on the officers under their control: see *Re Tyler* (3). Secondly, because the taxpayer, who is too often tempted to evade his liability and to keep in his own pocket money which he ought to have paid to the revenue, will find too ready an excuse in the plea that the revenue authorities will, if they can, keep in their coffers, if they can get it there, money which the taxpayer was under no obligation to pay to them and they had no right to demand. Although such an excuse would have no validity in either a court of law or in the forum of the taxpayer's own conscience, I think that, in the public interest, grounds for proffering it should, so far as possible, be avoided. While the defendants' resistance to the plaintiffs' claim in the present case has obliged me to make these general observations, I do not forget or overlook the policy of courteous consideration adopted, as a rule, by government departments in their dealings with members of the public, so that any deviation or apparent deviation from it is rightly regarded as exceptional. I order the defendants to pay to the plaintiffs the agreed sum without interest, and also their costs of this application.

Order accordingly.

Solicitors: *Titmuss, Sainer & Webb* (for the plaintiffs); *Sir Nazeby Harrington*, Solicitor to H.M. Customs and Excise (for the defendants).

[*Reported by H. McL. MORRISON, Esq., Barrister-at-Law.*]

Re FLETCHER (deceased). BARCLAYS BANK LTD. v. EWING AND OTHERS.

[CHANCERY DIVISION (Roxburgh, J.), March 15, 16, 1949.]

Will—"Children"—*Inclusion of adopted children—Adoptive mother incapable of bearing children—Adoption of Children Act, 1926 (c. 29), s. 5 (2).*

On Oct. 31, 1939, a testator made a will in American form disposing of his assets in the United States of America and directing his American trustee after the death of M. to pay over the whole of his trust estate to his "daughter H. if living and if not then in equal shares to her child P. and any other child or children of my said daughter her surviving who would be entitled to share in her estate had she died intestate a resident of the State of New York and possessed of personal property." On June 8, 1942, the testator made a will in English form by which he devised and bequeathed his residuary English estate to his trustee on trust for his daughter H. "absolutely if she be living at my death but if she be then dead then and in that event for all and every the children or child (if only one) of my said daughter living at my death who being sons or a son have attained or shall attain the age of 21 years or being daughters or a daughter have attained or shall attain that age or previously marry and if more than one in equal shares as tenants in common." By cl. 5 of the English will he declared that his will should "be read in conjunction with and not as in any way overriding or revoking (except and in so far as may be necessary for the purpose of giving effect to the directions concerning the disposition of my English will as herein contained) the will already executed by me to deal with my estate and assets in the United States of America . . ." H., who was domiciled in the United States, was living at the date of the English will, but she predeceased the testator. At all material times she was incapable of bearing a child, a fact known to the testator, but in June, 1938, she had adopted the boy, P., and in March, 1942, she had adopted a girl, I. On the question whether P. and I. were "children" of H. for the purposes of the distribution of the testator's estate:—

HELD : it was proper to apply the principles applicable in the case of illegitimate children ; the Adoption of Children Act, 1926, s. 5 (2) (which provides that, unless the contrary intention appears, the words " child " and " children," where used in any disposition, shall not apply to an adopted child) did not operate to exclude in the present case evidence which would be admissible in the case of an illegitimate child ; it was impossible in the circumstances, which were fully known to the testator, that any legitimate children could take under the bequest ; and, therefore, P. and I. were entitled.

Dictum of LORD CAIRNS in Hill v. Crook, (1873), (L.R. 6 H.L. 282), applied.

[AS TO DESCRIPTION BY RELATIONSHIP, see HALSBURY, Hailsham Edn., Vol. 34, pp. 292-298, paras. 344-348 ; and FOR CASES, see DIGEST, Vol. 44, pp. 807-818, Nos. 6603-6696.]

Cases referred to :

(1) *Hill v. Crook*, (1873), L.R. 6 H.L. 265 ; 44 Digest 808, 6614.

(2) *Re Wohlgemuth*, [1948] 2 All E.R. 882 ; [1949] Ch. 12.

ADJOURNED SUMMONS to determine whether a bequest to the children of the testator's daughter included adopted children. At all material times there was, to the knowledge of the testator, no possibility of the daughter bearing a child. ROXBURGH, J., held that adopted children were included. The facts appear in the judgment.

Droop for the plaintiffs, the executors of the will.

Pascoe Hayward, K.C., and *Wilfrid M. Hunt* for the first and second defendants, the adopted children.

E. Blanshard Stamp for the third and fourth defendants, daughters of the testator.

Maurice Berkeley for the fifth defendant, a daughter of the testator.

ROXBURGH, J. : The testator, Peter Fletcher, died on Mar. 17, 1943, and it is uncertain whether his domicile at the date of his death was English, American or Scots. He made two wills, one in American form on Oct. 31, 1939, and an English will with a codicil, the will bearing date Jan. 8, 1942, and the codicil bearing date June 8, 1942. An unusual difficulty occurs in the case because of the uncertainty regarding domicile, but, for reasons which will emerge in due course, I think that it may be possible to surmount those difficulties without determining what would be a difficult question, involving expensive evidence, namely, what was the domicile of the testator.

By his English will he devised and bequeathed his residuary English estate unto the plaintiff bank on trust to make certain payments thereout and, subject thereto, to stand possessed of his residuary English estate in trust for his daughter, Harriet Fletcher Ewing, of 615, Palisade Avenue, Yonkers, New York, America :

" . . . absolutely if she be living at my death but if she be then dead then and in that event for all and every the children or child (if only one) of my said daughter living at my death who being sons or a son have attained or shall attain the age of 21 years or being daughters or a daughter have attained or shall attain that age or previously marry and if more than one in equal shares as tenants in common."

The daughter was living at the date of the English will, but predeceased the testator. By cl. 5 the testator declared that his will should :

" . . . be read in conjunction with and not as in any way overriding or revoking (except and in so far as may be necessary for the purpose of giving effect to the directions concerning the disposition of my English will as herein contained) the will already executed by me to deal with my estate and assets in the United States of America as hereinbefore mentioned."

As the testator has declared that his will should be read in conjunction with the American will, I am bound to look at that will, which has been admitted to probate here as incorporated by reference into the English will, but I must pay careful attention to the wording of the exception which I have read. The American will contains a direction to the American trustee, after the death of Marion Ryan Fletcher, to pay over the whole of the capital of the trust estate as it may then exist to the testator's

"... daughter Harriet Fletcher Ewing if living and if not then in equal shares to her child Peter Fletcher Ewing and any other child or children of my said daughter her surviving who would be entitled to share in her estate had she died intestate a resident of the State of New York and possessed of personal property."

Harriet Fletcher Ewing was domiciled in the State of New York at all material times. She was married, but there is evidence which shows plainly that she was at all material times incapable of bearing a child and that she and her husband and the testator knew that. The evidence of the testator's frame of mind relates mainly to a period prior to 1939, when he left the United States for England, and counsel for the fifth defendant has submitted that, though the testator well knew in 1939 that Mrs. Ewing was incapable of bearing a child, he may have thought differently between then and the date of his English will, Jan. 8, 1942. That is a most improbable state of affairs, because nothing had happened in the meanwhile which could possibly have improved Mrs. Ewing's prospects of bearing a child. I go further and hold that the correspondence which passed between the testator and his family during the period when he was in England and up to and past the date of the will, and has been exhibited, while containing no passage which could be said to show in terms that he has not changed his mind about the capacity of his daughter, appears plainly to be written on the implied hypothesis that the state of affairs relating to the incapacity of his daughter was constant, unchanged and unchangeable.

So clearly had Mrs. Ewing realised her own incapacity, after much medical treatment, that she adopted two children. The order of adoption in the case of the boy, Peter, was dated June 28, 1938, and the order in the case of the girl, Irene, was dated Mar. 14, 1942. It will be observed that the adoption of the boy took place before the date of the American will, and, therefore, *a fortiori* before the date of the English will. The adoption of the girl was subsequent to both the American and the English wills, but she had been *de facto* adopted before the date of the English will. Both children were *de facto* adopted some time before the formal orders for adoption were made. These orders were made by the competent court having jurisdiction according to the law of Mrs. Ewing's domicile. Throughout the correspondence the testator refers to Peter as the child of Mrs. Ewing, to Irene as the sister of Peter and as a child of Mrs. Ewing, and to himself as grandfather of the two children. In a letter of Nov. 15, 1940, he writes to Mr. Ewing, the daughter's husband, in these terms:

"Now regarding the disposition of the 700 dollars. I remember that when little Peter arrived on the scene I opened a bank account for him in the sum of 1,000 dollars. I do not remember, however, whether I did the same thing for little Irene when she turned up. If I did not open a bank account for her upon her arrival, then I would like you to take these 700 dollars, add another 300 dollars, making a sum of 1,000 dollars, and open a bank account for the little girl, you and Kiltie [his daughter] taking the joint responsibility of the sum until she comes of age."

In those circumstances and in the present state of the evidence I have to construe this English will on the footing that the testator was domiciled in England. I will give my reasons later why I think that it is sufficient for present purposes to construe it only on this footing. There is no doubt (and I

start with this as a fundamental proposition) that "children" in an English will *prima facie* means legitimate children and does not include either illegitimate or adopted children. That being so, counsel for the two adopted children, has adumbrated three arguments. The first was that the relationship of parent and child is one of status; that the status of the adopted children, according to the law of the State of New York, was the same for all purposes as that of a legitimate child; that I ought to apply the law of the domicile in a matter of status; and that, accordingly, there should be no question but that I should treat these children as though they were lawful children. I have not called on counsel to develop that argument, because it became unnecessary to do so and I only mention it to show that it is still open to him if he requires to make use of it elsewhere. His second and third points counsel argued fully. His second point was that I must read the English will in conjunction with the American will. Certainly I must, because I am directed so to do. There is no doubt that, if I do that, I should be bound to say that this testator provided his own dictionary and that he clearly uses the word "child" to include an adopted child, but counsel for the fifth defendant has forcibly contended that, if I apply that process, I am violating the directions given to me by cl. 5 because I shall be altering the directions concerning the disposition of the testator's English estate by diverting in favour of adopted children property which would otherwise have gone to legitimate children only, and, in default of legitimate children, as on an intestacy. There is a good deal of force in that submission, so much so that I prefer to leave that point undecided and decide the case on the last ground which was submitted by counsel for the adopted children.

To do that, although this case concerns, not illegitimate but adopted, children, I must refer to the case of illegitimate children because, while several decisions have been given with regard to illegitimate children, there has been none, so far as I am aware, with regard to adopted children.

As regards illegitimate children the law was authoritatively laid down by LORD CAIRNS in *Hill v. Crook* (1) and it has been applied quite recently by JENKINS, J., in *Re Wohlgemuth* (2). In *Hill v. Crook* (1), LORD CAIRNS said (L.R. 6 H.L. 282):

"And what appears to me to be the principle which may fairly be extracted from the cases upon this subject is this—the term 'children' in a will *prima facie* means legitimate children, and if there is nothing more in the will, the circumstance that the person whose children are referred to has illegitimate children will not entitle those illegitimate children to take. But there are two classes of cases in which that *prima facie* interpretation is departed from. One class of cases is where it is impossible from the circumstances of the parties that any legitimate children could take under the bequest. A familiar example of that might be given in this way: Suppose there is a bequest 'to the children of my daughter Jane,' Jane being dead, and having left illegitimate children, but having left no legitimate children. There, inasmuch as the testator must be taken to have known the state of his family, and must be taken to have intended to benefit some children of his daughter Jane, and inasmuch as she had no children who could be benefited except illegitimate children, rather than that the bequest should fail altogether the courts will hold that those illegitimate children are intended, and they will take under the term 'children'."

Counsel for the fifth defendant has submitted that I ought not to apply to an adopted child the principles which are applicable to an illegitimate child because an illegitimate child is at least a natural child of the person named whereas an adopted child has no status as a child, except such as is conferred on it by the adoption order. I am disinclined to draw such a distinction. It seems to me that the question in every case is: In what sense has the testator used the

word "children"? *Prima facie* he has used it in its natural sense as meaning lawful children, but, if once the court comes to the conclusion that he has not used it in its natural sense of lawful children, it seems to me that it must be legitimate for the court to inquire into the sense in which he has used the word and that it makes no difference in principle whether the court finds that he has used it in the sense of illegitimate children or in the sense of adopted children. It is common for people to speak of both illegitimate children and adopted children as "children" *simpliciter*. A

A further argument against applying to adopted children the principles applicable to illegitimate children was founded by counsel on the Adoption of Children Act, 1926, s. 5 (2), which reads as follows:

"An adoption order shall not deprive the adopted child of any right to or interest in property to which, but for the order, the child would have been entitled under any intestacy or disposition, whether occurring or made before or after the making of the adoption order, or confer on the adopted child any right to or interest in property as a child of the adopter, and the expressions 'child,' 'children' and 'issue' where used in any disposition whether made before or after the making of an adoption order, shall not, unless the contrary intention appears, include an adopted child or children or the issue of an adopted child." B C

Counsel has submitted that I ought to construe the words "unless the contrary intention appears" in such a manner as to exclude some of the evidence which would be admissible in the case of an illegitimate child. I am not prepared so to construe it. It appears to me unthinkable that Parliament intended to place an adopted child in a worse position than an illegitimate child. Suppose the case of an illegitimate child born in such circumstances that it could not be legitimated by the subsequent marriage of its natural parents and that the natural parents marry, and, being unable to legitimate their natural child, adopt it (a course of procedure which is not uncommon), then the adopted child would be in a worse position than it would have been in if it had not been adopted, if counsel's submission is correct, unless I accept his solution, which is that in such a case the court would look behind the adoption order to the anterior illegitimacy which it is one of the purposes of the adoption order to hide. I do not feel able to accept counsel's solution of this problem. I feel bound to hold that s. 5 (2) does not exclude in the case of a child adopted under the Act of 1926 any evidence which would have been admissible in the case of an illegitimate child. There seems, therefore, in my judgment, to be no reason to be found in the Adoption of Children Act, 1926, which ought to lead the court to apply different principles to illegitimate children and adopted children. If that be right, the case is clear. It was impossible from the circumstances of the parties, which were fully known to the testator, that any legitimate children could take under the bequest. D E F

Counsel for the fifth defendant put forward one further conceivable hypothesis. This is, of course, admittedly an hypothesis and, I may add, a most improbable hypothesis. It is that Mrs. Ewing, before her marriage and before the advent of her incapacity, might have had an illegitimate child, that she might then have married Mr. Ewing, that her marriage to Mr. Ewing might have come to an end before the death of the testator, and that then she might have married the man by whom she had the hypothetical illegitimate child before her marriage to Mr. Ewing, and thereupon such child might have become legitimated. I repeat what LORD CAIRNS says in *Hill v. Crook* (1) (L.R. 6 H.L. 282): G H

"... inasmuch as the testator must be taken to have known the state of his family, and must be taken to have intended to benefit some children of his daughter Jane, and inasmuch as she had no children who could be benefited except illegitimate children, rather than that the bequest should fail

altogether the courts will hold that those illegitimate children are intended, and they will take under the term 'children'."

In applying that reasoning I decline altogether to embark on a hypothesis which is in itself most remote and which such evidence as there is in this case, though none of it was expressly directed to any such hypothesis, shows to be wholly lacking foundation. I cannot believe for one moment that the testator
A ever contemplated some such hypothetical illegitimate child as counsel has suggested. Accordingly, it seems to me clear that this case falls directly within the principle stated by LORD CAIRNS and the adopted children succeed.

[HIS LORDSHIP then referred to the question of domicile and said that counsel for the next of kin had elected to argue the case on the basis that the testator was domiciled in England. It was possible that the testator was domiciled
B in the United States of America or Scotland, but it appeared that the class of persons who would be entitled on an intestacy in those countries was the same as in England. HIS LORDSHIP considered evidence of the law of the United States and of Scotland relating to the meaning of "children," and came to the conclusion that counsel had adopted the wisest course in electing to argue on the basis of an English domicile. The trustees would, therefore, be authorised
C to administer and distribute the estate on that basis.]

Order accordingly. Costs as between solicitor and client to be paid out of the English estate in due course of administration.

Solicitors: *Ager & Ager* (for the plaintiffs); *Godden, Holme & Co.* (for the first and second defendants); *Parker, Garrett & Co.* (for the third and fourth defendants); *Simmonds, Church Rackham & Co.* (for the fifth defendant).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

E Re RICKETT. *Ex parte* INSECTICIDE ACTIVATED PRODUCTS, LTD. v. OFFICIAL RECEIVER.

[CHANCERY DIVISION (Jenkins, J.), March 14, 1949.]

Bankruptcy—Meeting of creditors—Voting—"Unliquidated debt"—Stated sum claimed as damages for misfeasance and breach of trust—High Court action pending—Bankruptcy Act, 1914 (c. 59), sched. I, para. 9.

A receiving order having been made against the debtor, a company of which he had been a director lodged a proof before the first meeting of creditors alleging that he was indebted to it "in the sum of £21,960 17s. 5d., being, as to £19,900, damages for misfeasance and breach of trust as a director" of the company "in the circumstances set forth in the statement of claim" in an action in the High Court by the company against the debtor and two other defendants. The remaining £2,060 17s. 5d. was interest on the sum claimed. The statement of claim in the action in the High Court alleged misfeasance and breach of trust by the debtor acting in conspiracy with the other defendants. It was alleged that cheques for varying sums totalling 9,550,000 francs were fraudulently drawn on the banking account of a French subsidiary of the company and applied as working capital for a syndicate formed by the defendants to purchase in Paris investments which had not been registered or declared as required by French law, bring those investments to London, and register them as British securities. In the action the company claimed (a) against the debtor (i) damages for misfeasance and breach of trust as a director of the company, (ii) a declaration that he was liable to account to the company for any profit made by him by reason of the transactions, and
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(iii) an account of profits made by him in breach of trust, and (b) against the debtor and the other defendants (iv) the sum of £19,900, being the sterling equivalent of 9,550,000 francs, with interest thereon, and consequential relief. Judgment had not yet been given in the action, but, for the purpose of the bankruptcy proceedings, the allegations in the statement of claim were to be accepted as substantially true, no evidence having been filed contesting the facts alleged. The official receiver held that the debt sworn in the proof was an unliquidated debt, and, therefore, under the Bankruptcy Act, 1914, sched. I, para. 9, the company was not entitled to vote at the meeting, and, under sched. I, para. 14, he rejected the proof for the purpose of voting. It was contended by the company that, although the three claims against the debtor alone were in the nature of unliquidated damages, the fourth claim (*i.e.*, that against all the defendants in the action) was a claim for liquidated damages.

HELD: the company's claim against the debtor was, as it was described in the proof, a claim for damages for misfeasance and must be judged on that footing; the damages asked for in the statement of claim in the action were in the nature of an unliquidated claim, even though a figure was set on them for the purposes of one part of the claim, and, in view of the speculative nature of the fraudulent transactions and the fact that there were three defendants in the action, it would be impossible to say until judgment was given what was the amount of the debt due from the debtor to the company by reason of the alleged misfeasance; and, therefore, the claim was an unliquidated claim and the official receiver had rightly rejected the proof as an unliquidated debt within the meaning of the Bankruptcy Act, 1914, sched. I, para. 9.

Per curiam: If there had been a liquidated debt in francs, the question of conversion from francs into sterling would not have prevented the debt from being a liquidated debt, as the appropriate date for ascertaining the rate of exchange for the conversion of the debt into sterling would have been the date at which each of the sums making up the total of 9,550,000 francs was withdrawn from the French subsidiary's banking account.

S.S. Celia v. S.S. Volturno ([1921] 2 A.C. 544; 126 L.T. 1) and *Di Ferdinando v. Simon, Smits & Co.* ([1920] 3 K.B. 409; 124 L.T. 117), *applied*.

[AS TO VOTING AT MEETINGS OF CREDITORS, see HALSBURY, Hailsham Edn., Vol. 2, pp. 96, 97, para. 113; and FOR CASES, see DIGEST, Vol. 5, pp. 1061-1063, Nos. 8674-8694.]

Cases referred to:

- (1) *Ex parte Ruffle. Re Dummelow*, (1873), 8 Ch. App. 997; 29 L.T. 384; 5 Digest 1062, 8681.
- (2) *Ex parte Pearce. Re Grieves*, (1879), 13 Ch.D. 262; 41 L.T. 742; 5 Digest 1062, 8692.
- (3) *S.S. Celia v. S.S. Volturno*, [1921] 2 A.C. 544; 126 L.T. 1; 17 Digest 159, 602.
- (4) *Di Ferdinando v. Simon, Smits & Co.*, [1920] 3 K.B. 409; 124 L.T. 117; 17 Digest 159, 604.

MOTION by the creditors against a decision of the official receiver under the Bankruptcy Act, 1914, sched. I, para. 14, rejecting a proof for the purpose of voting on the ground that it was an unliquidated debt within the meaning of sched. I, para. 9. The proof stated that the debtor was indebted to the creditors in a certain sum as "damages for misfeasance and breach of trust" in circumstances set out in the statement of claim in an action in the High Court by the creditors against the debtor and two other defendants.

The allegations in the statement of claim had not been contested, but judgment had not been given in the action. JENKINS, J., held that the debt was an unliquidated debt within the meaning of para. 9, and dismissed the appeal. The facts appear in the judgment.

Salmon, K.C., and *Share* for the creditors.

V. R. Aronson for the Official Receiver.

A JENKINS, J. : This is an appeal from a decision of the official receiver, as chairman of the first meeting of creditors, disallowing a proof by the appellants for the purpose of voting. The relevant provisions about voting are contained in the Bankruptcy Act, 1914, sched. I. Paragraph 8 of sched. I provides :

B “A person shall not be entitled to vote as a creditor at the first or any other meeting of creditors unless he has duly proved a debt provable in bankruptcy to be due to him from the debtor, and the proof has been duly lodged before the time appointed for the meeting.”

By para. 9 :

C “A creditor shall not vote at any such meeting in respect of any unliquidated or contingent debt, or any debt the value of which is not ascertained.”

The present appeal is brought under para. 14 of sched. I, which is in these terms :

D “The chairman of a meeting shall have power to admit or reject a proof for the purpose of voting, but his decision shall be subject to appeal to the court. If he is in doubt whether the proof of a creditor should be admitted or rejected he shall mark the proof as objected to and shall allow the creditor to vote, subject to the vote being declared invalid in the event of the objection being sustained.”

E In this instance the proof was rejected and the appeal is from that rejection as opposed to the other possibility under the paragraph, which is admission of the proof with a note of the objection and a possible appeal against that. The proof in question is in these terms. It asseverates that the debtor was

F “. . . at the date of the receiving order [*i.e.*, Nov. 11, 1948] and still is justly and truly indebted to Insecticide Activated Products, Ltd. in the sum of £21,960 17s. 5d., being, as to £19,900, damages for misfeasance and breach of trust as a director of Insecticide Activated Products, Ltd. in the circumstances set forth in the statement of claim in the action in the High Court of Justice, King's Bench Division, *Insecticide Activated Products, Ltd. v. Rickett and Others* . . . hereto annexed and marked ‘A,’ the statements wherein are to the best of my knowledge true, and, as to £2,060 17s. 5d., interest on the said sum at the rate of 4 per cent. per annum from Apr. 10, 1946. The said Francis William Rickett is also liable to account to the said Insecticide Activated Products, Ltd., for any profit made by him by reason of the transactions referred to in the said statement of claim, and the said company also claim payment of such sum when ascertained.”

H There follows the usual declaration that nothing in the way of satisfaction or security has been received in respect of the debt the subject of the proof.

The official receiver had to consider that proof, and he rejected it in reliance on para. 9 of sched. I to the Act of 1914. The issue before me is simply whether the official receiver was right in rejecting the proof under that paragraph, or, to narrow it down still further, whether he was right in the view he took that the debt sworn to in the proof was an unliquidated debt.

It is to be remembered that the proof incorporates by reference the statement of claim in the action between the creditors as plaintiffs and the debtor and

others as defendants. That statement of claim sets out a complicated story, but, in brief, its character is this. The plaintiff company carries on the business of buying and selling, manufacturing, preparing, and dealing in insecticides. The debtor was at all material times the chairman of the directors of the company. It is alleged that the debtor and the second defendant, Mr. William Peel Fletcher, and one Prince Jean de Bourbon, were operating a syndicate for the purchase in Paris of stocks and shares which had not been registered or declared as required by French law. These stocks and shares were to be brought to London, and arrangements were to be made with the assistance of the three defendants and a concern called the London and Eastern Trade Bank, Ltd., to procure the registration of the stocks and shares as British-held securities. The effect of that transaction would be to circumvent the difficulties created by the control of exchange between England and France. The materiality of the alleged purpose of this syndicate carrying on the activities of the kind I have described is that it afforded an outlet for any money that the debtor was able to lay his hands on. The substantive allegations are to the effect that in March, 1946, the plaintiff company sold to certain French promoters certain formulae relating to germicides so far as their use in France was concerned. The ultimate purchaser of the property so sold was to be a new French company which was to be incorporated for the purpose and was to acquire the assets in question. The consideration the plaintiff company was to receive was to consist of 3,000 fully paid shares of 100 francs each in this new French company, plus £20,000, or its equivalent of 9,600,000 French francs in cash. The French company was duly formed and the sale was duly completed. To receive the purchase consideration the plaintiff company incorporated a second French company which was to receive and hold on behalf of the plaintiff company the sum of 9,600,000 French francs receivable in cash and 3,000 shares of 100 francs each in the first mentioned French company. The debtor was appointed by the plaintiff company as their English representative in the holding company, *i.e.*, the second French company. De Bourbon was appointed "*gerant*," *i.e.*, manager, of the second French company, and as such he had power to draw cheques on behalf of the second French company, provided such cheques were countersigned by the debtor as representing the plaintiff company. It is alleged that in March and April, 1946, the debtor "unlawfully and fraudulently conspired with de Bourbon" to obtain from the second French company the whole or part of the 9,600,000 francs. That was done by drawing cheques on the second French company's banking account, the cheques being drawn by de Bourbon and countersigned by the debtor. Particulars are set out of the cheques which were drawn between Mar. 26, 1946, and Apr. 10, 1946, inclusive for varying sums totalling 9,550,000 francs. The proceeds of those cheques were received and used, it is alleged, with the knowledge and approval of the debtor who is alleged throughout to have been a party to all these transactions. The sum realised in this way was applied, if I may use that expression, as working capital for the syndicate to which I have referred and was invested in the purchase of undeclared stocks, shares and securities in Paris, and the investments so purchased, it is alleged, were delivered to the debtor in Paris. It is further alleged that the stocks, shares and securities were subsequently taken to London and were delivered to the defendants, or some or one of them, and were registered by the third defendant as British-held securities.

Founded on those allegations the relevant claims are : as against the first defendant (the debtor), (i) damages for misfeasance and breach of trust as a director of the plaintiff company ; (ii) a declaration that the first defendant is liable to account to the plaintiff company for any profit made by him by reason of the transactions aforesaid ; and (iii) an account of profits made or received by the first defendant as a result of the transactions aforesaid and taken on

the footing of such account. Those three claims are made against the debtor alone. Then, as against all the defendants, (iv) the sum of £19,900, being the sterling equivalent of 9,550,000 francs, with interest thereon; (v) damages; (vi) a declaration that the plaintiff company is entitled to follow the said sum of 9,550,000 francs into the hands of anyone other than a *bona fide* purchaser for value without notice of the plaintiff company's claim and is now entitled to transfer or delivery up of the said stocks, shares or securities, or, alternatively, to a lien thereon.

It is agreed for the purposes of this appeal that the allegations contained in the statement of claim must be accepted as substantially true because no evidence has been filed contesting those facts. The sole question argued has been whether the creditors can show that they had a liquidated debt, or a debt which is not disqualified for voting purposes as being an unliquidated debt within the meaning of para. 9 of sched. I to the Act of 1914. Counsel for the creditors has argued most persuasively that the claim here is a liquidated debt. He admits that the first three items of claim against the debtor alone are clearly in the nature of unliquidated damages, but he says that the fourth claim, *i.e.*, the first of the three made against all the defendants, is a claim for liquidated damages, and by being stated in the statement of claim and verified in the proof constitutes a debt in the nature of a liquidated debt. On the other hand, counsel for the official receiver says that, however it is put, this is essentially a claim for damages for misfeasance, as, indeed, it was described in the proof itself, and, being a claim for damages for misfeasance, it can only be quantified by the court at the trial. Secondly, he says that there is here no liquidated debt on which a right to vote might be founded, and an essentially unliquidated demand cannot be converted into a liquidated debt merely by laying the damages at a specific sum in pounds.

I was referred in the course of the argument to two authorities bearing on this topic. The first was *Ex parte Ruffle. Re Dummelow* (1). In that case the debtor was indebted to a creditor for a certain sum recovered by a verdict at law and costs which had not been taxed. The creditor attended the first meeting of creditors and stated in his affidavit that the debtor was indebted to him in £357 on the verdict and an amount of costs which he estimated at £200 and claimed to vote in respect of the aggregate amount. It was held that the estimated amount of untaxed costs was an unliquidated debt within the Bankruptcy Act, 1869, s. 16 (3), and that he could not vote in respect thereof, but that the proper course for him to pursue was either to apply for leave to sign judgment and tax his costs or else to swear to such a sum as the costs, when taxed, would at the least amount to. MELLISH, L.J., said (8 Ch. App. 1001):

"The question really is, what is meant by an 'unliquidated debt' in sub-s. (3). The fair construction of the clause seems to me this: 'a contingent debt' refers to a case where there is a doubt if there will be any debt at all; 'a debt, the value of which is not ascertained,' means a debt the amount of which cannot be estimated until the happening of some future event; and 'an unliquidated debt' includes not only all cases of damages to be ascertained by a jury, but beyond that, extends to any debt where the creditor fairly admits that he cannot state the amount. In that case there must be some further inquiry before he can vote. In the present case there is really no injustice done to the creditor; he might have applied for leave to sign judgment and tax his costs, and asked for the meeting to be adjourned till that was done. But it was said that the debtor was only able to pay a shilling in the pound, and it would not have been worth while to incur the costs of taxation. In that case he must be content to prove for such an amount as he can safely swear the costs would at least amount to. The appeal must be dismissed with costs."

That case seems to show, first, that, provided there is a liquidated minimum

which can be sworn to, it matters not that the amount recoverable might ultimately prove to be more, and, secondly, that *prima facie* all cases of damages to be ascertained by a jury, as the learned Lord Justice calls them, are in the nature of unliquidated debts.

In *Ex parte Pearce. Re Grieves* (2) a debtor who filed a liquidation petition had, by a separation deed between himself and his wife, covenanted to pay to a trustee an annuity, during the joint lives of himself and his wife, for the maintenance of the wife and a child of the marriage. The annuity was to cease in case the husband and wife should cohabit again. It was held that, the value of the annuity not having been ascertained, the trustee was not entitled to vote in respect of it at a meeting of creditors under the petition. I think that case is of no assistance to me, except that it is an example of a debt the value of which had not been ascertained and was of a kind which made it extremely difficult, if not impossible, to ascertain its value. As JAMES, L.J., put it (13 Ch.D. 265):

“The appellant was not in a position to have any sum fixed in respect of which he could vote at the meeting . . .”

Counsel for the creditors put their case here as if it were simply a case of money had and received by the debtor to the use of the creditors. They seek to equate the fourth claim in the action simply to a claim for the payment of money had and received, thus removing it from the category of claims for damages and converting it into a *quasi-contractual* claim for a liquidated sum, and, further, into a liquidated debt for the purpose of para. 9 of sched. 1 to the Act of 1914. In my judgment, that argument, attractive as it is, is really fallacious. This really is not a claim for money had and received. It is, as described in the proof, a claim for damages for misfeasance, and I think it must be judged on that footing. If one analyses the facts, the legal entity from which the money was taken was the holding company which I have referred to as the second French company. The plaintiff company is concerned as claiming as the beneficial owner of the money on the ground that the defendant, in dealing with the money in the hands of the second French company in the way he did, committed misfeasance and breach of trust and that the other defendants are liable, jointly and severally, with him for their complicity in the fraudulent conspiracy which is alleged. Essentially, I think, damages of that kind are in the nature of an unliquidated claim, and, in my view, they cannot be any the less unliquidated because a figure is set on the damages for the purposes of one part of the claim. I do not think this can fairly be compared to a case where a liquidated sum is, in any event, recoverable and a larger sum may be recoverable. One must regard all these claims as a whole. When one looks at them as a whole and bears in mind that there are three defendants and also that, according to the allegations in the statement of claim, this sum of francs was used in the speculative purchase of investments which may or may not have realised a profit, I think it will be impossible to say until judgment has been given in the action what is the amount of the debt due from the debtor to the creditors by reason of the various improper transactions alleged against him. It might be greater than £19,900 and interest, and it might be less. The probability on the facts as alleged in the statement of claim is that it will not amount in any event to less than £19,900, but I do not think that that probability, strong though it may be, is sufficient to convert the character of this claim from what I take to be its true nature, namely, a claim for unliquidated damages, or, in other words, damages to be assessed for misfeasance and breach of trust, into something in the nature of a claim for a liquidated sum now due and payable and ascertained beyond a peradventure.

In the course of the argument the point was raised that the amount of

A damages which is relied on by counsel for the creditors as representing a liquidated sum was, in truth, not a sum in sterling at all, but a sum of French francs, and it was suggested that that might be an added reason for regarding this debt as an unliquidated debt, inasmuch as the problems regarding the date of conversion into sterling would have to be considered, having regard to those authorities which have laid down that a contract for the payment of francs or other foreign currency is no more than a contract for the delivery of a chattel, for breach of which damages have to be assessed in sterling. I was, however, referred to *S.S. Celia v. S.S. Volturmo* (3) and *Di Ferdinando v. Simon, Smits & Co.* (4). From those two cases I think it is plain that, supposing there was here a liquidated debt in francs, the date for its conversion into sterling would have to be the date at which each of the sums in question, making up 9,550,000 francs, was withdrawn from the second French company's banking account. That, at all events, would be the appropriate date for ascertaining the exchange, although, if there had been an increase in the value of the franc subsequent to the withdrawal, it might be that, in addition, the debtor, as, in effect, a defaulting trustee, might have been chargeable with the excess. Therefore, I do not think that that question of conversion from francs into sterling would have been enough to prevent me from holding this to be a liquidated debt, if, in other respects, I thought it fairly answered that description. For the general reasons which I have endeavoured to state, however, this, in my view, is not a liquidated debt, but is an unliquidated one within the meaning of the Bankruptcy Act, 1914, sched. I, para. 9, with the result that this proof, in my opinion, was rightly rejected by the official receiver for the purpose of voting.

Appeal dismissed with costs.

Solicitors: *Evans Baker & Co.* (for the creditors); *Solicitor to the Board of Trade* (for the Official Receiver).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

EDWARDS v. NATIONAL COAL BOARD.

F [COURT OF APPEAL (Tucker, Asquith and Singleton, L.JJ.), March 9, 10, 11, 21, 1949.]

Mine—Coal mine—Statutory duty—Breach—“Reasonably practicable to avoid or prevent breach”—Test—Coal Mines Act, 1911 (c. 50), ss. 49, 102 (8).

G By s. 49 of the Coal Mines Act, 1911: “The roof and sides of every travelling road and working place shall be made secure . . .” and by s. 102 (8): “The owner of a mine shall not be liable to an action for damages as for breach of statutory duty in respect of any contravention of or non-compliance with any of the provisions of this Act if it is shown that it was not reasonably practicable to avoid or prevent the breach.”

H While going to his work along a travelling road in a coal mine owned by the defendants, a colliery timberman was killed by a fall of material from the side of the road, caused by a latent defect in the side of the road. Although some propping and lining of the road had been carried out at places where weaknesses appeared, the point at which the accident occurred had no form of artificial support. In a claim by the plaintiff, widow of the deceased man, for damages under s. 49, the defendants contended that they were protected by s. 102 (8) in that it was not reasonably practicable for them to have avoided or prevented the insecurity of the road at the point in question, there being nothing to indicate the

existence of the defect, and to require them to support all roads in the mine would be to impose on them an impossible burden.

HELD : (i) in considering whether or not it was "reasonably practicable to avoid or prevent" a breach of the statute within s. 102 (8) the mineowner must, before the occurrence of an accident, make a computation in which the *quantum* of risk run by the worker was placed in one scale and the sacrifice of the mineowner involved in the measures necessary to avert the risk (whether in money, time, or trouble) was placed in the other, and, if there were a gross disproportion between them—the risk being insignificant in relation to the sacrifice—the mineowner discharged the onus which was on him.

(ii) in the present case there had been a clear breach of statutory duty and the defendants had failed to discharge the onus which was on them under s. 102 (8).

[AS TO CIVIL LIABILITY OF OWNER OF MINE FOR BREACH OF STATUTORY DUTY, see *HALSBURY*, Hailsham Edn., Vol. 22, p. 824, para. 689; and FOR CASES, see *DIGEST* Supp.]

Cases referred to :

- (1) *Coltness Iron Co., Ltd. v. Sharp*, [1937] 3 All E.R. 593; [1938] A.C. 90; 157 L.T. 394; Digest Supp.
- (2) *Black v. Fife Coal Co., Ltd.*, [1912] A.C. 149; 106 L.T. 161; 5 B.W.C.C. 217; 34 Digest 740, 1166.
- (3) *Wales v. Thomas*, (1885), 16 Q.B.D. 340; 50 J.P. 516; *sub nom. Walls v. Thomas*, 55 L.T. 400.

APPEAL by the plaintiff from a decision of HALLETT, J., at Monmouth Assizes dated Nov. 10, 1948.

The plaintiff, the widow of a colliery timberman, claimed damages against the defendants under the Fatal Accidents Act, 1846, based on a breach of duty at common law and under s. 49 of the Coal Mines Act, 1911, in respect of the death of her husband caused by a fall which occurred from the side of a travelling road at Marine Colliery, South Wales. The learned judge decided both issues in favour of the defendants, but provisionally assessed damages at £984. The Court of Appeal allowed the appeal and entered judgment for the sum as assessed. The facts appear in the judgments of TUCKER and SINGLETON, L.JJ.

Havers, K.C., and *E. Ryder Richardson* for the plaintiff.

Gardiner, K.C., and *R. G. Micklethwait* for the defendants.

Cur. adv. vult.

Mar. 21. The following judgments were read.

TUCKER, L.J. : On Nov. 6, 1947, Joseph Edwards, a colliery timberman, was killed as a result of a fall which occurred from the side of a travelling road called Pitts' Level in No. 2 Pit, Marine Colliery, South Wales, owned and occupied by the defendants. The plaintiff, his widow, brought this action claiming damages against the defendants under the Fatal Accidents Act, 1846, based on breach of duty at common law and under s. 49 of the Coal Mines Act, 1911. The trial took place before HALLETT, J., at Monmouth Assizes. The learned judge decided both issues in favour of the defendants, but assessed the damages provisionally at £984. He found that the accident was due to a latent defect, known as a glassy slant, in the side of the roadway. This is the name given to material in the strata which is hard, shiny, and slippery, and, therefore, does not bind properly with the adjacent material but is likely to slide off if pressure is put on it. The slant in this case was a fossilised tree. He held on the evidence that the presence of this glassy slant could not have been detected by examination, nor was its existence to be expected. He rejected the evidence tendered on behalf of the plaintiff that the fall was due

or contributed to by subsidence or shot firing which had been taking place 125 feet below and 300 yards to the side of the scene of the accident. He, accordingly, acquitted the defendants of negligence at common law, and I accept these findings and the conclusion that follows therefrom.

The claim based on breach of statutory duty depends on the proper interpretation of ss. 49 and 102 (8) of the Coal Mines Act, 1911, read together, and the application thereof to the facts proved and evidence given in the court below. Section 49 of the Act reads as follows :

“The roof and sides of every travelling road and working place shall be made secure, and a person shall not, unless appointed for the purpose of exploring or repairing, travel on or work in any travelling road or working place which is not so made secure.”

Section 102 (8) of the Act provides :

“The owner of a mine shall not be liable to an action for damages as for breach of statutory duty in respect of any contravention of or non-compliance with any of the provisions of this Act if it is shown that it was not reasonably practicable to avoid or prevent the breach.”

HALLETT, J., dealt thus with the issue raised by these last words :

“I get back to the broad question which throughout this case I have felt to be the difficult one, whether, if there is no reason to suppose that the particular place requires propping or lining—and I think lining would be necessary for complete security, though propping might produce security—it can be said that it is reasonably practicable for the National Coal Board to prop or line everywhere in their pits, regardless of whether there is any particular reason for propping or lining at that particular place. It is not a point on which I confess I feel certain, but on the whole I feel that I have been satisfied by the defendants that it is not reasonably practicable for them to prop or line every place in their pits irrespective of whether there is any reason to suppose that propping or lining is necessary at that particular point. I want to make it quite plain. It might be a technical matter, but, as I understand it, a travelling road, as far as falls are concerned, will be made more secure if it is propped and lined. There may be other reasons possibly against it, but, so far as falls are concerned, I think it is plain even to a layman that it will be made more secure, and that in a case where there is some abnormality present which may cause a fall, that fall may be prevented by propping and lining, and it does not seem that it is reasonably practicable for the National Coal Board to deal with eventualities by propping and lining throughout, and I am not at all satisfied on the evidence here that there was any special reason why they should prop or line at that particular point.”

There is no dispute that the joint effect of ss. 49 and 102 (8) is to impose on the mineowner the absolute duty to make the roof and sides of every travelling road secure, and that he can only escape civil liability for breach of this duty if he can prove—the onus is on him—that it was not reasonably practicable to avoid or prevent the breach. It is also conceded that the deceased man's death was caused by the insecurity of the travelling road in which he was working. Consequently, the defendants can only escape liability by proof that it was not reasonably practicable for them to avoid or prevent this insecurity. It is contended by the defendants that it was not reasonably practicable for them to do so because there was nothing to indicate the existence of this latent defect, and that to expect them to prop and/or line every road in every mine would be to impose on them an altogether impossible burden. They concede that, if any travelling road is known to be insecure or if there is reasonable ground to fear insecurity, they cannot escape the consequences of failure to make it secure, save possibly in very exceptional circum-

stances. In short, it is not reasonably practicable to prop or line every roadway including those which are, in fact, perfectly safe in case somewhere there may be some unknown and unascertainable defects. On the other hand, counsel for the plaintiff argues that nothing short of some external interference by some unauthorised third person, or some occurrence which could not reasonably be anticipated, can excuse the breach of the absolute duty. He says matters which are within the control of the mineowner, such as cost, inconvenience and loss of profit are irrelevant. Alternatively, he submits that, if such matters as cost, labour and materials can be considered, the court can only look at the particular roadway in which the accident happened, and that the defendants gave no evidence on this point sufficient to discharge the onus that lay on them.

I cannot accept the submissions of either side in their entirety. The defendants' contention appears to me to leave the miner no better off than he was at common law. In effect, it makes the taking of reasonable care the sole test. On the other hand, though, no doubt, it is necessary to look primarily at the particular part of the particular mine with which the court is concerned, it is, in my opinion, necessary and proper to view it in relation to the totality of obligations resting on the mineowner. For example, vesting day having been Jan. 1, 1947, and an accident taking place the following November due to the insecurity of the sides or roof of a travelling road, it would, I think, be permissible for the defendants to lead evidence that there had been a scheme or plan for rendering all such roads secure, that certain areas had priority, and that it was not reasonably practicable for them to have carried out the remedial work at the particular pit by the time of the accident. Again, they might prove that in some areas, no propping or lining was necessary for some particular reason or that different methods were required. Dealing with the particular latent defect which caused this accident—a glassy slant—it might have been possible to show that such a thing is more common in some formations and areas than it is in others or that it is non-existent in some places, but this is the kind of evidence which, in my opinion, would have been relevant. I do not hold the view that cost must necessarily always be excluded as an element to be weighed in the balance. In *Coltness Iron Co., Ltd. v. Sharp* (1), LORD ATKIN said ([1937] 3 All E.R. 593):

“The time of non-protection is so short, and the time, trouble and expense of any other form of protection is so disproportionate, that I think the defence is proved.”

This shows that in every case it is the risk that has to be weighed against the measures necessary to eliminate the risk. The greater the risk, no doubt, the less will be the weight to be given to the factor of cost.

I turn to consider how the defendants in the present case, sought to discharge the onus of proof that lay on them. It was, I think, a heavy burden. They occupied a position between that of an absolute insurer and the ordinary occupier of property, but they start as insurers and have by evidence to divest themselves of this status. They called no witness qualified to assist the court to visualise the situation from the viewpoint of the monopoly owner. We are, therefore, left in ignorance of the practicability or otherwise of the measures which, in the opinion expressed by the inspector of mines appointed by the National Union of Mineworkers, after twelve years' experience of the investigation of fatal accidents, constitutes the only way to ensure security, *viz.*, artificially to support all roads in mines. According to his evidence, which stood uncontradicted, more than half of the existing roads are already artificially supported. It is obvious that to give artificial support to the remainder would be a very considerable and expensive operation which could not be carried out all at once, but whether it is reasonably practicable as a long term plan, or should already have been begun, I know not, nor can I

understand how any court can judge of these matters without evidence. I do not, therefore, think the defendants got any distance towards proving that security was not reasonably practicable from the viewpoint of the totality of the defendants' obligations. So far as the situation falls to be considered solely from the local angle, the evidence of the defendants' officials on the spot shows that they had never even applied their minds to the point until questioned in court. Mr. Wakeley, the under-manager, said: "I have never gone into the matter." He then proceeded to express the view that the labour involved would make it impracticable to carry out this work, but neither he nor the manager gave the court any figures as to cost or labour necessary to prop and/or line this particular travelling road which was only 400 yards long and had, in fact, been timbered for about half its length and up to within 15 to 30 yards of the spot where this accident occurred.

Although the learned judge has found that the fall was not due to subsidence or shot firing, it is the fact that weaknesses had appeared at places from time to time in the sides of this road and they had been timbered up as they appeared. Furthermore, there was undisputed evidence that glassy slants had been seen in this roadway, though they were rare. The road had only been in existence for some seven years. In truth, the defendants' officials never applied their minds to their absolute obligation under s. 49. They were content to rely on the system of inspections and on the observance of the ordinary and usual precautions. That was their whole case as presented in argument, and it was said that that was the true measure of reasonable practicability under s. 102 (8). In my view, the evidence in the present case falls short of what is required to discharge the burden that lies on a defendant under s. 102 (8) in a case where there has been a clear breach of statutory duty under s. 49. I would allow this appeal and enter judgment for the plaintiff for the sum of £984, the provisional assessment of damages.

ASQUITH, L.J. : I agree. The onus was on the defendants to establish that it was not reasonably practicable for them to have prevented a breach of s. 49. The construction placed by LORD ATKIN on the words "reasonably practicable" in the *Coltress* case (1) seems to me, with respect, right. "Reasonably practicable" is a narrower term than "physically possible" and seems to me to imply that a computation must be made by the owner in which the *quantum* of risk is placed on one scale and the sacrifice involved in the measures necessary for averting the risk (whether in money, time or trouble) is placed in the other, and that, if it be shown that there is a gross disproportion between them—the risk being insignificant in relation to the sacrifice—the defendants discharge the onus on them. Moreover, this computation falls to be made by the owner at a point of time anterior to the accident. The questions he has to answer are : (a) What measures are necessary and sufficient to prevent any breach of s. 49 ? (b) Are these measures reasonably practicable ?

In the particular type of accident caused by a "glassy slant" it is admittedly impossible before the event to foresee at what place or in what roadway or in what mine such an accident is likely to occur. The argument that the owners could and should have made secure the particular roadway in which, as things fell out, the glassy slant declared its presence without having to make secure every other roadway in which it might have done so assumes that by some process of divination they could have predicted that the accident was likely to occur in the roadway in which it did, rather than elsewhere. An owner, however, who is not gifted with second sight can make no such prediction. Without it, security against this peril can only be secured by extending similar security measures to all roadways. Only so can he prevent breaches of s. 49 due to glassy slants. So far, I am inclined to agree with the learned judge, but, like my Lord, I do not think any, or any sufficient, evidence was adduced

as to the relative *quantum* of risk and sacrifice involved on the basis either that the mines as a whole (or that this particular roadway) should be taken as the unit—a necessary prerequisite to any decision that the defendants have proved the necessary measures impracticable. For these reasons I think the appeal should be allowed.

SINGLETON, L.J. [after stating the facts]: The defendants' submission was that if the defective side of this travelling road had to be supported or made secure along the whole of its length, it followed that every roof and every other side of every travelling road in every mine to which the Act of 1911 applies must be similarly supported so as to render it secure, and that that was not reasonably practicable. **HALLETT, J.**, accepted this submission and held that the defendants were not liable to an action for damages by reason of s. 102 (8). With all respect, I do not think that this is the right test. The sides of this travelling road had not been made secure and Edwards was killed. It was for the defendants to show that it was not reasonably practicable to make secure the side of the road, a portion of which fell, and, in my judgment, they failed to do that. It can be no answer to an action in which damages are claimed, to say: "We did not do anything at such and such a place because we considered that point secure." Nor can it be an answer to say: "If we do something at this place we shall have to do something in many other places and in many other mines." Nor, again, can it be an answer to say: "We did not expect a fault of this kind, nor a fall, at this place." There is a breach in every case in which the roof and sides of a travelling road have not been made secure. The owners can escape paying damages in a civil action if they bring themselves within the terms of s. 102 (8). It is true to say that, if the defendants have to make secure the roofs and sides of every travelling road, a heavy burden will be placed on them. **HALLETT, J.**, said it would be a stupendous undertaking. I do not think the court is concerned with that. It seems to have been the practice in some cases in which it has been considered that roof and sides are safe to take the risk of a civil action.

Part II of the Act contains many provisions as to safety. Section 49 places an absolute obligation on the owners. That can only be altered by Parliament. In some sections of that Part of the Act the Secretary of State is empowered to grant relief from certain provisions, and this raises a question whether cost and expense can be used to establish that it is not reasonably practicable to avoid or prevent a breach. *Prima facie*, I should have thought that the words, when applied to the absolute obligation imposed by s. 49, were intended to cover a case in which everything reasonably possible had been done to make roof and sides secure, but, through a fault or the like, something happened and an accident took place. In such a case the defendants might well be able to establish that it was not reasonably practicable to comply with the provisions of s. 49. Though it is by no means clear how far expense was considered as an element in *Coltness Iron Co., Ltd. v. Sharp* (1), I think the words of **LORD ATKIN** form a most useful guide when he said ([1937] 3 All E.R. 593):

" . . . I am unable to take the view that it was reasonably practicable by any means to avoid or prevent the breach of s. 55. The time of non-protection is so short, and the time, trouble and expense of any other form of protection is so disproportionate, that I think the defence is proved."

In the present case, the time, trouble and expense involved must be examined in relation to the road on which the fall took place. The owners had taken steps to secure the sides along one half of its length approximately. I see no reason why the whole length could not have been similarly secured as and when the road was being made. There is no evidence to show that it would not have been reasonably practicable to do this, nor is there any evidence to show that it would not have been reasonably practicable to do it a month before the accident. If the defence now raised had been put forward by a private owner

before the Coal Industry Nationalisation Act, 1946, I do not think that it would have held water for a moment, and I am not satisfied that the defendants can claim to be in a better position than a private owner would have been in regard to the safety provisions of the Act of 1911. Some evidence was given to show the magnitude of the task if the roof and sides of every travelling road everywhere had to be made secure, but no evidence was directed to show what it would mean, or would have meant, in regard to this particular road. The mining engineer who was called on behalf of the defendants, was not asked any question on this subject. He did not visit the colliery until Oct. 8, 1948.

In the course of his judgment, HALLETT, J., said :

“ Upon the whole I feel myself that I am satisfied by the defendants that it is not reasonably practicable for them to prop or line every place in their pits, irrespective of whether there is any reason to suppose the propping or lining is necessary at that particular point.”

It seems to me that that approach fails to give effect to the statutory duty imposed by s. 49. The owners had done what they thought necessary to secure (or to make secure) the sides of this road in some parts. They failed to show that it was not reasonably practicable for them to do so in other parts, and, in particular, at the point at which the fall took place. In those circumstances they do not come within the terms of s. 102 (8). I agree that the appeal should be allowed.

Appeal allowed with costs.

Solicitors : *Theodore Goddard & Co.*, agents for *Edwards (T. S.) & Son*, Newport, Mon. (for the plaintiff) ; *Preston, Lane-Claypon & O'Kelly*, agents for *Colborne, Coulman & Lawrence*, Newport, Mon. (for the defendants).

[*Reported by C. ST.J. NICHOLSON, ESQ., Barrister-at-Law.*]

Dictum of DENNING, L.J., at p. 755, applied. Re POWER'S SETTLEMENT TRUSTS. [1951] 2 All E.R. 513.

ROYAL CROWN DERBY PORCELAIN CO., LTD. v. RUSSELL.

[COURT OF APPEAL (Bucknill, Cohen and Denning, L.JJ.), March 15, 1949.]

Statute—Construction—Decision of the Divisional Court interpreting provision—Repeal and re-enactment of provision—Extent to which Court of Appeal bound by earlier interpretation.

Rent Restriction—Premises let “in consequence of employment”—Knowledge of tenant—Materiality—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), sched. 1 (g).

Section 5 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, provided that no order or judgment for the recovery of possession of a dwelling-house to which the Rent Acts applied should be made unless, *inter alia*, alternative accommodation was available for the tenant. The section further provided that the existence of alternative accommodation should not be a condition of an order or judgment “(i) where the tenant was in the employment of the landlord or a former landlord and the dwelling-house was let to him in consequence of that employment and he has ceased to be in that employment.” In 1925 it was decided by the Divisional Court of the King's Bench Division in *Braby (Frederick) & Co., Ltd. v. Bedwell* ([1926] 1 K.B. 456 ; 134 L.T. 320) that for a landlord to obtain the benefit of para. (i) of s. 5 (1) it was necessary for him to show that both he and the tenant knew that the letting was in consequence of the tenant's employment. In 1933 s. 5 (1) of the Act of 1920 was repealed, para. (i) of that sub-section being re-enacted by the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, sched. I (g). In 1946 the

Court of Appeal in *Braithwaite & Co., Ltd. v. Elliott* ([1946] 2 All E.R. 537 ; [1947] K.B. 177 ; 176 L.T. 62), in interpreting the words "in consequence of that employment" in sched. 1 (g), purported to overrule the decision of the Divisional Court in 1925 on the meaning of the same words in the earlier Act of 1920 by holding that the vital matter was the intention of the landlord when letting the house and that it was immaterial whether or not the tenant knew that the dwelling-house was let to him in consequence of the employment.

HELD: the fact that in 1925 the Divisional Court placed a certain interpretation on the words of s. 5 (1) of the Act of 1920 did not preclude the Court of Appeal in 1946 placing a different construction on the words when re-enacted in sched. I (g) to the Act of 1933; there was no rule of law which prevented the Court of Appeal in 1946 from overruling *Braby (Frederick) & Co. v. Bedwell* (*supra*); and *Braithwaite & Co., Ltd. v. Elliott* (*supra*) was rightly decided.

Dictum of LORD BUCKMASTER in *Barras v. Aberdeen Steam Trawling and Fishing Co., Ltd.* ([1933] A.C. 411 ; 149 L.T. 171), *considered*.

[EDITORIAL NOTE. There is a rule of construction that when the words of an old statute are incorporated in a new statute this is understood to be done with the object of adopting any legal interpretation which has been put on the words of the old statute by the courts, but this rule does not prevent the Court of Appeal from overruling a previous decision which is not binding on it.

AS TO PREVIOUSLY ACCEPTED INTERPRETATION OF A STATUTE, see HALSBURY, Hailsham Edn., Vol. 31, pp. 491-495, paras. 624-630; and FOR CASES, see DIGEST, Vol. 42, pp. 667-671, Nos. 774-816.]

Cases referred to :

- (1) *Braithwaite & Co., Ltd. v. Elliott*, [1946] 2 All E.R. 537 ; [1947] K.B. 177 ; 176 L.T. 62 ; 2nd Digest Supp.
- (2) *Braby (Frederick) & Co. v. Bedwell*, [1926] 1 K.B. 456 ; 134 L.T. 320 ; 31 Digest 583, 7320.
- (3) *Queen's Club Gardens Estates, Ltd. v. Bignell*, [1924] 1 K.B. 117 ; 31 Digest 583, 7319.
- (4) *Benninga (Mitcham), Ltd. v. Bijstra*, [1945] 2 All E.R. 433 ; [1946] K.B. 58 ; 173 L.T. 298 ; 2nd Digest Supp.
- (5) *Read v. Gordon*, [1941] 1 All E.R. 222 ; [1941] 1 K.B. 495 ; 165 L.T. 113 ; 2nd Digest Supp.
- (6) *Barras v. Aberdeen Steam Trawling & Fishing Co., Ltd.*, [1933] A.C. 402 ; 149 L.T. 169 ; Digest Supp.
- (7) *The Olympic*, [1913] P. 92 ; 108 L.T. 592 ; 41 Digest 229, 680.
- (8) *Ex p. Campbell, Re Cathcart*, (1870), 5 Ch. App. 703 ; 23 L.T. 289 ; 42 Digest 669, 795.
- (9) *Webb v. Outtrim*, [1907] A.C. 81 ; 95 L.T. 850 ; 17 Digest 495, 606.
- (10) *Young v. Bristol Aeroplane Co., Ltd.*, [1944] 2 All E.R. 293 ; [1944] K.B. 718 ; 171 L.T. 113 ; 37 B.W.C.C. 51 ; *affmd.*, [1946] 1 All E.R. 98 ; [1946] A.C. 163 ; 174 L.T. 39 ; 38 B.W.C.C. 50 ; 2nd Digest Supp.

APPEAL by the tenant from an order made by His Honour JUDGE WILLES at Derby County Court on Sept. 7, 1948, whereby he granted possession of a dwelling-house to the landlords.

The county court judge considered himself bound by the decision of the Court of Appeal in *Braithwaite & Co., Ltd. v. Elliott* (1), and to succeed in his appeal the tenant had to show that the present court was not bound by that decision. This contention was not accepted by the court and the appeal was dismissed. The facts appear in the judgment of BUCKNILL, L.J.

W. R. Handforth for the tenant.

Scott Henderson, K.C., and *N. F. M. Robinson* for the landlords.

BUCKNILL, L.J. : This is an appeal from a judgment of His Honour JUDGE WILLES in favour of the landlords, the Royal Crown Derby Porcelain Co., Ltd., who claimed possession of a certain dwelling-house which was occupied by the tenant, Raymond Russell.

A The tenant entered the landlords' employment in 1926. At that time he was living in a house which did not belong to the landlords. In 1940 he went into possession of the cottage in question which did belong to the landlords. In April, 1941, the tenant's service with the landlords ended, but he stayed on in the cottage with his wife. In November, 1941, he entered the army in
B which he stayed until April, 1946, and during the whole of that time his wife remained in the cottage. In April, 1946, he returned to the employment of the landlords, but in May, 1948, he left that employment and the landlords then gave him notice to quit. The learned judge, in a very careful reserved judgment, has said that he considered himself bound by the decision of the Court of Appeal in *Braithwaite & Co., Ltd. v. Elliott* (1), and the only question
C that we have to decide is whether or not, in the circumstances, we are bound to follow that case.

The Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 5, as re-enacted by the Rent and Mortgage Interest Restrictions Act, 1923, s. 4, enacted that :

D “(1) No order or judgment for the recovery of possession of any dwelling-house to which this Act applies, or for the ejectment of a tenant therefrom, shall be made or given unless . . . (d) the dwelling-house is reasonably required by the landlord for occupation as a residence for himself . . . or for any person *bona fide* residing with him, or for some person engaged in his whole time employment or in the whole time
E employment of some tenant from him . . . and (except as otherwise provided by this sub-section) the court is satisfied that alternative accommodation is available . . .”

The sub-section went on to provide :

F “The existence of alternative accommodation shall not be a condition of an order or judgment on any of the grounds specified in para. (d) of this sub-section—(i) where the tenant was in the employment of the landlord or a former landlord, and the dwelling-house was let to him in consequence of that employment and he has ceased to be in that employment.”

G In 1925 *Braby (Frederick) & Co. v. Bedwell* (2) was decided by the Divisional Court. There the plaintiffs wished to regain possession of a house under s. 5 (1) of the Act of 1920, and SHEARMAN, J., who was a member of the court decided, to quote from his judgment ([1926] 1 K.B. 459) that :

H “The words ‘in consequence of’ imply causation, and mean that the tenancy was created in consequence of the employment. The court must be satisfied not only that the landlords let the premises to the defendant in consequence of his being in their employment, but also that the defendant took the premises in consequence of his being in their employment. The judge finds that the defendant did not know that his tenancy was conditional on his remaining in the employment of the plaintiffs ; he had never heard of it and knew nothing about it. There is no direct authority on this point, but there is a *dictum* of LUSH, J., in *Queen's Club Gardens Estates, Ltd. v. Bignell* (3) which is to that effect. He says : ‘In my view they mean, not that the landlord only knows, but

that both the landlord and the tenant know, that the premises were let to the tenant in consequence of his employment'."

SANKEY, J., agreed, and, in his judgment, said :

"I think the words do not have a unilateral but a bilateral construction, and really mean that the landlord lets and the tenant takes the premises in consequence of the employment."

In 1933 the law as contained in s. 5 (1) of the Act of 1920 was, in substance, re-enacted by the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933. A

When *Braithwaite & Co., Ltd. v. Elliott* (1) was decided in the Court of Appeal in 1946, MORTON, L.J., who was presiding, dealt with the question which was decided in *Braby (Frederick) & Co. v. Bedwell* (2), and said ([1946] 2 All E.R. 539) : B

"The principal reason which led the county court judge to arrive at that conclusion appears in the following passage in his judgment : 'When the cottage was let to the defendant in November, 1937, the tenant [i.e., the defendant] was in the employment of the landlords and the landlords would not have let the cottage to the defendant had he not been in their employ, but I do not find that the tenant knew of that fact or that he knew the cottage was let to him in consequence of his employment by them. There is nothing to show that the defendant knew that his tenancy was conditional on his remaining in the plaintiff's employment. On these facts it appears to me, on the authority of *Braby (Frederick) & Co. v. Bedwell* (2) and *Queen's Club Gardens Estates, Ltd. v. Bignell* (3), that the letting in November, 1937, was not in consequence of the defendant's employment.' In my view, at this stage the county court judge has misconstrued the section, and I think it is unlikely that he would have arrived at that conclusion if his attention had been directed to *Benninga (Mitcham), Ltd. v. Bijstra* (4). In my view, the material question is : What was the reason which actuated the landlord in letting the cottage to the defendant. The wording of the Act is : ' . . . and the dwelling-house was let to him in consequence of that employment.' When there is an agreement of letting, the landlord agrees to let and the tenant agrees to take, and, in my view, under the section one has to inquire only : What was in the mind of the person who let ? Was the house let to the defendant in consequence of his employment, or was it let to him for some other reason ? That matter is, in my view, concluded against the defendant in the present case by *Benninga's* case (4). If I may further quote from my judgment ([1945] 2 All E.R. 437) : 'As to question (iv) [i.e., the question now under consideration] it was stated by this court in *Read v. Gordon* (5) that the crucial time at which this question must be decided is the date of the notice to quit. In my view the question which has to be decided, as at that time, may be accurately stated as follows : Was the tenancy, which was determined by the notice to quit, a tenancy which had been granted to the tenant in consequence of his employment by the landlord ?' It seems to me that the judge has answered that question in favour of the present plaintiffs. He has said : 'The landlords would not have let the cottage to the defendant had he not been in their employ.' That, to my mind, is a finding of fact which concludes this point against the defendant. The judge goes on to discuss certain other questions which are, in my view, irrelevant. He says : 'I do not find that the tenant knew the fact'—to my mind, whether he knew it or not is irrelevant—'or that he knew the cottage was let to him in consequence of his employment by them'—that again, in my view, is irrelevant. 'There is nothing to show that the defendant knew that his tenancy was conditional on his

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remaining in the plaintiffs' employment.' I cannot find in the section the slightest trace of any of these matters being relevant to the consideration of the matter before the court. *Braby (Frederick) & Co. v. Bedwell* (2) and *Queen's Club Gardens Estates, Ltd. v. Bignell* (3) were not cited to this court in *Benninga's case* (4), but I feel bound to say that, in my view, *Braby (Frederick) & Co. v. Bedwell* (2) was wrongly decided."

A The argument put before us shortly is that it was not open to the Court of Appeal in *Braithwaite's case* (1) to come to that decision, having regard to the decision of the Divisional Court in 1925 in *Braby (Frederick) & Co. v. Bedwell* (2), and having regard to the rule of interpretation of statutes which has been enunciated in several cases, the latest being *Barras v. Aberdeen Steam Trawling & Fishing Co., Ltd.* (6), where LORD BUCKMASTER, when dealing with the meaning of the word "wreck" in the Merchant Shipping Acts, said ([1933] A.C. 411) :

C "The respondents here have based the main part of their case, as explained in the reasons they have given, upon the ground that *The Olympic* (7) was wrongly decided, and that the limited and relative meaning there attributed to the word 'wreck' is not the true interpretation of the phrase. I do not think that the consideration of that question is open to this House. It has long been a well established principle to be applied in the consideration of Acts of Parliament that where a word of doubtful meaning has received a clear judicial interpretation, the subsequent statute which incorporates the same word or the same phrase in a similar context, must be construed so that the word or phrase is interpreted according to the meaning that has previously been assigned to it. JAMES, L.J., in the case of *Ex parte Campbell* (8) expresses this rule in the following terms : 'Where once certain words in an Act of Parliament have received a judicial construction in one of the superior courts, and the legislature has repeated them without alteration in a subsequent statute, I conceive that the legislature must be taken to have used them according to the meaning which a court of competent jurisdiction has given to them.' And this opinion was expressed in a case where the learned Lord Justice himself said it was difficult to bring the interpretation within the words of the Act. The same opinion was expressed by LORD HALSBURY in delivering the judgment of the Judicial Committee in the case of *Webb v. Outram* (9), and I know of no authority that has in any way weakened the effect of this pronouncement. It is in my opinion a salutary rule and one necessary to confer upon Acts of Parliament that certainty which, though it is often lacking, is always to be desired."

G Counsel for the tenant contends that, the Divisional Court having given a judicial interpretation in *Braby (Frederick) & Co. v. Bedwell* (2) of the words "in consequence of" in the Act of 1920, the Court of Appeal was wrong in saying, in effect, in *Braithwaite's case* (1) that the Act of 1933 meant something inconsistent with the decision in *Braby (Frederick) & Co. v. Bedwell* (2), since Parliament, in using in 1933 the words of the Act of 1920 which had been interpreted by the Divisional Court in *Braby (Frederick) & Co. v. Bedwell* (2), must have intended the words of the Act of 1933 to have the meaning assigned to them by the Divisional Court. That being so, counsel says that this court is not bound to follow *Braithwaite's case* (1), in accordance with the principles laid down by the Court of Appeal in *Young v. Bristol Aeroplane Co., Ltd.* (10) where LORD GREENE, M.R., said ([1944] 2 All E.R. 300) :

"Where the court has construed a statute or a rule having the force of a statute, its decision stands on the same footing as any other decision on a question of law. But where the court is satisfied that an earlier decision was given in ignorance of the terms of a statute or a rule having

the force of a statute the position is very different. It cannot, in our opinion, be right to say that in such a case the court is entitled to disregard the statutory provision and is bound to follow a decision of its own given when that provision was not present to its mind. Cases of this description are examples of decisions given *per incuriam*."

I am not prepared to say that in *Braithwaite's* case (1) the Court of Appeal was ignorant of the fact that the terms of the Act of 1933 were practically the same as those of the Act of 1920, nor am I prepared to say that, having that knowledge, they were bound to interpret the words in the same way as the Divisional Court had interpreted them. I do not think that when LORD BUCKMASTER enunciated this rule in relation to the comparatively simple question what was the meaning of the word "wreck," he had in his mind anything like the present case where the words of the Act of 1920 are re-enacted in the Act of 1933 and numberless decisions have been given on the meaning of words in these complicated and difficult Acts. It seems to me that it would be wrong to assume that Parliament, when enacting an Act such as the Act of 1933, bore in mind every decision in the High Court on the meaning of the words in the earlier statute. Some of the decisions are conflicting, and, in my view, it would be wrong to say that in 1946 the Court of Appeal was precluded from giving its own interpretation to these words by reason of a decision given by the Divisional Court in 1925 on a different statute. If it is permissible in a case of this kind to consider public policy, it seems to me very undesirable that one division of the Court of Appeal should give a decision which is inconsistent with a decision given by another division of the court. So far as one can, one should keep the law certain, and to disturb the judgment in *Braithwaite's* case (1) by reason of this somewhat technical, though interesting, argument, would, to my mind, be contrary to public policy, and I should be most unwilling to do it unless I was so bound. I do not feel so bound in the present case, and, therefore, I think that this appeal should be dismissed.

COHEN, L.J. : I am of the same opinion. We have had the advantage of an ingenious argument from counsel for the tenant directed to establish (i) that this court decided *Braithwaite's* case (1) *per incuriam* in that their attention had not been directed to the fundamental principle of construction to be found in the passage of LORD BUCKMASTER's judgment in *Barras' case* (6), which my Lord has already read ; and (ii) that, therefore, in accordance with principles laid down by LORD GREENE, M.R., in *Young v. Bristol Aeroplane Co., Ltd.* (10), we ought not to treat *Braithwaite's* case (1) as correct but must place on the words under consideration, as they appear in the Act of 1933, the construction which was placed on them in 1925 when the Divisional Court were considering, in *Braby's case* (2), the meaning of s. 5 (1) of the 1920 Act.

The question we have to decide is whether the present case is within the principles laid down by LORD GREENE, M.R., in *Young v. Bristol Aeroplane Co., Ltd.* (10). I doubt whether a rule of construction is on a par with "a statute or rule having the force of a statute" which is the language used by the MASTER OF THE ROLLS in *Young's case* (10), but, assuming that "principles of construction" is within the *per incuriam* principle as laid down by the MASTER OF THE ROLLS, can we attribute to this court ignorance, when they were considering *Braithwaite's* case (1), of the rule of construction which is to be found in *Barras' case* (6) and a number of earlier cases in which the same point arose ? I find it impossible to attribute to the court any such ignorance. It is plain from the report that their attention was expressly directed to the decision of the Divisional Court in *Braby's case* (2). It necessarily follows that their attention was directed to the terms of s. 5 (1) of the Act of 1920, and they must have known that that sub-section was indistinguishable in substance from the words used in the schedule to the Act

of 1933. It seems to me that we must assume that in *Braithwaite's* case (1) this court, after a consideration of all the relevant factors including the rule of construction in question, came to the conclusion that it was open to them to find as they did—that the words “in consequence of” in the schedule to the 1933 Act related only to what was in the mind of the landlord and that what was in the mind of the tenant was irrelevant.

A I only desire to add, though it is, perhaps, irrelevant to the decision, that had the matter arisen for consideration before us free from any authority so that we were entitled to construe the matter on our own, I should myself have reached the same conclusion as that which was expressed by MORTON, L.J., in *Braithwaite's* case (1). For these reasons I agree that the appeal should be dismissed.

B DENNING, L.J.: I agree. In 1946 in *Braithwaite's* case (1) this court put an interpretation on the Act of 1933, and, in so doing, overruled *Braby (Frederick) & Co. v. Bedwell* (2), a decision of the Divisional Court which had stood since 1925. It is said that this court ought not to have overruled *Braby's* case (2) because that case had previously been rendered authoritative by Parliament when it passed the Act of 1933. I do not agree with that

C suggestion. I do not believe that whenever Parliament re-enacts a provision of a statute it thereby gives statutory authority to every erroneous interpretation which has been put on it. The true view is that the court will be slow to overrule a previous decision on the interpretation of a statute when it has long been acted on, and it will be more than usually slow to do so when Parliament has, since the decision, re-enacted the statute in the same terms,

D but if a decision is, in fact, shown to be erroneous, there is no rule of law which prevents it being overruled. There was, therefore, in my opinion, no rule of law which prevented this court in 1946 from overruling *Braby (Frederick) & Co. v. Bedwell* (2), and I do not agree with the contention that *Braithwaite's* case (1) was wrongly decided. For those reasons I agree that the appeal should be dismissed.

E *Appeal dismissed with costs.*

Solicitors: *Preston, Lane-Claypon & Co.*, agents for *Hollinshead & Moody*, Tunstall, Stoke-on-Trent (for the tenant); *Peacock & Goddard*, agents for *Moody & Woolley*, Derby (for the landlords).

[Reported by C. N. BEATTIE, Esq., Barrister-at-Law.]

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Affirmed. C.A. [1949] 2 All E.R. 913.

WHITESIDE v. WHITESIDE AND OTHERS.

G [CHANCERY DIVISION (Harman, J.), March 11, 1949.]

Deed—Rectification—No relief required as between the parties—Rectification to secure reduction of tax payable by party to deed—Failure of parties to appreciate legal consequences of words used.

H In October, 1940, the parties were divorced, and, after discussion as to the maintenance of the wife, their solicitors agreed, subject to confirmation by the wife, who resided in Canada, that the wife should be paid £1,000 a year free of tax up to 7s. 6d. in the £. After confirmation by the wife a deed was drafted by her solicitors in which the husband was expressed to covenant to pay “such a sum after deduction of income tax at the rate of not more than 7s. 6d. in the £ as shall represent £1,000 per annum . . .” The husband’s solicitors altered the draft so that the covenant provided that the husband should pay “£1,000 per annum free of British income tax up to but not exceeding 7s. 6d. in the £.” In that form the deed was executed, and

the husband thereafter paid on the basis of freedom from tax at 7s. 6d. in the £ until the Inland Revenue refused to allow deductions against his sur-tax, their contention being that that was not his legal liability, and that, having regard to r. 23 (3) of the General Rules in the Income Tax Act, 1918, he had no right to make the payments without deducting the tax. On Mar. 30, 1948, the husband executed a supplemental deed whereby he agreed that the original deed should be treated as rectified by the substitution in his covenant of the words "such an annual sum as after deduction of British income tax at a rate up to but not exceeding 7s. 6d. in the £ will leave the sum of £1,000 per annum" for the words already quoted. He now sought rectification of the original deed by the insertion therein of the words substituted by the supplementary deed, his object being to place himself in a position in which he would be entitled to claim deductions from sur-tax as against the Inland Revenue.

HELD : (i) no relief being required as between the parties, the court would not exercise its discretionary remedy of rectification.

Dicta of EVERSLED, J., in Van der Linde v. Van der Linde ([1947] Ch. 310, 311 ; 176 L.T. 298), *applied*.

(ii) The parties in negotiation had rejected the very words it was now sought to insert in the deed. They did not appreciate the legal consequences of the wording which they had adopted. That was not a legitimate ground for rectification.

Burroughes v. Abbott ([1922] 1 Ch. 86 ; 126 L.T. 354), *Jervis v. Howle & Talke Colliery Co., Ltd.* ([1936] 3 All E.R. 193 ; [1937] Ch. 67 ; 155 L.T. 572), and *Fredensen v. Rothschild* ([1941] 1 All E.R. 430), *considered*.

[AS TO RECTIFICATION FOR MISTAKE, see HALSBURY, Hailsham Edn., Vol. 23, pp. 140-143, paras. 197-200 ; and FOR CASES, see DIGEST, Vol. 35, pp. 91-95, Nos. 11-44.]

Cases referred to :

- (1) *Van der Linde v. Van der Linde*, [1947] Ch. 306 ; 176 L.T. 297 ; 2nd Digest Supp.
- (2) *Stone v. Godfrey*, (1854), 5 De G.M. & G. 76 ; 2 Eq. Rep. 866 ; 23 L.T.O.S. 289 ; 35 Digest 92, 21.
- (3) *Burroughes v. Abbott*, [1922] 1 Ch. 86 ; 126 L.T. 354 ; 35 Digest 92, 17.
- (4) *Jervis v. Howle & Talke Colliery Co., Ltd.*, [1936] 3 All E.R. 193 ; [1937] Ch. 67 ; 155 L.T. 572 ; Digest Supp.
- (5) *Fredensen v. Rothschild*, [1941] 1 All E.R. 430 ; 2nd Digest Supp.
- (6) *Jackson v. Stopford*, [1923] 2 I.R. 1 ; 35 Digest 93, 27ii.

ACTION for rectification of a deed on the ground that it did not represent the true intention of the parties. HARMAN, J., dismissed the action. The facts appear in the judgment.

Honeyman for the plaintiff, the husband, the covenantor.

Newsom for the first defendant, the wife, the covenantee.

Colinvaux for the second and third defendants, the trustees.

HARMAN, J. : This is a case of some difficulty. The plaintiff sues his former wife and the trustees of a deed of covenant dated Apr. 16, 1941, for rectification of that deed. When the matter came before me both the wife and the trustees had put in defences admitting all the allegations in the statement of claim. By my direction the trustees have withdrawn their defence and have substituted for it a defence that, while admitting the execution of the deed, they do not admit the other allegations in the statement of claim, but submit to act as the court directs.

The parties were married in 1919, and there were two children, born in 1920 and 1922. On Apr. 3, 1940, a decree *nisi* for divorce was pronounced and it was made absolute on Oct. 14, 1940. Before the hearing of the divorce proceed-

ings, which were brought by the wife against her husband, there was considerable discussion between the solicitors of the parties, first, as to alimony *pendente lite*, and then as to maintenance both for the wife and for the children up to the time when they should reach a certain age. The plaintiff was a substantial man of business and there were considerable disputes about what his assets were. Those discussions go back to 1939 and the first matter I need mention is a letter from the husband's solicitors on Oct. 17, 1939, in which they make this statement: "Our client is paying to your client £600 a year free of tax and to the daughter £120 a year free of tax," and they suggest that those payments should be continued *pendente lite*; those terms were not accepted. There was no agreement of any sort when the decree was made absolute in October, 1940, and after that event the solicitors returned to the question of maintenance and in a letter of Feb. 4, 1941, the wife's solicitors set out the terms with which she would be content. There had evidently been an interview between the parties' solicitors in November, 1940, because that is referred to in the letter as "our interview with you in November last." The interview took place between Mr. Kusel, a solicitor, then practising in partnership with another under the firm name of Litchfield & Kusel, representing the husband, and Mr. Day, a managing clerk in the firm of Joynson-Hicks & Co., who were the solicitors in England for the wife, she being resident in Canada and having also Canadian agents acting for her. The letter contains the following passages:

"In substance the proposals you made are accepted, but we set out the terms according to our instructions in the following way: . . . (iii) Payment to Mrs. Whiteside of £1,000 per annum free of tax up to the rate of tax in the £ payable as at the date of the deed of covenant to be entered into between the parties for the permanent maintenance of Mrs. Whiteside and her two children and this during her lifetime . . . (iv) The terms when agreed to be wholly incorporated in a deed of covenant the provisions thereof to be secured both as to maintenance and otherwise by deposit of a sufficient block of shares."

Those were the terms which the wife's advisers put forward, but they were not assented to by the husband or his advisers as appears from a letter which he wrote to his solicitors on Feb. 11, 1941, in which he says:

"My offer of £1,000 annuity free of tax up to 7s. 6d. in the £ stands. I am not interested in their suggestion 'free of tax up to the rate as at the date of the covenant'."

There was a further meeting between Mr. Kusel and Mr. Day, between Feb. 12 and 19, of which there is a record in a letter of Feb. 19, 1941, written by Mr. Kusel to his client in which he says:

"I have now had an interview with Joynson-Hicks & Co. Although they have to get formal instructions from Canada I do not think that there will now be any difficulty in arriving at a final agreement."

At this interview Mr. Day, for the wife, had no authority to come to an agreement. All he could do was to say he would refer the terms to his client in Canada. Mr. Kusel had authority to agree to a demand of £1,000 a year, free of tax, up to 7s. 6d. in the £. Mr. Kusel before me said: "We agreed terms subject to confirmation in Canada that Mrs. Whiteside should be paid £1,000 a year free of tax up to 7s. 6d. in the pound." Mr. Day said very much the same thing: "We came to an agreement that Mrs. Whiteside should be paid £1,000 a year clear of tax up to 7s. 6d."

As a result of that interview and after obtaining authority from Canada Mr. Day drew the deed of covenant contemplated between the parties. It was expressed to be made between the husband, of the first part, the former wife,

of the second part, and the two trustees, of the third part, and recital (5) is in these terms :

"It has been agreed between the parties hereto that the husband and his personal representatives shall pay to the wife during her life for the maintenance of herself and the said children such a sum as after deduction of tax at the rate of not more than 7s. 6d. in the £ shall amount to £1,000 per annum."

By cl. 1 (1) in the operative part of the draft, the husband was expressed to covenant that he would :

"... during the life of the wife pay to the wife such a sum after deduction of income tax at the rate of not more than 7s. 6d. in the £ as shall represent £1,000 per annum payable in advance . . ."

Mr. Day sent the draft in that form to Mr. Kusel, who altered it into the form in which the deed was finally executed. Recital (5) now reads :

"The husband and his personal representatives shall pay to the wife during her life for the maintenance of herself and the said children the sum of £1,000 per annum free of British income tax up to but not exceeding 7s. 6d. in the £."

By cl. 1 (1) of the operative part the husband now covenants :

"... during the life of the wife . . . to pay to the wife for her maintenance the sum of £1,000 per annum free of British income tax up to but not exceeding 7s. 6d. in the £ payable in advance . . ."

The altered draft was accepted by Mr. Day who told me he was under the impression that the alterations had not in any way changed the rights of his client under the deed. Mr. Kusel said that he altered the draft because, it being a divorce matter, he thought it right to follow the form so far as he could of orders in the Divorce Court to pay annuities free of tax. In pursuance of that covenant the husband paid his wife on a basis of freedom from income tax at 7s. 6d. in the £. During the first two years he obtained from the Crown deductions for the purposes of his assessment to sur-tax on the footing that that was his legal liability. It then appears to have been observed by someone that that was not so. When the Crown took the point (as in the interests of other taxpayers it was bound to) it appeared that, having regard to s. 23 (2) of the General Rules of the Income Tax Act, 1918, there was no right to pay the annuity without deduction. The husband thereupon started this action. When he started it the wife and the trustees may have had some interest in the case. The deed contains certain provisions whereby recourse may be had to shares in the hands of the trustees by way of collateral security, and, therefore, it might be said that they had some interest in seeing the deed rectified. However, on Mar. 30, 1948, after action brought the husband executed a supplemental deed whereby he agreed that the deed should be treated as rectified and as always having contained the terms in which rectification is now asked. From that moment the wife and the trustees had not the slightest interest in the action. Its only object is to obtain for the husband a weapon with which he can defend himself against the claims of the Revenue or make claims against it. The prayer to the statement of claim is in these terms :

"Rectification of the said deed of covenant by substituting in the fifth recital thereof and in cl. 1 (1) thereof the words 'such an annual sum as after deduction of British income tax at a rate up to but not exceeding 7s. 6d. in the £ will leave the sum of £1,000 per annum' for the words 'the sum of £1,000 per annum free of British income tax up to but not exceeding 7s. 6d. in the £'."

It was appreciated that the objection might be taken that the Crown was

the only person concerned beyond the plaintiff. Therefore, the Crown was asked whether it wished to be joined as a party, and it intimated that it did not wish to be so joined.

Similar circumstances existed in *Van der Linde v. Van der Linde* (1) where there was a voluntary deed of covenant by a settlor in favour of his sister, which, it was said, was intended to make a tax-free provision for her. The settlor had always paid her tax-free and continued to do so, but to better his position *vis-a-vis* the Revenue he brought the action. According to the headnote it was held that, as the proposed rectification was not one which would benefit the parties *inter se*, the court would not exercise its jurisdiction to rectify the deed. In that case the Crown appeared as *amicus curiae* in opposition to the claim. I take leave to doubt whether the case justifies the headnote. That is not what EVERSHED, J., decided. In fact, the judge decided that he was not satisfied on the evidence that there was any common mistake or that rectification could be had and, therefore, the action failed on the facts. The learned judge did, however, make some observations which are extremely pertinent to what I have here to decide. He said ([1947] Ch. 310) :

"It is a deed of covenant *inter partes*, executed, however, only by the plaintiff. Having regard to the form of the deed, it is plain that it disentitled, as between himself and the taxing authority, the plaintiff from claiming relief, or deduction from liability, on the footing of an obligation to pay, with income tax at 10s. in the pound, a gross sum of £800. From the time that that circumstance was discovered, it was, of course, a simple matter to remedy the defect by means of some amendment of the original deed, or the execution of a new one, assuming always that there was no objection raised on the part of the covenantee."

Of the beneficiary he says (*ibid.*) :

"Certainly she was in no way affected as regards the benefaction she received on its coming into existence and therefore could throw no light whatever on the matter which has been litigated. But the execution of the amendment, or deed of rectification, has, of course, not had the effect of making the amendments retrospective so as to entitle the plaintiff, from the date of the execution of the original deed, Oct. 8, 1942, to the tax relief which he sought. On those facts it is said on behalf of the plaintiff that what he intended to effect has been proved . . . It is said on behalf of the Crown that there is no desire to take advantage of a mistake, though it must also be borne in mind that, since the question is one of the tax obligation of one subject, anything like unregulated benevolence towards him would be at the expense of other subjects. The Crown also points out that, whether or not the discretion should in any case be exercised, it is quite plain that the rectification of documents is a remedy which these courts grant only on most careful consideration of the circumstances sought to justify the claim."

He considered a question about voluntary deeds to which I need not refer and continued (*ibid.*, 311) :

"Further it is said on the Crown's behalf that, where on the facts it is shown that there never was any obstacle as between the two parties to the deed to put right any mistake, it would not be a case in which on any view the court should exercise its discretion, more particularly where the object is on the plaintiff's part to obtain, so to speak, by a side wind an advantage which he could have obtained and which he only lost through the error which was made. On the view that I take of it, it is not necessary, and I do not think, therefore, probably desirable, that I should express any concluded view on those propositions . . . But in the case of such a deed, and all the more particularly when the object is to obtain by a side wind

some advantage to the settlor without any regard to the apparent intention on the face of the deed and to the fact that the covenantee has never suffered any damage from what is said to have gone wrong, I am satisfied that the reminders one finds in the text books to approach matters with caution are to be particularly borne in mind."

With every word of that I agree, and it seems to me that this is a case in which I ought not to grant the plaintiff rectification. The action is not to put right anything which needs putting right. That has been done already. The covenantee has already received, on any view, all that she is entitled to. The covenantor has not, in any way, failed to pay it. There is no relief that the parties require. What is sought is a side wind to help the plaintiff against the Revenue. I do not think in those circumstances the court ought to exercise its discretionary remedy of rectification and on that ground alone I should be disposed to dismiss this case, but it may be thought elsewhere that that is a wrong view to take so I think it is incumbent on me to consider whether, apart from that, the plaintiff makes out his case. A B

This is a very striking case in that the very words which I am now asked to put into the deed by way of rectification were considered by the parties when the matter was in negotiation and deliberately and with set purpose rejected. The amended draft shews that the parties deliberately intended to contract in the very words which they used. The prior agreement, so to call it (although a prior agreement in a binding sense is not necessary for rectification), was that Mrs. Whiteside should be paid maintenance of £1,000 a year free of tax up to 7s. 6d., and those are the very words in the deed. When it appears that in the interim between the agreement and the execution of the deed one side has suggested that another form of words should be used which have in law a different effect and those words have been deliberately rejected by the consent of the parties, then it seems to me, if there is to be rectification, it must be on a principle different from any of which I have heard in connection with that remedy. I take the law to be correctly stated in KERR ON FRAUD AND MISTAKE, 6th ed., p. 620 : C D E

"Though the court will rectify an instrument which fails through some mistake of the draughtsman in point of law to carry out the real agreement between the parties, it is not sufficient in order to create an equity for rectification that there has been a mistake as to the legal construction or the legal consequences of an instrument."

The parties here meant to make the very contract which they have made, but they say they did not appreciate what the legal consequences would be, and they, therefore, ask the court to rectify their mistake of law. I do not take the view that that is a legitimate ground for rectification. F

The question, or something like it, has been considered in a number of cases. One finds a statement by that great authority, TURNER, L.J., in *Stone v. Godfrey* (2) (5 De G.M. & G. 90) : G

"... this court has power ... to relieve against mistakes in law as well as against mistakes in fact."

The mistake in law there, however, was a different matter. The plaintiff was advised that he was not entitled to an estate by the courtesy, and, acting on that advice, obtained the estate for his daughter. He came to the court and said he had been wrongly advised and wanted rectification. Even if he had got it, that would not be the kind of mistake there is here. It was argued that the present deed could be rectified because of two decisions. The first is that of P. O. LAWRENCE, J., in *Burroughes v. Abbott* (3) where the Divorce Court made an order that the wife was to have a sum of money free of income tax. When the conveyancer to the court came to translate that into a deed he put it in a H

form which offended against r. 23, and rectification was asked to make the deed conform with the order. P. O. LAWRENCE, J., was confronted with the objection that a mistake of law could not be rectified and he said ([1922] 1 Ch. 95) :

“ . . . then it is said that the mistake made by the parties was a mistake in law and that the court has no power to relieve against the consequences of mistakes in law. In my judgment the general proposition that the court has no such power is unsound : see *e.g.*, *Stone v. Godfrey* (2), but, be that as it may, the proposition in my opinion has no application to the facts of this case.”

I do not disagree with any part of that. What he was doing was to make the document conform with the Divorce Court order. Significantly, during the course of the case the only hesitation was whether the Divorce Court should make the rectification or the Chancery Division.

In *Jervis v. Howle & Talke Colliery Co., Ltd.* (4), before CLAUSON, J., there was an oral agreement between the parties that the defendant should take a lease of the plaintiff's coal mine at a royalty of 3d. a ton free of tax. A memorandum of that agreement contained the words “free of tax,” and a lease translated those words literally into a covenant to pay royalty free of tax. The plaintiff claimed rectification by substituting for the payment of royalty “free of tax” a provision for the “payment of royalty of such amount as after deduction of income tax of the standard rate from time to time should leave threepence.” The difference between that case and this may not be very wide. It is, I think, significant that CLAUSON, J., said that *Burroughes v. Abbott* (3) was precisely in point. I am very diffident about differing from that learned judge, but it does not seem to me that that is right. The memorandum in the case before him was a consensual document whereas the order of the Divorce Court in *Burroughes v. Abbott* (3) was an order *in invitum*, and that seems to be a matter which the judge overlooked. However that may be, the learned judge had not before him the extraordinary feature I have here—that the parties have rejected the very words they now seek that I should supply. I do not think that that case compels me to say that in every case where the words “free of tax” are used rectification may be granted on proof of mistake, and in that connection the observations of BENNETT, J., in *Fredensen v. Rothschild* (5) are significant. In that case a lady brought an action for rectification of a deed of covenant on the ground that the terms had been that she was to have £550 free of tax and that meant such a sum after deduction of tax should leave her £550. She did not satisfy the learned judge about her recollection of the matter whether or not the word ‘tax’ was ever used. BENNETT, J., said ([1941] 1 All E.R. 435) :

“However, supposing that that conclusion of fact which has been reached is not the right one, and that the word ‘tax’ was used. The high watermark of the case of counsel for the plaintiff is that I ought to find it proved as a fact that Lord Rothschild said to her ‘You are to have £550 free of tax.’ Take those words ‘£550 free of tax.’ What do they mean? Do they mean that there is agreement as to the words which are to be used to give effect to the bargain they have made? Counsel for the plaintiff agrees that, if those words had been put into a deed, they would not have had the effect of freeing the plaintiff from liability to income tax and of throwing the burden of the income tax upon the shoulders of Rothschild. He says, however, that it has been settled by two authorities. One was a decision of CLAUSON, J., in *Jervis v. Howle & Talke Colliery Co., Ltd.* (4) and the other, *Burroughes v. Abbott* (3). These cases decided that, if parties have agreed that a sum shall be paid free of tax, they do not mean what they have said, but they mean payment of such a sum as, after deduction of tax, will produce the specified

sum . . . I am troubled about it very largely because I have had the pleasure and advantage of reading a most delightful and entertaining lecture by MACKINNON, L.J., which he calls 'Accurate and clear expression.' At the conclusion he says: 'You may sometimes hear people who have made, or think they have made, an agreement, talk about "getting it put into legal form." Rightly understanding, they ought to mean "getting it expressed in perfectly clear language." And if their own amateur effort is in truth a real agreement, no further process is necessary. What usually is necessary is to help them to make, not merely to express, an agreement'."

A

BENNETT, J., then points out that he has great doubt what exactly the words "free of tax" do mean. I am visited by the same trouble as BENNETT, J., was on that score.

B

My view of the impropriety of rectifying in these circumstances is supported by an Irish case, *Jackson v. Stopford* (6). That was a case about a lease and it arose out of an Irish statute which prohibited payment by landlords of certain poor rates assessed on occupiers. It was held:

"By the High Court of Appeal, affirming the decision of the Court of Appeal in Southern Ireland and the judgment of GORDON, J., that the court cannot rectify or cancel a deed or agreement because its terms operate differently from what the parties intended owing to their mistake as to the general law applicable to the transaction."

C

The decision is by the Supreme Court then representing both North and South Ireland and is one of considerable weight though, of course, not binding on me. The point made was that if the actual agreement made was translated into the deed the effect would not be produced which the parties said ought to have been produced. There was no doubt what they had agreed. They had only made a mistake regarding the legal effect of their agreement. I do not think I need refer to the case in detail, but it supports the proposition I have advanced.

D

I do not think this is a case in which, even if I were otherwise disposed, which I am not, I can assist the plaintiff. He has not satisfied the necessary conditions. All he proves is that an agreement was made which both parties intended. It has turned out to have a different legal effect from that which was anticipated, but that is no ground for rectification, and I, therefore, dismiss the action.

E

Action dismissed on the plaintiff's undertaking to pay his own costs and those of the trustees as between solicitor and client, and the first defendant's undertaking to pay her own costs. No order was made as to costs.

F

Solicitors: *Kimber Bull & Co.* (for the plaintiff and the second and third defendants); *Joynson-Hicks & Co.* (for the first defendant).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

G

Re CITY OF LONDON REAL PROPERTY CO., LTD.

[CHANCERY DIVISION (Vaisey, J.), March 2, 3, 17, 1949.]

War Damage—Value payment—Value after damage—Basis of valuation—Hypothetical sale—Restrictions affecting property—“Any restriction imposed . . . under an enactment . . . to which the hereditament was subject at the time immediately after the occurrence of the war damage”—War Damage Act, 1943 (c. 21), s. 10 (1), (2); sched. II, para. 1 (1) (c) (iii).

The appellants were the owners of a warehouse in London which was so seriously damaged by enemy action on May 10, 1941, that it became a total loss within the meaning of the War Damage Act, 1943, s. 7 (2), and the appellants were entitled to a value payment under that section. By s. 10 (1) of the Act the amount of a value payment is the difference in the value of the property before damage and its value after damage, the basis of valuation, in each case, being, by s. 10 (2), a hypothetical sale of the property on Mar. 31, 1939, on the terms specified in sched. II, paras. 1 and 2, to the Act. Under these provisions, the hypothetical sale is a sale of the fee simple in the property, and, by para. 1 (1) (c) of sched. II, it is to be a sale made “subject to (i) any restrictive covenant, easement, quasi-easement, or other right inuring for the benefit of other land, (ii) any public right of way . . . or other right inuring for the benefit of the public or of any section thereof, and (iii) any restriction imposed by or under an enactment passed before the War Damage Act, 1941, to which the hereditament was subject at the time immediately after the occurrence of the war damage. . .” It was contended by the appellants that in estimating the value of the property after damage the provisions of the Defence (General) Regulations, 1939, regs. 50 and 51 (giving the competent authority power to forbid or do work on, or to requisition, land), and the restrictions on building operations imposed by reg. 56A (S.R. & O., 1940, No. 1678, as amended by S.R. & O., 1941, No. 437) should be taken into consideration, as reducing the price which a purchaser would be likely to offer for the property.

Held: the restrictions referred to under head (iii) of sched. II, para. 1 (1) (c), to the Act of 1943 were (like those specified in heads (i) and (ii)) confined to restrictions which were peculiar to the property itself, and did not include the disabilities to which the property or its owner was subject in common with all other properties and owners of properties, and of which no express disclosure need have been made to an intending purchaser; no order had been made specifically with regard to the property under the Defence (General) Regulations, 1939, reg. 50 or reg. 51, and reg. 56A, and so these regulations, which applied to all property and not merely to the property in question, did not constitute restrictions imposed by or under an enactment passed before the War Damage Act, 1941, within the meaning of para. 1 (1) (c) (iii) of sched. II, so as to affect the value of the property after damage; and, therefore, the appellants failed.

[FOR THE WAR DAMAGE ACT, 1943, ss. 7 and 10, and sched. II, paras. 1 and 2, see HALSBURY'S STATUTES, Vol. 36, pp. 344, 348 and 434.]

H Case referred to:

(1) *Re Forsey and Hollebone's Contract*, [1927] 2 Ch. 379; 91 J.P. 182; 40 Digest 82, 634.

APPEAL by way of Special Case from a determination of the War Damage Commission.

The appellants were entitled under the War Damage Act, 1943, s. 7, to a value payment in respect of certain property which was a total loss within the meaning of that section. The War Damage Commission held that the

Defence (General) Regulations, 1939, regs. 50, 51 and 56A, did not constitute restrictions imposed by or under an enactment passed before the War Damage Act, 1941, within the meaning of sched. II, para. 1 (1) (c) (iii), to the Act of 1943, for the purpose of estimating the value of the property after damage. The appellants contended that the property should be valued subject to the provisions and restrictions of these regulations. VAISEY, J., held that a restriction within the meaning of sched. II, para. 1 (1) (c) (iii), was one which was peculiar to the particular property and not merely a disability to which all properties were subject, and he dismissed the appeal. The facts appear in the judgment.

Sir Walter Monckton, K.C., Harold Williams, K.C., and Christopher Hodson for the appellants.

Rowe, K.C., and H. L. Parker for the War Damage Commission.

Cur. adv. vult.

Mar. 17. VAISEY, J., read the following judgment. This is an appeal by the City of London Real Property Co., Ltd., against a determination of the War Damage Commission with regard to a property known as Nos. 14 and 16, Norwich Street in the city of London. The appellants are the successors (in title and interest) to another company called Fenchurch Street Properties, Ltd., to whom, at all material times and for all material purposes, the property in question belonged. The facts are not in dispute. The property was a warehouse, erected in 1904, substantially constructed, and used for the purposes of a printers' business until May 10, 1941, when it was so seriously damaged by enemy action that it became a total loss within the meaning of the War Damage Act, 1943, s. 7. The before-damage value of the property is agreed by the War Damage Commission and the appellants to be £12,500. The dispute between them is as to its after-damage value. Their respective contentions, as set out in the Special Case which defines the issues arising on this appeal, may be summarised as follows. Both parties agree that the value of the property in the state in which it was immediately after the occurrence of the war damage is the amount which it might have been expected to realise on such a sale as is specified in sched. II, para. 2, to the Act, but the War Damage Commission say that such sale must be assumed to have been effected under the conditions (social, economic and political) existing on Mar. 31, 1939, and they say further that in estimating such value the provisions of the Defence (General) Regulations, 1939, regs. 50 and 51, and the restrictions imposed by reg. 56A of the Defence (General) Regulations, 1939 (S.R. & O., 1940, No. 1678, as amended by para. 4 of S.R. & O., 1941, No. 437, made under the Emergency Powers (Defence) Acts, 1939 and 1940), as in force on May 10, 1941, did not constitute restrictions imposed by or under an enactment passed before the War Damage Act, 1941, within the meaning of sched. II, para. 1 (1) (c) (iii) to the Act of 1943, and, again, that, in arriving at such value, it has to be assumed that all other land and buildings were, on Mar. 31, 1939, in their then actual physical condition, that is to say, unaffected by war damage. On their part the appellants say that the after-damage value of the property (ascertained by reference to prices current on Mar. 31, 1939) is to be taken to be the amount which the property in its damaged state might have been expected to realise on that date on such a sale as is specified in sched. II, para. 2, to the Act of 1943, if the building had been demolished by enemy action during a war and at a time when the physical condition of all other land and buildings was in the actual condition in which they were on May 10, 1941, and when (as was, undoubtedly, the case on that date) labour and materials for re-building were not readily available. They further in particular say that the property should be valued subject to the provisions of the Defence (General) Regulations, 1939, regs. 50 and 51 and the restrictions imposed by reg. 56A which had the effect of prohibiting building operations (with certain immaterial

exceptions) and of exposing any possible purchaser of the property to the risk of requisition, thereby reducing the price which any purchaser would be likely to offer for the property.

The result of these alternative views appears to be that on the former view (that of the War Damage Commission) the £12,500 is divisible thus: £3,700 as after-damage value, and £8,800 as the appropriate value payment; whereas, on the appellants' view, £2,275 would be the after-damage value and £10,225 the value payment. The appellants' figures are not accepted by the War Damage Commission as correct, and, if the appellants' contentions are correct, their figures must be referred for further consideration by the appropriate tribunal. The dispute, therefore, involves a comparatively small sum of money, but I understand that the action is regarded as being to some extent a test case.

The question which I have to decide may be thus stated. How much of the conditions of the year 1941 are to be written back, as it were, into the conditions of 1939? The answer to that question, as it arises in the present case, appears to turn principally, if not exclusively, on the interpretation of a few words in sched. II to the Act of 1943. I must, in the first place, refer to s. 10 of the Act, which provides as follows:

"(1) Subject to the provisions of this Part of this Act, the amount of a value payment shall be an amount equal to the amount of the depreciation in the value of the hereditament caused by the war damage, that is to say, the amount by which the value of the hereditament in the state in which it was immediately after the occurrence of the damage is less than its value in the state in which it was immediately before the occurrence of the damage. (2) For the purpose of computing the amount of a value payment, the value of a hereditament in any state shall be ascertained by reference to prices current at Mar. 31, 1939, and shall be taken to be the amount which, if the hereditament had been on that day in that state, it might have been expected to realise on such a sale as is specified in para. 2 of sched. II to this Act made on that day . . ."

"Any state," in sub-s. (2), must mean, I think, "in either state." I now turn to sched. II. Paragraph 2 is:

"(1) For the purposes of s. 10 (2) of this Act, the sale by reference to which the value of a hereditament, whether in its state immediately before the occurrence of war damage or in the state by reference to which, as regards its state after damage, the depreciation in the value of the hereditament is to be determined, shall be a sale of the fee simple in the hereditament made as specified in para. 1 of this schedule, so however that the time to be referred to for the purposes of heads (c) and (d) of sub-para. (1) thereof shall be (a) as regards the valuation of the hereditament in its former state, the time immediately before the occurrence of the war damage; and (b) as regards the valuation of the hereditament in its latter state, the time immediately after the occurrence of the war damage. (2) For the said purpose the amount that the hereditament in its latter state might have been expected to realise on the said sale shall be ascertained on the assumption that it would have been possible to foresee, immediately after the taking of the action or measures from which the war damage resulted, all the war damage which is known at the time when valuation is made to have resulted therefrom."

Paragraph 1 (1) of sched. II is:

"For the purposes of s. 7 (2) of this Act, the sale by reference to which there is to be ascertained the amount which the fee simple in a developed hereditament might have been expected to realise on a sale thereof in the state in which it would be after the execution of works, or as a site, shall be a sale made (a) in the open market; (b) with vacant possession;

(c) subject to (i) any restrictive covenant, easement, quasi-easement, or other right inuring for the benefit of other land, (ii) any public right of way, right of common, or other right inuring for the benefit of the public or of any section thereof, and (iii) any restriction imposed by or under an enactment passed before the War Damage Act, 1941, to which the hereditament was subject at the time immediately after the occurrence of the war damage or, in the case of an ascertainment for the purposes of s. 16 (1) of this Act in the case of a hereditament which has sustained war damage on more than one occasion, immediately after the subsequent occasion mentioned in that sub-section; (d) free from any other incumbrance, and without regard to any liability of the hereditament to become subject after the said time to any restriction by virtue of any enactment."

I regard as vital in the present case the words of para. 1 (1) (c) (iii). The alternative words at the end of para. 1 (1) (c) (iii) do not apply in the present case. Paragraph 1 (2) deals with the application of the paragraph, with certain modifications, to Scotland.

Reading ss. 7 and 10 of the Act and paras. 1 (1) and 2 of sched. II to the Act together, it appears to me that the hypothetical sale of the property in question in its state after damage must be considered to have been a sale effected on Mar. 31, 1939, of such property in the condition in which it was at the moment of time immediately following the occurrence of the war damage (say on the morning of the next day, which here was May 11, 1941) subject (*inter alia*) to any restriction affecting the property at that moment of time, or that morning, imposed by or under any enactment passed before the War Damage Act, 1941, *i.e.*, before Mar. 26, 1941, that being the day on which that Act received the Royal Assent. The point which I have to decide may, in my view, be further formulated thus. Are the restrictions referred to in para. 1 (1) (c) (iii) of sched. II confined to those which affected the property itself in particular, or specially, and were *ejusdem generis* with the matters specified under heads (i) and (ii) of para. 1 (1) (c) (which, be it remembered, are restrictive covenants, etc., and public rights of way, etc.), which I understand to be the contention of the War Damage Commission—or do they include (as the appellants would say) such restrictions as affected all other similar property in general, without special application to this property in particular and whether or not they were *ejusdem generis* with the matters specified under the preceding heads (i) and (ii)?

It is, in my judgment, important to bear in mind that it is not strictly accurate to speak of restrictions affecting or imposed on property. It is the owner of the hereditament who is restricted—restricted, that is, in his freedom to use it as he likes. Some of the restrictions on him are of a perfectly general character. For instance, the owner of a house may not use it for an immoral purpose, nor so as to create a public or private nuisance. He may not contravene local bye-laws in regard to building operations. He may not use it for harbouring the king's enemies or fugitive criminals. That is the first class of restrictions, and no vendor need call a purchaser's attention to their existence. The other class of restrictions consists of particular restrictions. This class includes the matters enumerated under heads (i) and (ii) of para. 1 (1) (c) of sched. II, to which I have already referred. It also, in my judgment, would include a prescribed building line, a requisitioning order, and similar statutory or departmental restrictions directed against the property itself or the owner of it in particular. Do the words under head (iii) of para. 1 (1) (c) include the first class or do they include only the second? The risk of requisition is a useful example by which to test the matter. No doubt, the existence of the risk was, to some extent, depreciatory, but on May 11, 1941, it was a risk to which all property, or, at any rate, every warehouse, was subject. So, too, with regard to the prohibition or limitation of building operations which,

undoubtedly, on that date would have been a consideration tending to reduce the value to a purchaser of any one of those bombed sites with which we have become so familiar during the last few years. The consideration, however, was not of special application to this particular property, Nos. 14 and 16, Norwich Street, but applied with equal force to every comparable warehouse or vacant site in the city of London, or, indeed, elsewhere.

- A In my judgment, the contention of the War Damage Commission on this point is well-founded. Looking again at para. 1 (1) (c) of sched. II to the Act, I find that the hypothetical sale is to be subject under head (i) to restrictive covenants, etc., and under head (ii) to rights of way, etc., which are obviously incidents of the tenure of the particular property, peculiar to itself as distinguished from other properties. It seems to me to follow that the restrictions under head (iii) must likewise be such as are peculiar to the property itself and not the disabilities to which it, or the owner of it, was subject in common with all other properties and owners of property and of which no express disclosure ought to or need have been made to an intending purchaser. If the property had, in fact, been requisitioned under an order or notice which was operative on May 11, 1941, or if the use of the site had been expressly controlled by some effective direction of a competent authority (such order, C notice or direction being made or given under an enactment passed before Mar. 26, 1941), then, in my judgment, a restriction within the meaning of head (iii) would have existed, but nothing of the kind is alleged in the circumstances of the present case. The artificial and conjectural hypotheses which I have to formulate under this and other comparable legislation involve considerations which are not easy to grasp—or, perhaps, I should say that D I, at least, do not find them so.

- I have dealt with what I think was the appellants' main point. I need not refer to the alleged "restrictions" in detail. The Defence (General) Regulations, 1939, reg. 50, enabled certain authorities to carry out works on lands in private ownership, reg. 51 was the requisitioning provision, reg. 56A limited E the amount of money which it was permissible to lay out on property—i.e., on any property, and not this property in particular. I propose to confine this judgment to the facts of this particular case. The property is not one which is or was at any material time affected by such enactments as the Roads Improvement Act, 1925 (see s. 5 as to the prescription of building lines), the Town and Country Planning Act, 1932, the Restriction of Ribbon Development Act, 1935, and the Rent Restrictions Acts, but, if it were so affected, F directly and immediately, and not merely in some remote though imaginable contingency, it may be that such enactments would be held to impose restrictions within the meaning of the head (iii) to which I have in this judgment so often referred. I leave that question open to be decided when, if ever, it arises, but I may in passing refer to *Re Forsey and Hollebone's Contract* (1).

- G I will deal very briefly indeed with the contention that the sale on Mar. 31, 1939, must be considered as a sale of the property with its surroundings not in the condition in which they were on that date but in the condition in which they were on May 11, 1941. I will merely say that I am unable to accept that contention. In the result, I think that the findings of the War Damage Commission are based on a proper interpretation of the law, and this appeal H must be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Rooks, Wales, Godwin & Galsworthy* (for the appellants); *The Treasury Solicitor* (for the War Damage Commission).

[*Reported by H. McL. MORRISON, Esq., Barrister-at-Law.*]

CLARKE v. GRANT AND ANOTHER.

[COURT OF APPEAL (Lord Goddard, C.J., Bucknill and Denning, L.JJ.), March 22, 1949.]

Landlord and Tenant—Notice to quit—Waiver—Acceptance of rent in respect of period after termination of tenancy.

A
A yearly tenant of a dwelling-house at a rent payable monthly in advance, received a valid notice to quit expiring on Apr. 30, 1948. Early in May, 1948, the tenant paid one month's rent in respect of the month of May, 1948, to the landlord's agent, who accepted it in the belief that it was rent payable in arrear for the month of April, 1948. In an action by the landlord for possession,

B
HELD: the acceptance by the landlord of rent in respect of a period after the termination of the tenancy by the notice to quit did not operate as a waiver of the notice, and the landlord was entitled to possession.

Hartell v. Blackler ([1920] 2 K.B. 161; 123 L.T. 171), *overruled*.

Davies v. Bristow ([1920] 3 K.B. 428; 123 L.T. 655), *approved*.

C
[AS TO EFFECT OF PAYMENT OF RENT, see HALSBURY, Hailsham Edn., Vol. 20, p. 128, para. 138; and FOR CASES, see DIGEST, Vol. 31, pp. 456, 457, Nos. 6033-6056.]

Cases referred to:

- (1) *Doe d. Cheney v. Batten*, (1775), 1 Cowp. 243; 31 Digest 457, 6042.
- (2) *Hartell v. Blackler*, [1920] 2 K.B. 161; 123 L.T. 171; 31 Digest 456, 6040.
- (3) *Croft v. Lumley*, (1856), 5 E. & B. 682; *affmd.*, (1858), 6 H.L. Cas. 672; 31 L.T.O.S. 382; 22 J.P. 639; 31 Digest 461, 6085.
- (4) *Davies v. Bristow*, *Penrhos College v. Butler*, [1920] 3 K.B. 428; 123 L.T. 655; 31 Digest 459, 6065.
- (5) *Hunt v. Bliss*, [1919] W.N. 331; 31 Digest 456, 6032.

E
F
APPEAL by a landlord from an order of His Honour DEPUTY JUDGE SMYLIE, sitting at Birkenhead County Court on Sept. 23, 1948, whereby he refused an order for possession of a dwelling-house on the ground that the notice to quit served by the landlord had been waived by the acceptance of rent in respect of a period after the date of its expiry. The Court of Appeal allowed the appeal, holding that there was no evidence on which the learned judge could find an intention to create a new tenancy. The facts appear in the judgment of LORD GODDARD, C.J.

C. J. I. Cunningham for the landlord.

J. Robertson Crichton for the tenants.

G
H
LORD GODDARD, C.J.: The plaintiff (the landlord) brought an action to recover possession of a dwelling-house which the defendants (the tenants) were occupying on a yearly tenancy at a rent of £75 a year. There had been a previous lease, and the defendants had been holding over as yearly tenants. On Mar. 26, 1947, the tenants received from the landlord a notice to quit on Apr. 30, 1948. No one disputes that that was a good notice, but early in May one of the tenants went to the landlord's agent and paid to him a sum of money which was equivalent to one month's rent. The agent, whose evidence does not appear to have been challenged, said that he received that rent in the belief that it was rent in arrear in respect of the previous month. In fact, the rent had always been paid in advance, and, therefore, there was a mistake in the agent's mind, he accepting the rent as rent paid for the month that had expired whereas the tenant was paying it as rent in advance. The learned deputy judge held that the notice to quit had been waived. If one may say so with respect to the learned deputy judge, he fell into the error of confusing an acceptance of rent after a notice to quit with an acceptance of rent after notice that

an act of forfeiture has been committed. If a landlord seeks to recover possession of property on the ground that breach of covenant has entitled him to a forfeiture, it has always been held that acceptance of rent after notice waives the forfeiture, the reason being that in the case of a forfeiture the landlord has the option of saying whether or not he will treat the breach of covenant as a forfeiture. The lease is voidable, not void, and if the landlord accepts rent after notice of a forfeiture it has always been held that he thereby acknowledges or recognises that the lease is continuing. With regard to the payment of rent after a notice to quit, however, that result has never followed. If a proper notice to quit has been given in respect of a periodic tenancy, such as a yearly tenancy, the effect of the notice is to bring the tenancy to an end just as effectually as if there has been a term which has expired. Therefore, the tenancy having been brought to an end by a notice to quit, a payment of rent after the termination of the tenancy would only operate in favour of the tenant if it could be shown that the parties intended that there should be a new tenancy.

That has been the law ever since it was laid down by the Court of King's Bench in *Doe d. Cheney v. Batten* (1) where LORD MANSFIELD said (1 Cowp. 245) :

"The question therefore is, *quo animo* the rent was received, and what the real intention of both parties was ?"

It is impossible to say that the parties in this case intended that there should be a new tenancy. The landlord always desired to get possession of the premises. That is why he gave his notice to quit. The mere mistake of his agent in accepting the money as rent which had accrued is no evidence that the landlord was agreeing to a new tenancy.

The importance of the present case is that it gives this court an opportunity of overruling once and for all the decision of the Divisional Court in *Hartell v. Blackler* (2). That case, unfortunately, was argued on one side only, and the court, if one may say so with all respect, fell into exactly the same error as the learned deputy judge has fallen into in this case of confusing the effect of an acceptance of rent after a notice of forfeiture and the effect of acceptance of rent after the expiration of a notice to quit. They applied the doctrine that always has applied in regard to the acceptance of rent after a notice of forfeiture—indeed, they based their judgment on the well-known case of *Croft v. Lumley* (3)—and held that where a landlord had accepted rent after a notice to quit had been given he had given up all the benefit under the notice to quit.

Hartell v. Blackler (2) was expressly dissented from by another Divisional Court in *Davies v. Bristow* (4). Previously *Hunt v. Bliss* (5) had been decided, but it had not been brought to the notice of the court which decided *Hartell's* case (2). The Divisional Court in *Davies v. Bristow* (4), therefore, were confronted with two conflicting decisions and LUSH, J., in a most convincing judgment, explained why he preferred *Hunt v. Bliss* (5) to *Hartell v. Blackler* (2).

In the opinion of this court, without any hesitation, *Hartell v. Blackler* (2) was wrongly decided and must be taken to be overruled. The deputy judge did not apply his mind to whether there was a new agreement come to by the parties because he relied on the acceptance of rent as conclusive of a waiver, but we can reverse his judgment because, in our opinion, there is no evidence on which a new agreement could be inferred. This appeal must be allowed.

BUCKNILL, L.J. : I agree.

DENNING, L.J. : I agree.

Appeal allowed with costs.

Solicitors : George A. Herbert, agent for Edward A. Simans, Birkenhead (for the landlord) ; Ranger, Burton & Frost, agents for G. F. Lees & Son, Birkenhead (for the tenants).

[Reported by C. N. BEATTIE, Esq., Barrister-at-Law.]

PHILLIPS v. LAMDIN.

[KING'S BENCH DIVISION (Croom-Johnson, J.), March 7, 1949.]

Lease—Assignment—Delay in completion—Award of damages after completion—Removal of fixture after contract—Order to replace.

On Feb. 20, 1947, the plaintiff contracted with the defendant to purchase from the defendant the lease of a house held by him, and Mar. 28, 1947, was fixed as the date for completion. On Mar. 25, the plaintiff's solicitors sent the draft assignment to the defendant's solicitors, emphasising in a covering letter that the plaintiff was "most anxious to complete if possible on the date fixed . . . She will be put to considerable trouble and inconvenience if she is forced to cancel arrangements she has already made for moving in on the 29th instant . . . The completion date was fixed after considerable discussion and your client has been fully aware that these premises were and still are required for our client's personal occupation." The draft was approved, but the defendant informed the plaintiff that he was unable to arrange for possession on Mar. 28 owing to unforeseen difficulties which had arisen in respect of the house into which he himself proposed to move. On Mar. 27, the defendant's solicitors wrote stating that it would be impossible to give possession for another six weeks. The plaintiff's solicitors replied emphasising that it was a matter of the greatest urgency that the defendant should be given possession of the house, that a staff had been engaged, and that a delay of a month would ruin the plaintiff's practice as a naturopath. The plaintiff's solicitors did not send to the defendant's solicitors the engrossment of the assignment until Apr. 9. On Apr. 15, a writ for specific performance was issued by the plaintiff, and in endeavouring to serve it on May 9 her solicitors discovered that the house was empty. On June 5 the purchase was completed. In an action by the plaintiff for damages in respect of the delay in completing the contract, it was agreed that time was not of the essence of the contract.

HELD : except where delay was due to a defect in the title or a conveyancing difficulty, damages were recoverable for delay in the performance of a contract for the sale of an interest in land ; the plaintiff had proved damage resulting from the defendant's delay ; and, therefore, she was entitled to succeed.

Jones v. Gardiner ([1902] 1 Ch. 191 ; 86 L.T. 74), *applied*.

When viewing the house prior to the contract to purchase, the plaintiff observed an ornate door matching a mantel-piece which was attributed to the design of one of the brothers Adams. On taking possession she found that the door had been removed, and replaced by one of plain white wood.

HELD : so far from observing his duty to use reasonable care to preserve the property, the defendant had himself despoiled it, and an order would be made that he should, at his own cost, replace the door.

Clarke v. Ramuz ([1891] 2 Q.B. 456 ; 65 L.T. 657), *applied*.

[AS TO DAMAGES FOR BREACH OF CONTRACT FOR SALE OF LAND, see HALSBURY, Hailsham Edn., Vol. 29, pp. 389-394, paras. 535-541 ; and FOR CASES, see DIGEST, Vol. 40, pp. 258, 259, 262-268, Nos. 2242-2256, 2273-2350.]

Cases referred to :

- (1) *Clarke v. Ramuz*, [1891] 2 Q.B. 456 ; 65 L.T. 657 ; 56 J.P. 5 ; 40 Digest 344, 2921.
- (2) *Webb v. Hughes*, (1870), L.R. 10 Eq. 281 ; 40 Digest 111, 893.
- (3) *Bain v. Fothergill*, (1874), L.R. 7 H.L. 158 ; 31 L.T. 387 ; 39 J.P. 228 ; 40 Digest 265, 2306.

- (4) *Jones v. Gardiner*, [1902] 1 Ch. 191; 86 L.T. 74; 40 Digest 267, 2343.
 (5) *Engell v. Fitch*, (1869), L.R. 4 Q.B. 659; 10 B. & S. 738; 40 Digest 263, 2284.
 (6) *Jacques v. Millar*, (1877), 6 Ch.D. 153; 37 L.T. 151; *sub nom. Jacques v. Millar*, 42 J.P. 20; 42 Digest 567, 1327.
 (7) *Royal Bristol Permanent Building Society v. Bomash*, (1887), 35 Ch.D. 390; 57 L.T. 179; 40 Digest 187, 1562.

A

ACTION for damages for breach of contract.

The parties contracted, subject to the National Conditions of Sale, for the plaintiff to purchase the lease of a house held by the defendant. Completion was delayed owing to the default of the defendant, and, after the assignment of the lease, the plaintiff claimed damages. CROOM-JOHNSON, J., found that damage had been proved, and made an award accordingly. The relevant facts are set out in the headnote.

B

T. G. Roche for the plaintiff.

H. G. Garland for the defendant.

C

CROOM-JOHNSON, J., stated the facts, and, dealing first with the removal of the door, continued: According to *Clarke v. Ramuz* (1) in the Court of Appeal, where a vendor remains in possession pending completion he owes a duty to take reasonable care to preserve the property. It is sometimes said that he is a trustee of the property, but, if he is, he is not an ordinary trustee. There are, however, as was stated by LORD COLERIDGE, C.J., in *Clarke v. Ramuz* (1) ([1891] 2 Q.B. 459) certain duties imposed on him by law

D

"... one of which is to use reasonable care to preserve the property in a reasonable state of preservation, and, so far as may be, as it was when the contract was made."

So that, even if somebody else had removed this door, the defendant might have been responsible, but in the present case the defendant, in the teeth of his contract, has removed something which is not a mere trifle. I entertain no doubt that he is liable to replace the door. You cannot make a new Adams door. In these times you cannot re-fashion a door or make a copy. It seems to me that it is proper to order the defendant to return the door to where it belongs and to pay the expenses of so doing. I do not see how damages can be an adequate remedy, and I do not mean, if I can avoid it, to give the defendant the opportunity of paying damages in lieu. The plaintiff must give up the existing door.

F

[His LORDSHIP, having held that as from Apr. 9 there had been wilful delay and default on the defendant's part, proceeded:] With regard to the rest of the case, it is said: "This is mere delay. You cannot recover damages for mere delay for non-completion of a contract for the sale of land or an interest in land." Counsel for the defendant has argued that, if time is not of the essence of the contract here—and everybody agrees it is not—time might be made of the essence by giving an appropriate notice during the progress of the negotiations towards completion, and that when time had been made of the essence it would be possible for the plaintiff to rescind the contract because of delay. He cites as an example *Webb v. Hughes* (2). It is true that that is one thing the purchaser can do if he is so minded, but the plaintiff does not want to rescind.

G

No doubt, in an ordinary contract for the sale of goods, if there is no time limit fixed or no time limit which is of the essence of the contract, it is possible to give express notice to the other party to complete within a certain time, and, if completion is not made within that time, to rescind the contract and claim re-payment of any money paid and damages, but that is not the end of the matter. I have never heard it suggested that, in an ordinary contract for the sale of goods, when a reasonable time has elapsed and the goods have not been delivered, the only thing that can be done is to give notice

H

and then seek to rescind and recover damages. Damages for breach of contract for delay, even after the sale of the goods has been completed, are always recoverable if the plaintiff can prove damage. There is no distinction to be drawn in general, so far as I am able to ascertain from passages in DART ON VENDOR AND PURCHASER, 8th ed., vol. 2, and WILLIAMS ON VENDOR AND PURCHASER, 4th ed., vol. 2, between a contract for the sale of land and any other contract, except that where the contract is not completed owing to some conveyancing difficulty or some difficulty with regard to title and the matter goes on, a court of equity will not give damages for loss of the bargain, the reason, apparently, being that the uncertainty of title in this country is thought to make an exception to the general rule. This exception is known as the rule in *Bain v. Fothergill* (3).

That being so, I cannot see that the argument of counsel for the defendant can be accepted. In *Jones v. Gardiner* (4) BYRNE, J., had to deal with this problem, and also with another argument advanced by counsel for the defendant in this case, that, where the contract provides for payment of interest when there is delay in completion, no claim for damages for delay can arise. BYRNE, J., decided that where the delay has been caused by default of the vendor, not in consequence of want of or defect in title or conveyancing difficulties, but by reason of the vendor not having used reasonable diligence to perform his contract, damages could be recovered. He said ([1902] 1 Ch. 195):

"There is no question in the present case of want of good faith, as evinced by any desire to repudiate the contract, or of fraud; but, having carefully considered all the proceedings and the correspondence and the evidence, I am of opinion that a very considerable part of the delay which has occurred in carrying out the contract (after making full allowance for the time which may fairly be considered to have been due to difficulties in making out title, and to a controversy as to the form of the conveyance) has arisen entirely from the default of the vendor—default, that is, in doing what he could reasonably and fairly have done had he been duly careful to fulfil his contract. So far as the materials before me enable me to judge, the contract might certainly have been carried out, making a liberal allowance for delay in consequence of the difficulties and discussions I have referred to, three months earlier than the actual date of completion."

In the case now before me—except that, by some oversight after they had been told that completion would not be made on the proper date, the engrossment of the assignment was not forwarded until Apr. 9—no part of the delay can be attributed to the actions of the plaintiff's solicitors. BYRNE, J., then goes on to deal with *Bain v. Fothergill* (3) and he says that *Engell v. Fitch* (5)

"... which was considered in *Bain v. Fothergill* (3), so far as it determines that where the breach of contract arises, not from inability to make a good title, but from refusal to take necessary steps to give the purchaser possession pursuant to the contract, further damages may be recovered, appears to remain good law. *Jaques v. Miller* (6) is a distinct authority for giving damages against a vendor, in addition to specific performance, in respect of delay caused by wilful refusal to carry out a contract, and for the measure to be applied in ascertaining the damages, namely, such damages as may reasonably be said to have naturally arisen from the delay, or which may reasonably be supposed to have been in the contemplation of the parties as likely to arise from the partial breach of contract. This case was followed in *Royal Bristol Permanent Building Society v. Bomash* (7)."

The learned judge in that case acquitted the defendant of any ulterior motive. I do not find it necessary to go as far as that in this case, but it seems to me that the plaintiff has made out her case for damages, and the only question in my mind is whether I can give her damages from Mar. 28 down to June 5 or whether I should give her damages only from Apr. 9. I think that, on the whole, it is safer to say that, as there was a breach by the plaintiff's solicitors in not sending the engrossment of the assignment at once, although I do not think it made any difference to anybody, damages should start from Apr. 9.

His Lordship assessed the damages at £194 17s. 6d. and gave judgment for the plaintiff with costs.

Solicitors: *D. B. Levinson & Shane* (for the plaintiff); *Philip Conway, Thomas & Co.* (for the defendant).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

R. v. GARTH.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Humphreys and Birkett, JJ.), March 25, 1949.]

Criminal Law—Receiving—Summing-up—Explanation by prisoner of possession raising doubt in minds of jury.

On the trial of the applicant for receiving, the deputy recorder directed the jury that, if the applicant gave an explanation of his possession of the stolen goods "which, although you do not think it to be true, you think might possibly be true, then he is entitled to be acquitted".

HELD: this direction was unduly favourable to the applicant as any explanation "might possibly be true." A proper direction would be that possession of property recently stolen, where no explanation is given by the prisoner, is evidence which can go to the jury that the prisoner received the property knowing it to have been stolen, but, bearing in mind that the *onus* of proof is always on the prosecution, if the prisoner gives an explanation which raises a doubt in the minds of the jury whether or not he knew that the property has been stolen, the ordinary rule applies, the case has not been proved to the satisfaction of the jury, and the prisoner is entitled to be acquitted.

R. v. Schama, R. v. Abramovitch, (1914) (112 L.T. 480; 79 J.P. 184), explained.

[AS TO POSSESSION OF GOODS RECENTLY STOLEN, see HALSBURY, Hailsham Edn., Vol. 9, pp. 555, 556, para. 944; and FOR CASES, see DIGEST, Vol. 15, pp. 972, 973, Nos. 10861-10879.]

Case referred to:

(1) *R. v. Schama, R. v. Abramovitch*, (1914), 112 L.T. 480; 79 J.P. 184; 15 Digest 972, 10,865.

APPLICATION for leave to appeal against a conviction of receiving.

The applicant was convicted at Leeds City Quarter Sessions and sentenced to eighteen months' imprisonment. The Court of Criminal Appeal now dismissed the appeal, but LORD GODDARD, C.J., indicated a proper form of summing-up to be adopted in receiving cases.

No counsel appeared.

LORD GODDARD, C.J., delivered this judgment of the court. The applicant was convicted at the Leeds City Quarter Sessions of receiving 64½ yards of cloth which had been stolen from a stationary car in Leeds between

3.30 p.m. and 6 p.m. in the afternoon, and was sentenced to eighteen months' imprisonment. About 6 p.m. on the same day the applicant was seen with another man carrying this roll of cloth and depositing it in some place nearby. He was properly convicted of receiving, and the only point in the case is that the learned deputy recorder, in summing up, stated the law far too favourably to the applicant. Having dealt with *Abramovitch's* case (1), which seems so often to cause difficulty, the learned deputy recorder stated the law in this way :

A

"Anyway, the prosecution have to prove guilty knowledge, and, in the absence of any explanation by the accused man, you are entitled to convict him of receiving stolen goods knowing them to have been stolen—if he fails to give an explanation which you can possibly believe. If, on the other hand, he gives an explanation, and that is one which, although you do not think it to be true, you think might possibly be true, then he is entitled to be acquitted."

B

That, as I have said, is stating the law far too favourably because any explanation may possibly be true, and that is not what *Abramovitch's* case (1) lays down. I have more than once endeavoured to say what *Abramovitch's* case (1) does lay down, and it is this. Possession of property recently stolen where no explanation is given is evidence which can go to the jury that the prisoner received the property knowing it to have been stolen, but, bearing in mind that the *onus* is always on the prosecution, if the prisoner gives an explanation which raises a doubt in the minds of the jury whether or not he knew the property was stolen, the ordinary rule applies, the case has not been proved to the satisfaction of the jury, and he is entitled to be acquitted. A proper direction to the jury would be : "If the prisoner's account raises a doubt in your minds, then, of course, you ought not to say that the case has been proved to your satisfaction." If that simple fact were borne in mind, a good deal of the confusion which often arises by an attempt to lay down the law in accordance with *Abramovitch's* case (1) will be avoided.

C

D

Appeal dismissed.

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[Reported by H. McL. MORRISON, Esq., *Barrister-at-Law.*]

F

WALSHAM v. WALSHAM.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Wallington, J.), February 8, 1949.]

Cruelty—Injury to health—Partial intercourse—Coitus interruptus.

G

A husband, from the early days of married life and despite repeated protests by the wife, formed the habit of partial intercourse by *coitus interruptus*. For varying periods he would abstain from intercourse and would follow such periods with numbers of occasions when he had partial intercourse. This practice, to the husband's knowledge, was having an increasingly injurious effect on the bodily and mental health of the wife.

H

HELD : the husband's conduct amounted to cruelty.

Per WALLINGTON, J. : "Mere abstention by the husband from intercourse could not amount to cruelty or give the wife any remedy even though it might injure her health."

[AS TO CRUELTY, see HALSBURY, *Hailsham Edn.*, Vol. 10, pp. 649-654, paras. 954-962 ; and FOR CASES, see DIGEST, Vol. 27, pp. 281-293, Nos. 2513-2694.]

PETITION by the wife for divorce on the ground of the husband's cruelty.

WALLINGTON, J., held that the husband, by his deliberate practice of having only partial intercourse with his wife, to the detriment of her health, both bodily and mental, was guilty of cruelty and granted the wife a decree *nisi*.

F. H. Lawton for the wife.

Stephen Murray for the husband.

A WALLINGTON, J. : The petitioning wife asks for a decree of divorce on the ground of cruelty alleged by her to have been inflicted on her by her husband in the course of the married life. The cruelty relied on has been limited before me to failure on the part of the husband (failure consistent only with determination on his part) properly to give the wife those sexual rights to which she was entitled, with the result that her health deteriorated and, at one time at all events, was in a serious condition.

B On July 14, 1948, FINNEMORE, J., had before him a petition by the wife asking for a decree of nullity on the ground of the husband's sexual incompetence. At the hearing the learned judge allowed an amendment of the petition by adding an alternative prayer for a decree of nullity on the ground of wilful refusal by the husband to consummate the marriage, and the trial of the petition proceeded on that basis. The judge decided against the wife on the ground C that the evidence adduced did not satisfy him that the marriage had not been consummated. The present petition was signed on Oct. 4, 1948, and filed on Nov. 9 in that year.

D Almost from the outset of the married life the husband formed the habit of partial intercourse by means of *coitus interruptus* despite the repeated protests of the wife and regardless of the fact that he knew that his conduct was increasingly injurious to her bodily and mental health. Mere abstention by the husband from intercourse could not, in my view, amount to cruelty or give to the wife any remedy, even though it might injure her health, but the husband in the present case did much more than abstain. He abstained for varying periods and followed such periods with numbers of occasions when he had partial intercourse. On each of these occasions the wife genuinely hoped and believed E that the intercourse would be complete and that it would be made possible for her to bear children, and on each occasion she was frustrated, disappointed and depressed, and her nervous system was disturbed with the result that her health, bodily and mental, increasingly suffered, for she was very desirous of raising a family, a desire that she was justified in believing that her husband shared. I do not doubt that the conduct of the husband, if continued, would F have produced a serious and dangerous deterioration in her health. Nor do I entertain any doubt that the husband must have understood the wrong and injury that he was doing to his wife. I am not supposing, for a moment, that the wife's whole well-being depended on sexual intercourse or that she thought it did. Some women may be so constituted that their health is not affected by G repeated partial intercourse, such as *coitus interruptus*, while other women enter into the marriage state hoping to fulfil one of the most important functions of matrimony, *viz.*, the bearing of children. When the latter class of women are denied the normal means of child bearing and their sexual functions are abused by frequent *coitus interruptus*, especially when it follows substantial periods of complete denial of intercourse, their health (both bodily and mental) H is likely to be affected. In my opinion, the present case falls within the latter category. The husband, therefore, has been guilty of cruelty within the accepted definition of that expression as applied in these courts, and I grant a decree.

Decree nisi.

Solicitors : *C. Grobel, Son & Co.* (for the wife) ; *Harold Miller & Frazer*, agents for *Weigall & Inch*, Margate (for the husband).

[*Reported by R. HENDRY WHITE, ESQ., Barrister-at-Law.*]

HELMAN v. HORSHAM AND WORTHING ASSESSMENT COMMITTEE.

[COURT OF APPEAL (Bucknill, Evershed and Denning, L.JJ.), February 7, 8, March 17, 1949.]

Rates—Assessment—Building occupied in parts—Occupation by lodger or tenant—Owner occupying rest of house—Control by owner—Assessment of parts separately—Rating and Valuation Act, 1925 (c. 90), s. 23 (1).

The owner of a house, who himself occupied three rooms and a kitchen-scully on the ground floor and one room on the first floor, let to one M. two rooms and a kitchen-scully on the first floor, with the right to use, in common with himself, the combined bathroom and w.c. on that floor, the upper landings, the entrance hall, the front and back doors and the yard and outside w.c., to get to which there was a right to go through the downstairs rooms. The rent included payment for the use of a carpet on the stairs and in the hall and of linoleum in the rooms let, and the owner kept the hall and landings clean. In the current valuation list the whole house was assessed as one hereditament, but, on a proposal by the rating authority for an amendment of the valuation list, the assessment committee determined that the house should be assessed in two parts. Their decision that there was a separate rateable occupation of the rooms occupied by M. was confirmed by quarter sessions, but there was no finding of fact by quarter sessions whether M. was a tenant or a lodger.

HELD : as the owner continued to live in the house there was no rateable occupation by M. unless there was clear evidence of an intention of the owner to abandon control of the rooms occupied by M. ; the question of the amount of control retained by the owner was one of fact ; and, as the Case stated by quarter sessions did not set out any clear evidence of such an intention, the conclusion that M. had a separate rateable occupation was wrong.

Smith v. St. Michael, Cambridge, Overseers (1860) (3 E. & E. 383 ; 3 L.T. 687), and *dicta* of COLLINS, M.R., in *Kent v. Fittall* ([1906] 1 K.B. 70 ; 94 L.T. 81), and of LORD RUSSELL OF KILLOWEN in *Westminster Corpn. v. Southern Ry. Co.* ([1936] 2 All E.R. 326 ; [1936] A.C. 529 ; 155 L.T. 35), applied.

Per EVERSHEDE, L.J. : I cannot see any reason in logic or in law why the net annual value of a house as a whole should vary in accordance with the answer to the question : Have certain of the rooms been " let " to a tenant on a demise or to one who is a mere lodger in them ? . . . I must not, therefore, be taken to be assenting in any way to the view that if, because the " inmate " of certain rooms is held to be a tenant rather than a lodger, separate assessments may be made of two separate and independent " hereditaments," the arithmetical result is to increase the net annual value of the house as a whole.

Decision of Divisional Court ([1948] 2 All E.R. 588 ; [1949] 1 K.B. 62), affirmed.

[AS TO THE RATING OF HOUSES OF WHICH PARTS ARE SEPARATELY LET, see HALSBURY, Hailsham Edn., Vol. 27, pp. 361, 362, paras. 791, 793 ; and FOR CASES, see DIGEST, Vol. 38, pp. 444-448, Nos. 147-163, and pp. 452-454, Nos. 191-202.]

Cases referred to :

- (1) *Smith v. St. Michael, Cambridge, Overseers*, (1860), 3 E. & E. 383 ; 3 L.T. 687 ; 25 J.P. 133 ; 38 Digest 444, 150.
- (2) *Kent v. Fittall*, [1906] 1 K.B. 60 ; 94 L.T. 76 ; 69 J.P. 428 ; 20 Digest 21, 124.
- (3) *Hogan v. Sterrett*, (1886), 20 L.R.Ir. 344.

- (4) *Allan v. Liverpool, Inman v. Kirkdale*, (1874), L.R. 9 Q.B. 180 ; 30 L.T. 93 ; 38 J.P. 261 ; 38 Digest 445, 155.
- (5) *Bradley v. Baylis, Morfee v. Novis*, (1881), 8 Q.B.D. 195 ; Colt. 188 ; 46 L.T. 253 ; 45 J.P. 847 ; 20 Digest 21, 123.
- (6) *Westminster Corpn. v. Southern Ry. Co., Railway Assessment Authority & Smith & Son, Ltd., Westminster Corpn. & Kent Valuation Committee v. Southern Ry. Co., Railway Assessment Authority & Pullman Car Co., Ltd.*, [1936] 2 All E.R. 322 ; [1936] A.C. 511 ; *sub nom., Re Southern Ry. Co.'s Appeals*, 155 L.T. 33 ; 100 J.P. 327 ; Digest Supp.
- (7) *R. v. Rogers*, (1772), 1 Leach, 89 ; 15 Digest 956, 10,662.
- (8) *Lee v. Gansel*, (1774), 1 Cowp. 1 ; Lofft. 374 ; 21 Digest 478, 531.
- (9) *Monks v. Dykes*, (1839), 4 M. & W. 567 ; 1 Horn & H. 418 ; 3 J.P. 179 ; 43 Digest 397, 194.
- (10) *Phillips v. Henson*, (1877), 3 C.P.D. 26 ; 37 L.T. 432 ; 42 J.P. 137 ; 18 Digest 305, 419.
- (11) *R. v. St. Mary the Less, Durham (Inhabitants)*, (1791), 4 Term Rep. 477 ; Nolan, 171 ; 1 Bott. 120, 200 ; 38 Digest 453, 192.
- (12) *Kent v. Fittall*, [1911] 2 K.B. 1102 ; 105 L.T. 422 ; 75 J.P. 378 ; 20 Digest 22, 126.
- (13) *London (City) Case, Wansey v. Perkins, Hill's Case*, (1845), 7 Man. & G. 151 ; *sub nom., Wandsey v. Perkins*, 4 L.T.O.S. 337.
- (14) *Allchurch v. Hendon Union Assessment Committee*, [1891] 2 Q.B. 436 ; 65 L.T. 450 ; 56 J.P. 117 ; 38 Digest 453, 200.
- (15) *Tracy v. Talbot*, (1704), 6 Mod. Rep. 214 ; Holt, K.B. 581 ; 2 Salk. 532 ; 38 Digest 452, 191.
- (16) *Cole v. Harris*, [1945] 2 All E.R. 146 ; [1945] K.B. 474 ; 173 L.T. 50 ; 2nd Digest Supp.
- (17) *Monk v. Murphy*, (1949), *post*, p. 786.

APPEAL by the assessment committee from an order of the Divisional Court (LORD GODDARD, C.J., SINGLETON and SLADE, JJ.), dated July 23, 1948, and reported [1948] 2 All E.R. 588, allowing the appeal of the ratepayer (the present respondent), George Helman, the owner of a house, from a decision of West Sussex Quarter Sessions confirming a determination of the Horsham and Worthing Area Assessment Committee that the house should be assessed in two parts.

The house in question was originally designed as a single dwelling, the accommodation being three living rooms, a kitchen-scullery and a combined bathroom and w.c. on the first floor, and three living rooms, a kitchen-scullery and an outside w.c. on the ground floor. In the current valuation list the whole house was assessed as one hereditament at a rateable value of £54. Paragraph 5, sub-*paras. (d) to (g)*, of the Case stated by quarter sessions were as follows :

" 5 (*d*) For some time immediately prior to Mar. 8, 1947, [Helman] let to one Tyler the same part of the said house as was let by him to one Miles as hereinafter mentioned. (*e*) On Mar. 8, 1947, [Helman] entered into a verbal tenancy agreement with the said Miles the material terms of which were :—(i) The said Miles was to have the sole use and occupation of two living rooms and the kitchen-scullery on the first floor, [Helman] remaining in occupation of the rooms on the ground floor and the other room on the first floor. (ii) The said Miles was to have a right in common with [Helman] to use the bathroom and both w.c.'s. (iii) The said Miles was to have a right of passage through the entrance hall and over two upper landings and a right of passage through the rooms on the ground floor as and when he required for the purpose of using the outside w.c. . . . and also for gaining access to the yard at the rear to the use of which he has a right in common with [Helman]. (iv) The front and the back doors were to be used in common, there being no separate entrance to the first floor of the said house.

(v) The said Miles was to pay the sum of 37s. 6d. per week (the rent fixed for the said accommodation by the tribunal appointed under the Furnished Houses (Rent Control) Act, 1946) which sum was to include the use of carpets, the property of [Helman], on the stairs and in the hall, and of linoleum laid in the rooms occupied by the said Miles. (vi) The hall and landings were to be kept clean by [Helman]. (f) In the cupboard under the stairs on the ground floor there were two electric meters, one for supplying the part of the house let to the said Miles and the other for supplying the part of the house occupied by [Helman], and, further, there was a shilling-in-the-slot meter on the first floor for the supply to the said Miles. (g) Pursuant to and under the terms of the said agreement the said Miles, on Mar. 8, 1947, took possession of the said rooms let to him where he has resided ever since on the same terms."

In para. 7 of the Case it was stated that "after hearing the evidence and the arguments on either side" quarter sessions "came to the conclusion that there was a separate rateable occupation of the rooms occupied by the said Miles and, accordingly, dismissed [Helman's] appeal." The Court of Appeal now held that there was no evidence of an intention by Helman to abandon his control over the rooms occupied by Miles, and, therefore, Miles was not in rateable occupation, and they dismissed the assessment committee's appeal.

Scott Henderson, K.C., and Harold Brown for the assessment committee.
Ashe Lincoln, K.C., and Heathcote-Williams for the owner.

Cur. adv. vult.

Mar. 17. The following judgments were read.

BUCKNILL, L.J.: This is an appeal by the Horsham and Worthing Area Assessment Committee from a judgment of the Divisional Court reversing the order of quarter sessions that the assessment by the rating authority of a house, 78, Brighton Road, Worthing, owned by George Helman, be confirmed. By that assessment three rooms on the first floor of the house were assessed at a rateable value of £22, and the rooms on the ground floor and the other room on the first floor were assessed at £44 rateable value. In the current valuation list the whole house was assessed as one hereditament at a rateable value of £54. Helman's appeal came before the rating committee of quarter sessions. They heard him in person and counsel for the assessment committee, viewed the premises in the presence of Helman and counsel for the assessment committee, and then dismissed the appeal, and, on the application of Helman, stated a Case for the opinion of the Divisional Court. After setting out the statement of facts and the finding of quarter sessions thereon, the Case states:

"The question upon which the opinion of the court is desired is whether the said committee of quarter sessions upon the above statement of facts came to a correct decision in point of law in deciding that there was a separate rateable occupation of the rooms on the first floor by the said Miles, and that there should be a separate assessment in respect thereof."

The following is a summary of the statement of facts set out in the Special Case. On the first floor of the house there are three living rooms, together with a kitchen-scullery, and a combined bathroom and w.c. On the ground floor there are three living rooms and a kitchen-scullery. There is also an outside w.c. At some time before Mar. 8, 1947, Helman as owner, let to one Tyler two living rooms and the kitchen-scullery on the first floor. On Mar. 8, 1947, Helman entered into a verbal tenancy agreement with Miles. The agreement contained the following terms: (i) Miles was to have the sole use and occupation of the two living rooms and the kitchen-scullery on the first floor. (ii) Miles was to have a right to use the bathroom and both w.c.'s, in common with Helman, who remained in occupation of the rest of the house. (iii) Miles

was to have a right of passage through the entrance hall and over two upper landings and a right of passage through the rooms on the ground floor as and when required for using the outside w.c. and also for gaining access to the yard at the rear, to the use of which he was to have a right in common with Helman. (iv) The front and back doors were to be used in common, there being no separate entrance to the first floor. (v) Miles was to pay 37s. 6d. per week (the rent fixed for the accommodation by the tribunal appointed under the Furnished Houses (Rent Control) Act, 1946). This sum was to include the use of Helman's carpets on the stairs and in the hall, and of linoleum in the rooms occupied by Miles. (vi) Helman was to keep the hall and landings clean. On these facts the committee came to the conclusion that there was a separate rateable occupation of the rooms occupied by Miles, but propounded the question to the Divisional

A Court whether, in doing so, they came to a correct decision in point of law.

B I understand that the question of law propounded by the committee was whether, from the facts set out in the Special Case, they were entitled as a matter of law to draw the inference that Miles had a separate rateable occupation of the two rooms and the scullery on the first floor. I find this question, which seems to be mainly one of fact, difficult to answer. It is an important question, because it must affect indirectly innumerable cases. In these times, when there

C is a great shortage of houses, and the cost of living presses hard on householders, there is a constant tendency for them to arrange with relatives or friends, or even strangers, to share their houses with them, but sharing is difficult, especially in the kitchen, and, therefore, arrangements are often made whereby the "in-comer," to use a neutral word, is granted housing accommodation more or less like a self-contained flat in the house. How much control the landlord intends to give, and how much control the landlord intends to retain, is a question of fact in each case. Naturally, the landlord, if he remains in occupation, retains control over the whole house. He started with that control, and it is reasonable that he should not be held to have parted with it unless there is clear evidence to that effect. If, for instance, he puts up a separate front door opening on to the "tenant's" rooms, installs in them a kitchen-scullery, bathroom and w.c., and gives a key of the main front door to the tenant, this would be cogent evidence of an intention by the landlord to give up his right of control over the rooms.

E There is, however, no cogent evidence of this kind in the present case. No case was cited to us in which a person occupying rooms in a house of this kind in which his landlord continued to live has been separately rated in respect of those rooms, but several cases were cited in which the landlord was held to remain in occupation of the whole house for the purpose of rateability, although he had granted to another a right to occupy some of the rooms in his house. Thus, in *Smith v. St. Michael, Cambridge, Overseers* (1), Smith, the lessee of a house, agreed with the surveyor of taxes and the collector of Inland Revenue to let off five of the principal rooms in the house to the Commissioners of Inland Revenue for an annual rent to include all expenses such as rates, taxes, gas, wood, coals, also providing a person to reside on the premises to keep them clean, light fires and to attend to them. Another room was occupied by Smith as an office, and he himself lived in another house. The rest of the house, viz., two kitchens and a cellar in the basement, and two bedrooms and a sitting room on the second floor, were occupied by a servant of Smith who cleaned the rooms and lighted the fires. Smith was rated for the whole house, and the question was raised whether, in the circumstances set out, he was liable to be rated in respect of the house or only part thereof. The case was heard by HILL, J., and BLACKBURN, J. In the course of a considered judgment of the court HILL, J., said (3 E. & E. 390) :

"There is no doubt that exclusive possession of a part only of a house may be given, so as in effect to make the two parts of the house separate

tenements: the question in the present case was, whether such possession had been given; and we are of opinion that it had not . . . We think that we must look not so much at the words as the substance of the agreement; and, taking the whole together, we think it must be construed, not as a demise of the five rooms, but as an agreement by which the appellant, retaining possession of those rooms and keeping his servant there, bound himself to supply the other party with fire and gas and attendance. It is true that the exclusive enjoyment of the rooms is to be given; but that is the case where a guest in an inn or a lodger in a house has a separate apartment, or where a passenger in a ship has a separate cabin; in which case it is clear that the possession remains in the innkeeper, lodging-house keeper, or shipowner. We think, therefore, that the appellant was occupier of the whole of the rated premises."

Many authorities were cited to us confirming the statement in the judgment of LORD GODDARD, C.J. ([1948] 2 All E.R. 590), in the present case that:

" . . . the fact that the landlord is living on the premises does seem to me to raise the presumption . . . that he intends to retain control of the whole of the premises . . . that, I think, *prima facie* at least negatives the fact that the person who is occupying rooms in the other part of the house than that in which the landlord lives is a tenant in the true sense and not a lodger."

In *Kent v. Fittall* (2) the question was raised whether a person resident in part of a house was an "inhabitant occupier" or a "lodger" within the meaning of those words as used in the Representation of the People Act, 1867. In the course of his judgment COLLINS, M.R., said ([1906] 1 K.B. 70):

"It is not disputed that in dealing with the occupation of part of a dwelling-house, if the landlord is living in the house, that fact creates a presumption that the occupation of the other part is that of a lodger rather than that of an inhabitant occupier. But while that is the inference that may be drawn, it is not a necessary inference of law, and there is no authority that it is to be treated as conclusive."

COLLINS, M.R., cited with approval (*ibid.*, 72) the following passage from the judgment of PORTER, M.R. (20 L.R.Ir. 349), in *Hogan v. Sterrett* (3) in the Court of Appeal in Ireland:

"I do not mean to decide that in every case where the landlord resides under the same roof the persons occupying the other portions of the structure may not be entitled otherwise than as lodgers. I think they may be entitled; but the evidence of separate occupation must be very clear—such as in the case of "flats": for there the landlord would live in a separate "house" within the meaning of the Act, and there would be several "dwelling-houses" all under the same roof."

Can it be said in the present case that the "evidence of separate occupation" is "very clear"? Apart from the use of the words "sole use and occupation" in the verbal agreement, there does not seem to me any evidence which may not be said to be neutral, *i.e.*, applicable either to a tenancy or to a lodging. The words, "sole use and occupation," are not, I think conclusive of the matter, because a man may have the exclusive use of the rooms and yet be a lodger, as appears from the judgments of BLACKBURN, J., in *Allan v. Liverpool, Inman v. Kirkdale* (4), and JESSEL, M.R., in *Bradley v. Baylis* (5). I think that the rating committee in this case must have had some doubt whether the sole occupation by Miles of these three rooms was in law a rateable occupation. Otherwise, I do not understand why they stated a Case for the opinion of the Divisional Court. In my opinion, the proper answer to their question is that, unless there was clear evidence of the intention of the landlord to abandon

control of the rooms in question, there was not a rateable occupation by Miles ; that the question of the amount of control retained by the landlord is a question of fact ; and that the statement of facts in the Special Case does not set out any clear evidence of an abandonment by the ratepayer of his control over the rooms occupied by Miles. Therefore, the conclusion that Miles had a separate rateable occupation of the rooms in question was wrong. For these reasons, I think that this appeal should be dismissed.

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EVERSHED, L.J. : On a question such as that raised in the present appeal I take as the foundation on which a conclusion should be built the observations of LORD RUSSELL OF KILLOWEN in *Westminster Corpn. v. Southern Ry. Co.* (6), and I shall, I hope, be forgiven for quoting from the noble Lord's speech at some length. LORD RUSSELL said ([1936] 2 All E.R. 326) :

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" In the next place I would make a few general observations upon rateable occupation. Subject to special enactments, people are rated as occupiers of land, land being understood as including not only the surface of the earth but all strata above or below. The occupier, not the land, is rateable ; but, the occupier is rateable in respect of the land which he occupies.

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Occupation, however, is not synonymous with legal possession : the owner of an empty house has the legal possession, but he is not in rateable occupation. Rateable occupation, however, must include actual possession, and it must have some degree of permanence : a mere temporary holding of land will not constitute rateable occupation. Where there is no rival claimant to the occupancy, no difficulty can arise ; but in certain cases there

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may be a rival occupancy in some person who, to some extent, may have occupancy rights over the premises. The question in every such case must be one of fact, *viz.*, whose position in relation to occupation is paramount, and whose position in relation to occupation is subordinate ; but, in my opinion, the question must be considered and answered in regard to the position and rights of the parties in respect of the premises in question, and in regard to the purpose of the occupation of those premises. In other

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words, in the present case, the question must be, not who is in paramount occupation of the station, within whose confines the premises in question are situate ; but who is in paramount occupation of the particular premises in question. A familiar instance of this competing occupancy is the case of the lodger. It has long been settled on the one hand that, in the case of lodgers

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in a lodging house, the lodgers are not rateable in respect of their occupancy of their rooms, but that the landlord is the person who is rateable in respect of his occupancy of the entire house. In view of the frequently fleeting nature of the occupancy of a lodger, the convenience of this view, indeed the necessity for it, is obvious ; but it purports to be based upon the paramountcy of the landlord's occupation, arising from his control of the front door and his general control over and right of access to the lodgers'

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rooms for the proper conduct of the lodging house. And the same view as to rateability has prevailed in the case of the business lodger. On the other hand the occupation of a person residing in a flat is such that he is (generally speaking) rateable, although as a matter of practice, the owner of the block of flats usually pays the rates charging the tenant an inclusive rent. My Lords, I cannot but feel that the position of the lodger in relation

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to rateability is an exceptional one, and is largely the product of practical considerations. But it can I think be justified and explained when we remember that the landlord, who is the person held to be rateable, is occupying the whole premises for the purpose of his business of letting lodgings, that for the purpose of that business he has a continual right of access to the lodger's rooms, and that he, in fact, retains the control of ingress and egress to and from the lodging house, notwithstanding that the power of ingress and egress at all hours is essential to the lodger.

The general principle applicable to the cases where persons occupy parts of a larger hereditament seems to be that if the owner of the hereditament (being also in occupation by himself or his servants) retains to himself general control over the occupied parts, the owner will be treated as being in rateable occupation; if he retains to himself no control, the occupiers of the various parts will be treated as in rateable occupation of those parts."

If this statement of the law to be applied is correct (as it must, I think, be taken to be), then it appears to follow that though, in general, legal title is not the test of rateability, nevertheless, in the special case of one who occupies rooms in the house of another, in effect it is. As LORD RUSSELL observed, the case is anomalous, but its justification can be found in convenience—including, I think, the convenience of having a criterion both simple and certain.

I have had the advantage of reading the judgment which is about to be delivered by DENNING, L.J., in which he expresses the view that, although, as between them, the relationship of Helman and Miles may be in law that of lessor and lessee, nevertheless (in the absence, at any rate, of structural severance of the "tenement" of Miles from the rest of the house) so long as Helman continues to reside himself in the house, for rating purposes, and, indeed, for all purposes other than those affecting the legal rights and obligations *inter se* of Helman and Miles, Miles will be regarded as a lodger and Helman will be regarded as retaining the "paramount occupation" of the whole premises, and DENNING, L.J., has referred to a number of the older decisions of the courts both civil and criminal. On such a question I should not differ from DENNING, L.J., save with the greatest diffidence, and, on the view at which I have arrived, it is not strictly necessary for me to express a concluded opinion.

I feel, however, bound to say that, as at present advised, I am not satisfied that the test for rating liability in such cases as the present is that which DENNING, L.J., has stated, and I should certainly wish to hear argument on the authorities to which he has referred. For, as it seems to me at present, *R. v. Rogers* (7), *Lee v. Gansel* (8), and *Monks v. Dykes* (9) all turned on a finding that the person whose rooms were alleged to have been broken into was, in fact, a lodger and had no such estate or interest therein as would be conferred by a contract of letting. I think the *ratio decidendi* was the same in the franchise cases. *Phillips v. Henson* (10) turned, in my judgment, on the effect of the Lodgers' Goods Protection Act, 1871. In the rating case of *R. v. St. Mary the Less, Durham (Inhabitants)* (11) the question was whether the householder who used his house for the purposes of his hobby (without ever residing in it) and allowed some poor people to live in the kitchen was an occupier of the house. There was no question of the poor occupants of the kitchen being his tenants. In *Smith v. St. Michael, Cambridge, Overseers* (1) the finding of the court was that, notwithstanding the language used in the agreement there in question, there was, in fact, no demise. Finally, such a test appears to me *prima facie* inconsistent with the decision of the court in the earlier case of *Kent v. Fittall* (2) (to which I shall refer again in reference to the "presumption" on which the Divisional Court relied) where the claimant to the franchise was held entitled to the vote though his tenement was not structurally severed from the rest of the house and the landlord himself resided in the premises: see also the final sentences of the judgment of MATHEW, L.J. ([1906] 1 K.B. 78). I am also disposed to think that some regard should now be had to the changed social and economic circumstances of the time. In the more spacious days of the eighteenth and nineteenth centuries householders were not disposed to "sublet" parts of their houses to the extent to which they are compelled or encouraged today by financial needs and the shortages of housing accommodation and staff. Complete structural sub-division is by no means always possible. Is it right that the intended relationship between householder and "inmate" depends

on structural severance or that the extent of structural severance should necessarily determine what that relationship should be taken to be? Is a sharing of the front door and staircase or (in addition) of a garden or a downstairs cloakroom decisive of the character of the relationship for some, and what, purposes? Therein is a prospect of almost endless controversy and litigation and no clear standard for decision.

- A I agree that the test, not only for rating purposes but, as I think, also for other purposes, is what has been referred to as "control" or "paramount occupation," but that test is to be applied, as observed by LORD RUSSELL in *Westminster Corpn. v. Southern Ry. Co.* (6), as regards the particular rooms in question in the litigation rather than in reference to the house as a whole. If in the present case Miles, when going away for a week-end, is entitled to lock his doors and say to Helman: "I do not want either you or anyone else to go into my rooms while I am away," then he has, *prima facie*, such exclusive occupation of his rooms as would be consistent with a tenancy, but inconsistent with the position of a lodger. If this view is the right one, the result may be inconvenient for rating authorities, since, when there is a tenancy, they would (as I follow it) be bound to rate separately the tenant in respect of the rooms covered by the demise, but, if that is the result in the case of a self-contained flat, I cannot see anything illogical in similarity of effect in the case of chambers or rooms in fact sub-let though not structurally severed from the rest of the house.
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- Whether or not the view to which I incline is the correct one, the first question in the present case is: What did the rating committee of quarter sessions decide and intend to decide? It is on this question that I have found the greatest difficulty. BUCKNILL, L.J., has summarised the material paragraphs of the Case and I will not take time by making further reference to them. On a fair reading of the Case, and, particularly, para. 5 (d) to (g) inclusive, and 7, the problem is: Did the rating committee find and intend to find that, in fact, Miles was tenant of the rooms of which he was given the exclusive use
- E (together with certain privileges), or did they find and intend to find only that there was an agreement between Helman and Miles in the terms set out in para. 5 (e) *plus* the fact that Miles was in "possession" of his rooms under that agreement? It has been much stressed on Helman's behalf that there is no finding in terms on the vital matter of "control," and that, in the absence of such a finding or of any indication that that essential matter was present
- F at all to the minds of the rating committee, the Special Case cannot be read in the sense of the former of the above alternatives, or, if it is, then that the finding cannot stand by reason of the absence of the facts essential to support it. I should not, for my part, be prepared to say that the rating committee could not have validly and properly found as a fact that Miles was a tenant and not a lodger without any express finding in regard to control or paramount occupation.
- G Nevertheless, the absence of any such reference is significant. True it is that Helman (who conducted his case in person before quarter sessions) did not appreciate the point and appears to have used language consistent with the view that he conceived Miles to be his tenant rather than his lodger, but it was for the rating authority to make good their case, and (having regard to the existence of the presumption presently referred to) I do not think they
- H can properly rely on Helman's failure to put his case in the best way.

I have, therefore, on the whole, come to the conclusion that the view taken by BUCKNILL, L.J., ought to prevail, and that the Case Stated cannot be read as containing, and intended to contain, a finding of fact that Miles was Helman's tenant and not his lodger. If this view is right, how does the matter stand? I cannot for myself derive assistance from the fact (which I assume) that Helman is entitled to go into Miles' rooms for the purpose of fulfilling his obligation to do repairs. Such a right is commonly enough found in what are indubita-

ably leases, and its presence seems to me to have but little bearing on the matter of paramount occupation. Nor do I attach importance to the sharing of the bathroom and w.c. It is not suggested on any view that the bathroom was included in the alleged demise, and, if it be the fact (on which I express no opinion) that the Furnished Houses (Rent Control) Act, 1946, applies to rooms "let" to lodgers, still in its context I regard the reference to the Act [in the Case] as inclining more towards the existence of a demise. On the other hand, it is clear that the use of words—"let", "rent," even "tenancy"—strictly appropriate to a demise—is by no means conclusive. The cases referred to by BUCKNILL, L.J., amply illustrate the point. In the case of lodgers (properly so called) I take it that the words "let" and "rent" are commonly, if not normally, used.

There then remains the effect of the "presumption" on which LORD GODDARD, C.J., substantially relied ([1948] 2 All E.R. 590). The existence of "presumptions," whether of law or fact, must, in my judgment, be accepted with some caution. BUCKNILL, L.J., has already referred to the judgment of COLLINS, M.R., in the earlier case of *Kent v. Fittall* (2). It is, however, to be noted that the decision in that case was in favour of the existence of a tenancy and that neither ROMER, L.J., nor MATHEW, L.J., referred to the "presumption," and, although in the later *Kent v. Fittall* case (12) the decision of the Divisional Court was affirmed, it was affirmed on special grounds which did not involve the acceptance of the *dictum* of PICKFORD, J. ([1911] 2 K.B. 1110), quoted by LORD GODDARD, C.J. It is, I think, clear that, if in any case it appears that some rooms in a man's house where he himself lives are occupied by another who pays for that privilege, the inference proper to be drawn from those facts of themselves—whether for purposes of rating liability, franchise or any other purpose—is that the latter is the former's lodger, but it does not seem to me that, where, in addition to the facts of occupation, there is further evidence of the nature of the relationship between the occupants, there is anything in the authorities which fetters the right of the court to reach conclusions which naturally flow from the evidence given.

These observations, however, still leave unsolved the problem in the present case where, *ex hypothesi*, the rating committee has not found as a fact, one way or the other, whether Miles is a tenant or a lodger. I have felt much sympathy for the view expressed by SINGLETON, J., in the Divisional Court, that the case should be referred back to the quarter sessions, but, as pointed out by the learned judge, there was no request for such a direction, and it is now, I think, manifestly too late. It became the duty of the Divisional Court, and is now the duty of this court, to do the best it can on the facts which alone (as I construe the Special Case) were found, *i.e.*, that both Miles and Helman occupied the premises, the occupancy of Miles being governed by the terms of the agreement set out in para. 5 (e) of the Case. On these facts I have come to the conclusion that it is sufficient to say (in the light of the judgment of COLLINS, M.R., in *Kent v. Fittall* (2), and the cases cited by him to which BUCKNILL, L.J., has referred) that the rating authority has not established a tenancy, and, therefore, a rateable occupation on the part of Miles. In the result, in my opinion, the appeal must fail.

I add only this. In the present case the figures have not been disputed. It has, therefore, been conceded or assumed that the net annual value of the house as a whole is greater on the footing that Miles is a tenant of Helman of certain of the rooms than it would be if Miles were not a tenant but a mere lodger. In so stating I may do an injustice to the assessment committee. In any case, however, I cannot as at present advised see any reason in logic or in law why the net annual value of the house as a whole should vary in accordance with the answer to the question: Have certain of the rooms been "let" to a tenant on a demise or to one who is a mere lodger in them?

Financially, the result to the landlord appears to be the same. Indeed, having regard to the Rent Restrictions Acts, it may be better for the landlord if the inmate is a lodger and not a tenant. I must not, therefore, be taken to be assenting in any way to the view that if, because the "inmate" of certain rooms is held to be a tenant rather than a lodger, separate assessments may be made of two separate and independent "hereditaments," the arithmetical result is to increase the net annual value of the house as a whole.

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DENNING, L.J. : It is no new thing for a house to be occupied by several families. If each family occupies a part of the house which is structurally separate from the other parts, as in the case of chambers or flats, then the law has always treated each part as a separate house for all purposes, but it continually happens that a house which is built for one family is occupied by more than one family without there being any structural severance at all. A householder simply lets some or all of the rooms. The tenants may have the exclusive use of their own rooms, but they share other parts of the house such as the passages, stairs and lavatories in common with the other occupiers. When that happens, the rights of the householder and occupier, as between one another, are, of course, governed by the contract between them and much may turn, for them, on whether it is in law a demise or a licence, but other people are not concerned with that sometimes nice distinction. Whenever a question arises with the outside world the principal distinction that has been taken by the law depends on whether the householder is still living in the house himself or not. So long as he is living there himself, he is, *prima facie*, regarded as being in paramount occupation of the whole and the tenants are regarded as lodgers, but when he leaves the house and lets out all the rooms, then the individual tenants are occupiers. This distinction has been drawn, ever since the days of LORD HOLT, by some of the greatest names in the law. If, for instance, a resident owner lets out rooms to a tenant and a burglar should break into the rooms that are let, the indictment charges him, not with breaking into the tenant's rooms, but with breaking into the owner's house, because the owner is in paramount occupation of the whole : see the opinion of HOLT, C.J., in 1701, quoted in a note to *R. v. Rogers* (7) (1 Leach 90, note (a)). Again, if a sheriff comes with a lawful warrant to levy execution on the tenant's goods, he is not entitled to force the outer door of the owner's house, but, if he finds it open, he is entitled to go in and force open the doors of the rooms that are let, because the owner is in paramount occupation of the whole and, while the law will protect his outer door, it will not protect the inner doors : see *Lee v. Gansel* (8), per LORD MANSFIELD (1 Cowp. 8), in 1774. So, also, if there is a disturbance in the tenant's rooms, it is the owner, and not the tenant, who has the right to eject the disturber from the house and to sue in trespass *quare clausum fregit* : see *Monks v. Dykes* (9), per PARKE, B. (4 M. & W. 569). Furthermore, when the goods of a lodger were protected by statute from distress, a person to whom the resident owner let rooms under a demise was regarded as a lodger : see *Phillips v. Henson* (10), per LINDLEY, J. (3 C.P.D. 32) ; and in the days when there was one vote for householders, *i.e.*, occupiers, and no vote at all for lodgers—or a different kind of vote—the resident owner was always regarded as the occupier of the house and the tenants of the rooms were regarded as lodgers : see *Wansey v. Perkins*, *Hill's Case* (13), *Morfee v. Novis* (5), and *Kent v. Fittall* (12). If one examines those three franchise cases, one will find that in each of them there was a demise and not a licence, but, nevertheless, the tenant of the rooms was regarded as a lodger : and if one examines the judgments in the leading case of *Bradley v. Baylis* (5) one finds that four lords justices expressly contemplate that a tenant in the ordinary acceptance of the word may yet be a lodger for franchise purposes (8 Q.B.D. 224, 235, 240, 245). The principal distinction taken was whether the owner was living in the house himself or not, though, of course, it was not conclusive. *Kent v. Fittall* (2)

shows that circumstances may arise in which the owner, although living in the house, is in no sense in control of it, in which case the tenants are not lodgers for franchise purposes. These franchise cases have, as I think rightly, always been regarded as authority in rating cases because the Franchise Acts applied the test of rateability: *Bradley v. Baylis* (5) (8 Q.B.D. 217, 218). Although I have not actually found an instance in a rating case of rooms let on a demise, nevertheless I find the same principal distinction being drawn in them.

If the owner or his servant is living in the house, he has always been regarded, *prima facie*, as being in rateable occupation of the whole: see *R. v. St. Mary the Less, Durham (Inhabitants)* (11), and *Smith v. St. Michael, Cambridge Overseers* (1). If, however, the householder leaves and lets off all the rooms, then the individual tenants are the occupiers: see *Allchurch v. Hendon Union Assessment Committee* (14). This distinction is in full accord with the settled rule that rateability depends on occupation, not on title. Where there are rival occupancies, it depends on whose occupation is paramount: see *Westminster Corpn. v. Southern Ry. Co.* (6), per LORD RUSSELL OF KILLOWEN ([1936] 2 All E.R. 328, 329), and per LORD WRIGHT, M.R. (*ibid.*, 349, 350). The upshot of the whole discussion is that, where there is a resident owner who lets out rooms, he is regarded as in paramount occupation unless the facts negative that inference. That is the rule which LORD GODDARD, C.J., as I understand it, stated in this case ([1948] 2 All E.R. 590), and I entirely agree with his statement of it. Of course, if substantial structural alterations are made by which the one house is turned into two houses, then the two parts are separately rateable even though the owner lives in one of the parts himself. That was laid down by HOLT, C.J., in *Tracy v. Talbot* (15), and by LORD GODDARD, C.J., ([1948] 2 All E.R. 590) in the present case. Such cases depend on the degree of structural severance—a matter which the rating authority are called on to consider in other cases, as under the Rating and Valuation Act, 1925, s. 23. But I am only concerned here with cases where there is no structural severance.

I would point out, however, that, where a house is shared by tenants of an absent landlord, rating authorities have obtained by statute special permission to be able to treat the landlord, not the tenant, as the person rateable: see the Rating and Valuation Act, 1925, s. 23, but, as LORD GODDARD, C.J., points out, that section does not apply to a resident landlord sharing the house with a tenant because the landlord always has been rateable for the whole house. If the contention of the rating authority in this case were right, it would mean that a resident owner could only be rated for his own part and not for the rooms occupied by his tenant. That would, I fancy, be very inconvenient for the rating authorities.

One final word. In holding that Mr. Miles is to be regarded as a lodger for rating purposes, I do not wish it to be supposed that I think he is to be regarded as a lodger for the purposes of the Rent Restrictions Acts. He plainly is not. On the facts stated, it seems to me that he is a tenant protected by those Acts and not a mere licensee: see *Cole v. Harris* (16). The fitting of a separate meter and cooker was not a sufficient structural alteration to make the single house lose its identity: see *Monk v. Murphy* (17)* which we decided a few days ago. It is for this reason that I think it important to say that, in my opinion, in this branch of rating law, as in others, the distinction between a demise and

* *MONK v. MURPHY. MONK v. BROCK.*

[COURT OF APPEAL (Bucknill, Cohen and Denning, L.JJ.), March 14, 1949.]

Rent Restriction—Standard rent—Apportionment—Loss of identity of original dwelling-house—Substantial structural alterations—Alterations made to enable house to be let as two separate units—Separate gas and electricity meters fitted—Sink installed—Gas cooker substituted for gas fire—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 12 (3) (as amended by the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), s. 17 (2)).

a licence is not the test of rateable occupation : see the words of LORD WRIGHT, M.R., ([1936] 2 All E.R. 349 351), in *Westminster Corpn. v. Southern Ry. Co.* (6). If it is not the test, then paramount occupation is the test. Applying that test, I agree with LORD GODDARD, C.J., that there was only one conclusion to which quarter sessions could come on these facts, namely, that the premises should be rated as one hereditament and not two. For these reasons, I agree

A that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors : *Waller, Neale & Houlston*, agents for *Marsh & Ferriman*, Worthing (for the assessment committee) ; *A. Kramer & Co.* (for the owner).

[*Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.*]

B

R. v. BROOK.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Humphreys and Birkett, JJ.), March 24, 1949.]

C

Criminal Law—Larceny—Sentence—Direction that defendant to remain in custody until payment—Criminal Justice Act, 1948 (c. 58), s. 14 (1) (2).

The Criminal Justice Act, 1948, s. 14, provides : “ (1) Subject to the provisions of this section, where a fine is imposed by . . . a court of assize or quarter sessions, an order may be made in accordance with the provisions of this section : (a) allowing time for payment of the amount of the fine . . . (b) directing payment of the said amount by instalments of such amounts and on such dates respectively as may be specified in the order ; (c) fixing a term of imprisonment which the person liable to make the payment is to undergo if any sum which he is liable to pay is not duly paid or recovered . . . ”

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On Sept. 1, 1939, the whole of a two-storied house to which the Rent Restrictions Acts applied was let to one tenant. In September, 1940, the house was damaged by enemy action and the tenant gave up possession of the premises which remained unoccupied until 1943. The house consisted originally of three living rooms, a kitchen, scullery, pantry and an outside lavatory on the ground floor, and six bedrooms and a bathroom and lavatory on the upper floor. In 1943, when the damage was being repaired, the following alterations were made so as to enable the house to be let as two separate units : (a) separate gas and electric meters were fitted on the two floors, (b) a gas cooker was substituted for a gas fire in one of the rooms on the upper floor, and (c) a sink was fitted into that room so that it could be used as a kitchen. The two floors were then let separately. It was contended by the landlord that the original dwelling-house had lost its identity as a result of the alterations, that each of the two floors had become a new dwelling-house subject to the Rent Restrictions Acts, and that the standard rents were fixed by the rents at which they were first let as separate dwelling-houses, and not by apportionment of the standard rent attributable to the whole house.

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Cases referred to :

- (1) *Stockham v. Easton*, [1924] 1 K.B. 52 ; 129 L.T. 762 ; 31 Digest 571, 7193.
- (2) *Sinclair v. Powell*, [1922] 1 K.B. 393 ; 126 L.T. 210 ; 31 Digest 565, 7129.
- (3) *Marchbank v. Campbell*, [1923] 1 K.B. 245 ; 128 L.T. 283 ; 31 Digest 571, 7192.

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Havers, K.C., and *R. M. A. C. Talbot* for the tenants.
Heathcote-Williams for the landlord.

THE COURT OF APPEAL held that the alterations made in 1943 did not constitute substantial structural alterations and, therefore, the original dwelling-house had not lost its identity, and the tenants of the two separate units were entitled to apportionment of the standard rent of the whole house under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (3) (as amended by the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 17 (2)).

Solicitors : *Harston & Bennett* (for the tenants) ; *Weller & Birrell* (for the landlord).

The defendant pleaded Guilty at quarter sessions to larceny, and the recorder ordered him to pay a fine of £25 and £10 costs, directing that he should remain in custody until the fine was paid. The defendant was unable to pay the fine forthwith and remained in custody for 25 days.

HELD : Section 14 (1) had effected a change in the law so that it was no longer possible to order a prisoner to remain in custody until a fine was paid, and so, in imposing the fine, the recorder had power to make an order or orders under paras. (a), (b) or (c) of the sub-section, but he had no power to make an order not provided for by those paragraphs.

Observations on the effect of s. 14 (2) of the Criminal Justice Act, 1948.

APPEAL against an order of the Recorder of Grimsby whereby the appellant was ordered to be kept in custody until payment of a fine imposed for larceny. The Court of Criminal Appeal held that the recorder had no power to make the order, having regard to the alteration in the law effected by the Criminal Justice Act, 1948, s. 14 (1), and allowed the appeal. The facts appear in the judgment of the court.

T. H. K. Berry for the defendant.

Elborne for the Crown.

LORD GODDARD, C.J., delivered the judgment of the court : The appellant pleaded Guilty before the Recorder of Grimsby to a charge of the theft of some ship's stores. Having heard evidence of the appellant's character, the recorder said that he was not going to send him to prison. He added :

"I am going to impose a fine on you, as I am entitled to do, of £25.

You will pay £10 towards the costs of the prosecution, and you will remain in custody till it is paid."

If the learned recorder thought he had any power to keep the appellant in custody until the payment of the costs, he was wrong, and so the clerk of the peace seemed to think because he drew up the conviction in the form that the appellant was to be kept in prison till the fine was paid, but not until the costs were paid. The learned recorder adjourned the quarter sessions *sine die*, and on Feb. 3, the appellant, having been in custody by that time for 25 days, wrote to the learned recorder, who assumed the power—what power he had got, I do not know—of directing the governor of the gaol to release the prisoner on his entering into a recognisance to appear at the next quarter sessions.

Under the practice before 1948, there was no power to impose a fine for felony, with the exception of manslaughter, but for misdemeanour the court could always fine. When a fine was imposed the court constantly ordered the prisoner to remain in custody until the fine was paid. I think the reason was that it was the duty of the prisoner, who was already in custody, to pay the fine if he could, and, if he could not, he was in the position of a debtor to the Crown and would have to petition the Crown to let him out of prison and forego the penalty. Cases where the prisoner was in custody for non-payment of a fine were reviewed from time to time, and instructions would be given either by the Home Office or other appropriate authority to release the prisoner when it was thought he had been in prison long enough.

Under s. 2 of the Levy of Fines Act, 1822—and under the Queen's Remembrancer Act, 1859, in respect of assizes—the clerk of the peace could allow the prisoner to depart, and then, if he did not pay, the roll together with a writ of *distringas* and *capias*, was sent to the sheriff who would take the body of the prisoner and imprison him as a debtor to the Crown. The prisoner was released when the Crown saw fit.

In the present case, the learned recorder imposed a fine of £25 on the appellant and ordered him to remain in custody till it was paid. We have to consider what is the proper practice to be followed, and the course, as we think, laid down by statute. Under the Criminal Justice Act, 1948, the court, as I have

already said, for the first time has power to fine for felony, so it is all the more necessary to see that the procedure of the Act is properly followed. Section 14 (1) of the Act provides :

“ Subject to the provisions of this section, where a fine is imposed by, or a recognisance is forfeited before, a court of assize or quarter sessions, an order may be made in accordance with the provisions of this section.”

A This clearly refers to all fines, whether for felony or misdemeanour. The provisions referred to are :

“(a) Allowing time for the payment of the amount of the fine or the amount due under the recognisance ; (b) directing payment of the said amount by instalments of such amounts and on such dates respectively as may be specified in the order ; (c) fixing a term of imprisonment which the person liable to make the payment is to undergo if any sum which he is liable to pay is not duly paid or recovered ; (d) in the case of a recognisance, discharging the recognisance or reducing the amount due thereunder : Provided that any term of imprisonment fixed under this sub-section in default of payment of a fine shall not exceed twelve months.”

C It is true that the words of the section are “ an order may be made,” but it seems to the court that the section is inconsistent with the law that existed with regard to the payment or recovery of fines before the Act was passed, and, therefore, in accordance with the well-known principles of construction, we construe it as altering the law and laying down a new procedure. It is desirable that the attention of quarter sessions should be called to this so that they may know what is the proper course to pursue in the future and that when they are imposing a fine in lieu of sending a man to prison they should make one or more of the three orders which they can make under paras. (a), (b) or (c) of that section. They can say : “ We fine you so much, and you may have a month to pay it.” They can say : “ We fine you so much, and it is to be paid by three instalments.” Then they can go on and say : “ You will be imprisoned for such-and-such a time, not exceeding twelve months, if any sum you are liable to pay is not duly paid ”, so that, if the amount is not paid in accordance with the order made under paras. (a) or (b), proceedings can be taken and the person fined will have to undergo the sentence. Where the court does not think it appropriate to give time or to allow the fine to be paid by instalments, they can pass a simple sentence—a fine of so much, and, in default, so many months’ imprisonment. In that case, as neither time nor instalments are allowed, the sentence will begin to run forthwith, but the prisoner can obtain his discharge at any time by paying the fine as provided by s. 15 (5) (b).

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Section 14 (2) provides :

G “ Any order under this section may be made by the court by which the fine is imposed or before which the recognisance is forfeited ; and (subject as hereinafter provided) an order under this section providing for any such matters as are mentioned in para. (a) or para. (b) of the foregoing sub-section may be made (a) where the fine was imposed or the recognisance forfeited by or before the Central Criminal Court, by a judge of that court upon application made in writing to the clerk of the court ; (b) where the fine was imposed or the recognisance forfeited by or before any other court of assize, by a judge of the High Court upon application made in writing to the clerk of assize ; (c) where the fine was imposed or the recognisance forfeited by or before a court of quarter sessions, by the chairman or any deputy chairman of that court, or by the recorder or any deputy recorder, as the case may be, upon application made in writing to the clerk of the peace ; and may amend any previous order made under this section so far as it provides for those matters.”

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That sub-section, in the opinion of the court, provides for a case in which the court has made an order in the first instance, and the defendant asks the court in its discretion to vary the order. For instance, the court may have imposed a substantial fine to be paid in two instalments. The prisoner finds that he can pay the first, but not the second, instalment. He will then run the risk of being imprisoned in default, but under this sub-section he can apply to the court to vary the order and give him more time, or, instead of paying the second instalment in one sum, pay it in two or three sums. Then s. 14 (2) expressly provides :

" . . . no application shall be made under paras. (a) to (c) of this sub-section after the refusal of a previous application made thereunder."

So that the person can only apply once, and, if the court refuses the application, he will have to undergo the sentence of imprisonment passed in default. Section 15 deals with the enrolment of fines or recognisances under s. 32 of the Queen's Remembrancer Act, 1859, that is, fines at assizes, or under s. 2 of the Levy of Fines Act, 1822, which deals with fines imposed by quarter sessions. I do not think it is necessary to refer to that section any further because that is really a machinery section dealing with making up what is commonly called the estreat roll.

We have come to the conclusion that the sentence imposed by the learned recorder was wrong. After the coming into force of the Act of 1948, he had no power to pass any such sentence. Although, if a sentence which cannot stand in law has been passed, this court has power in its place to pass a sentence which could be lawfully passed, we think in this case the appellant has been sufficiently punished for what he did. We, therefore, quash the sentence, set aside the recognisance into which he has entered to appear before the learned recorder, and he, therefore, goes free from today.

Order accordingly.

Solicitor : *Registrar of the Court of Criminal Appeal* (for the defendant);
Director of Public Prosecutions (for the Crown).

[Reported by H. McL. MORRISON, Esq., Barrister-at-Law.]

med. H.L. [1950] 1 All E.R. 737.

JACOBS AND ANOTHER v. LONDON COUNTY COUNCIL.

[COURT OF APPEAL (Tucker, Asquith and Singleton, L.JJ.), March 23, 24, 1949.]

Negligence—Liability of landlord—Defective paving of forecourt of shop—Forecourt in occupation of landlord—Shop let to tenant—Injury to customer—Invitee or licensee.

Nuisance—Defective paving of forecourt adjoining highway—Need to cross forecourt to reach shop—Injury to customer leaving highway to visit shop—Liability of occupier of forecourt.

The landlords of a housing estate had laid out a forecourt between the pavement of the highway and the entrance to some shops which they had let. Anyone going to one of the shops from the highway had to cross the forecourt which remained in the occupation of the landlords. While on her way to make a purchase at one of the shops, the plaintiff stepped from the pavement of the highway on to the forecourt and caught her foot in the cover of a stop-cock which projected about an inch and a quarter above the surrounding surface of the forecourt, at a distance of about 2½ ft. from the highway. The landlords were not aware of this danger, and the plaintiff was not aware of the fact that she was leaving the highway when

she stepped on to the forecourt. In an action by the plaintiff against the landlords claiming damages for negligence or nuisance,

HELD, by the Court of Appeal: (i) although the occupier of the shop was a tenant of the landlords, the landlords had not a sufficient interest in the visit of the plaintiff to the shop to render her their invitee while she was crossing the forecourt; she was merely a licensee while so doing; and, therefore, the landlords were not under a duty to make the forecourt safe for her use and she was not entitled to damages.

Fairman v. Perpetual Investment Building Society ([1923] A.C. 74; 128 L.T. 386), followed.

(ii) the plaintiff was not a user of the highway when she met with the accident, as she had left the highway to reach a place that was off it, and, therefore, the landlords were not liable to her as for a nuisance on land belonging to them and adjoining the highway.

Bromley v. Mercer ([1922] 2 K.B. 126; 127 L.T. 282), and *Howard v. Walker & Lake (Trustees) and Crisp* ([1947] 2 All E.R. 197; [1947] K.B. 860; 177 L.T. 326), applied.

[As to DUTY TO INVITEES AND LICENSEES, see HALSBURY, Hailsham Edn., Vol. 23, pp. 600-612, paras. 851-860; and FOR CASES, see DIGEST, Vol. 36, pp. 35-49, Nos. 208-306.]

Cases referred to:

- (1) *Indermaur v. Dames*, (1866), L.R. 1 C.P. 274; Har. & Ruth. 243; 14 L.T. 484; *affmd.*, (1867), L.R. 2 C.P. 311; 36 Digest 35, 208.
- (2) *Fairman v. Perpetual Investment Building Society*, [1923] A.C. 74; 128 L.T. 386; 87 J.P. 21; 36 Digest 37, 213.
- (3) *Lowery v. Walker*, [1910] 1 K.B. 173; 101 L.T. 873; *revsd. on other grounds*, [1911] A.C. 10; 36 Digest 42, 256.
- (4) *Miller v. Hancock*, [1893] 2 Q.B. 177; 69 L.T. 214; 57 J.P. 758; 31 Digest 99, 2380.
- (5) *Cavalier v. Pope*, [1906] A.C. 428; 95 L.T. 65; 31 Digest 348, 4900.
- (6) *Haseldine v. Daw & Son, Ltd.*, [1941] 3 All E.R. 156; [1941] 2 K.B. 343; 165 L.T. 185; 2nd Digest Supp.
- (7) *Mersey Docks & Harbour Board v. Procter*, [1923] A.C. 253; 129 L.T. 34; 36 Digest 15, 59.
- (8) *Wringe v. Cohen*, [1939] 4 All E.R. 241; [1940] 1 K.B. 229; 161 L.T. 366; 2nd Digest Supp.
- (9) *Harrold v. Watney*, [1898] 2 Q.B. 320; 78 L.T. 788; 36 Digest 69, 443.
- (10) *Bromley v. Mercer*, [1922] 2 K.B. 126; 127 L.T. 282; 36 Digest 69, 436.
- (11) *Howard v. Walker & Lake (Trustees) and Crisp*, [1947] 2 All E.R. 197; [1947] K.B. 860; 177 L.T. 326; 2nd Digest Supp.
- (12) *Owens v. Scott & Sons (Bakers), Ltd., and Wastall*, [1939] 3 All E.R. 663; Digest Supp.
- (13) *Smith v. London and St. Katharine Docks Co.*, (1868), L.R. 3 C.P. 326; 18 L.T. 403; 36 Digest 37, 215.
- (14) *Morgan v. Girl's Friendly Society (Incorporated Central Council)*, [1936] 1 All E.R. 404; Digest Supp.
- (15) *Griffiths v. St. Clement's School, Liverpool (Managers) and Liverpool Church of England Schools Society*, [1938] 3 All E.R. 537; *on appeal*, [1939] 2 All E.R. 76; *sub nom.*, *Griffiths v. Smith*, 103 J.P. 163; Digest Supp.
- (16) *Anderson v. The Guinness Trust*, [1949] 1 All E.R. 530.

APPEAL by the defendants, the London County Council, from an order of His Honour JUDGE HUNTER, K.C., made at Ilford County Court on Oct. 6, 1948, awarding damages to the plaintiffs, Mrs. Jacob and her husband, in respect of injuries suffered by Mrs. Jacobs through the defective condition of the forecourt of a block of buildings on a housing estate belonging to the defen-

dants. The Court of Appeal now allowed the appeal. The facts appear in the judgment of TUCKER, L.J.

H. E. Francis for the defendants.

Monier-Williams for the plaintiffs.

TUCKER, L.J. : This is an appeal from a judgment of His Honour JUDGE HUNTER, K.C., whereby he awarded the sum of £100 damages to the plaintiff, Mrs. Jacobs, and £37 10s. to her husband in respect of injuries suffered by Mrs. Jacobs and caused by the defective condition of a stop-cock which was situate in the forecourt of a block of buildings which belonged to the defendants, the London County Council, and formed part of an estate which they had laid out in Bennett's Castle Lane, Dagenham. Adjoining this highway there were three shops, numbered 238, 240, and 242, which had been let by the defendants. Alongside Bennett's Castle Lane there was an ordinary pavement of about 7ft. in width, and adjoining the pavement, and between the pavement and the shops, there was this forecourt, which had been laid out by the defendants, and which consisted partly of cement and partly of cast-stone paving-stones. To get to any one of the shops from the pavement, persons would have to cross the forecourt. The premises, No. 240 (*i.e.*, the shop with which we are concerned in this case) were let to Smith, Gard & Co. by lease, the terms of which gave them permission to use the premises for the purpose of a chemist's shop and one other specified purpose. The case has proceeded on the basis that the defendants were at all material times the persons in occupation of the forecourt.

In the forecourt, some 2ft. 6ins. from the pavement, there was a stop-cock. The surrounding cement and paving-stones had sunk so that the stop-cock projected an inch and a quarter from the surface of the forecourt. The plaintiff, Mrs. Jacob, was on the way to make a purchase at Smith, Gard & Co., the chemists, and for this purpose left the pavement and proceeded on to the forecourt. When she reached the stop-cock—having, of course, only just stepped off the pavement—she caught her foot in the raised stop-cock cover and suffered the injuries for which she brought this action. The first question which had to be determined was whether, in the position in which she was when she fell, she was an invitee of the defendants or merely a licensee on the forecourt. The learned judge has found that the defendants ought to have known of this unusual danger and that they failed to know of it owing to their lack of reasonable care in the matter of inspection. They were not, in fact, aware of the existence of the danger. So we have a clear-cut case in which it is essential to decide whether or not the plaintiff was an invitee or a licensee, because, on the learned judge's finding of fact, if she was an invitee, she was clearly entitled to recover. On the other hand, if she was a licensee it is equally clear that her claim must fail. When that issue is disposed of, it may be necessary to consider the second part of her claim, which is put in the alternative, namely, on the ground that the defendants had created, or allowed to come into existence, and had failed to remedy, that which was a nuisance adjoining the highway, and she (the plaintiff) suffered damage from that nuisance as a user of the highway. With regard to the plaintiff's status, the learned judge has held that she was an invitee within the principle of *Indermaur v. Dames* (1), but he has not given any reasons showing the exact means by which he arrived at that decision.

This case appears to me to raise in an acute form the problem which has troubled the courts from time to time in cases of this sort. First, it may be just as well to go back to the fountain-head of *Indermaur v. Dames* (1). In the course of his judgment WILLES, J., said (L.R. 1 C.P. 288) :

“The class to which the customer belongs includes persons who go not as mere volunteers, or licensees, or guests, or servants, or persons whose employment is such that danger may be considered as bargained for, but

who go upon business which concerns the occupier, and upon his invitation, express or implied. And, with respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know . . .”

- A There have been a number of cases similar to the present which involved claims, sometimes by tenants and sometimes by their guests or visitors, against landlords who had retained a staircase or other portions of property in respect of injuries suffered on such staircases by guests and tenants. After a number of those cases had been through the courts, *Fairman v. Perpetual Investment Building Society* (2) reached the House of Lords in 1923, and that is now the governing authority covering this branch of the law.
- B In that case the plaintiff, who was a lodger of one of the tenants of a flat in a block of flats, met with an injury owing to the state of the stairs, and she brought her action against the landlords who retained control of the stairs. One of the issues in the case was : What was the status of the plaintiff ? Was she a licensee or was she an invitee ? I should have thought that, logically that was the first issue, because, until
- C that was determined, it was not possible to measure or ascertain the nature of the duty or the relevant facts. In dealing with that case LORD ATKINSON, LORD SUMNER and LORD WRENBURY all expressed the view in very clear language that the plaintiff was a licensee and not an invitee. LORD ATKINSON, having set out the facts, said ([1923] A.C. 85) :

- “ When the owner of a flat lets it to a tenant for the purpose of its
- D being resided in by the tenant and his family the landlord must, I think, be taken to have given permission for whatever is reasonably necessary for the reasonable use and enjoyment of the flat for that purpose. This would necessarily include permission to the tenant and his family, his servant, the messengers of the tradesmen with whom he dealt, his visitors and guests and suchlike persons, to have access to his flat in order
- E to enable him and his family to live in it with the customary amenities. It may be doubted whether lodgers were included in the list of privileged persons, since, apparently, it was not contemplated by either landlord or tenant when the letting was made that the tenant should take in lodgers. Whether that be so or not, however, I think it might be held in this case, upon the principle upon which *Lowery v. Walker* (3) was decided, that from
- F the user of the stairs for such a length of time as the lady has, to the knowledge of the landlord’s caretaker, in fact used them it was to be inferred that she had the landlord’s permission to use them.”

So the learned Lord was putting the plaintiff into the category of the other persons to whom he had referred, namely, the family of the tenant, servants, messengers, tradesmen, visitors, guests, and suchlike persons. Having put her into that

G category, he said (*ibid.*) :

- “ She was undoubtedly, when using the stairs, using them as the invitee of the tenant, though not of the landlord. *Quoad* the landlord she was, I think, when using them at most merely his licensee. There is nothing in the case to support the suggestion that the tenant was authorised by the landlord to act as the latter’s agent to invite her. The landlord gave
- H her no invitation, it would appear to me, either direct or indirect, to use these stairs.”

Then LORD SUMNER said (*ibid.*, 92) :

“ My Lords, I think that the plaintiff was the defendants’ licensee not their invitee. Somebody builds the stairs, and the defendants open the door, but the tenant gives the invitation. It was not about the landlord’s business that the plaintiff used the stairs, though it may well be that, as a

lodger to whom the tenant was seemingly entitled to sub-let a room, she had such a right to go in and out as to make her licence irrevocable, so long as she remained a lodger. In this particular case, however, it makes no difference to the liability whether she was the defendants' licensee or their invitee."

LORD WRENBURY said (*ibid.*, 95) :

"It is well to define at the outset what, in my judgment, is the relation between the plaintiff and the landlord in respect of which she can sue. There was no contractual relation. She was a person who, as between herself and the landlord, was entitled to use the landlord's staircase, because she was there rightly for the purpose of gaining access to premises which he had demised to a tenant with an implied right of use by the tenant and all persons lawfully resorting to the tenant's premises. She was, I think, the invitee of the tenant, and, in consequence, the licensee of the landlord."

In the course of their speeches the Lords (especially LORD SUMNER) dealt, at some length, with *Miller v. Hancock* (4) which they overruled. The importance of that is that in *Miller v. Hancock* (4) the plaintiff who suffered injury was visiting premises which consisted partly of business offices and was going there for business purposes. The facts in *Miller v. Hancock* (4) were set out by LORD BUCKMASTER ([1923] A.C. 79) in *Fairman's* case (2) :

"The defendant Hancock owned a building in the city, the different floors of which were let separately as chambers or offices. The staircase by which access to and from the street was obtained remained in his possession and control. The plaintiff, who, in the course of business with one of the tenants, was attending one of these sets of offices on the second floor, fell on the stairs owing to their worn and defective state and suffered injuries . . ."

It was much discussed whether the true basis of the decision in *Miller v. Hancock* (4) rested on some alleged contractual duty or whether it was based in tort, but, having examined the case, LORD SUMNER said (*ibid.*, 94) :

"If then *Miller v. Hancock* (4) is not a case of a trap, but decides that an owner of property is liable contractually to others than parties or privies, or non-contractually is under a duty to repair, even though the want of repair is patent, it is inconsistent with the authorities cited, to which, except to name *Cavalier v. Pope* (5), it is not necessary for me to refer."

In 1941 this court had occasion to consider *Fairman's* case (2) in *Haseldine v. Daw & Son, Ltd.* (6) in which the plaintiff had suffered injury owing to the defective condition of a lift in a block of flats. In that case the plaintiff was a solicitor's clerk visiting one of the tenants in the block of flats on the solicitor's business, but the tenant was the tenant of a residential flat. The court decided that the plaintiff, whether he was a licensee or an invitee, could not succeed against the landlords because the landlords had fully fulfilled their duty in either event, *i.e.*, they had done everything which was reasonable with regard to the repair of the lift by putting it in the hands of competent engineers to repair and inspect, and so forth. None the less, both SCOTT, L.J., and GODDARD, L.J., considered with great care and in some detail whether or not the plaintiff was a licensee or an invitee. SCOTT, L.J., came to the conclusion that the plaintiff was an invitee, and found himself able to arrive at that conclusion, notwithstanding the decision in *Fairman's* case (2), on the ground that he thought the statements of the Law Lords in *Fairman's* case (2) were *obiter dicta*, because in that case, also, it was clear on the facts that the House of Lords were satisfied that in either event the plaintiff would not have been able to succeed. Feeling himself free to express his own view, SCOTT, L.J., said ([1941] 3 All E.R. 164) :

" . . . it is my duty to express my view. My view is that, in the ordinary case, the landlord of a block of flats, who retains possession, occupation and control of the means of access which he provides for the use of his tenants and their visitors, has an interest of his own in facilitating access to the flats not only of his tenants and their households, but also of their visitors, and, therefore, that, when a visitor avails himself of the proffered access, he does so on the implied invitation of the landlord. If so, the plaintiff was the landlord's invitee, to use a horrid, non-English word made common, if not invented, by our judges . . ."

CLAUSON, L.J., did not deal with this matter, but he said (*ibid.*, 174) :

" I have had the advantage of reading the judgment which GODDARD, L.J., is about to deliver. For the sake of brevity, I desire to adopt as my own his statement of the facts, and also the conclusions which he reaches as regards the failure of the plaintiff to establish a case for damages against the defendant Daw. I agree with GODDARD, L.J., that it becomes unnecessary to determine whether the plaintiff was a licensee or an invitee."

It is true that GODDARD, L.J., stated (*ibid.*, 181) :

" . . . even assuming that the plaintiff is to be regarded as an invitee, I think that his claim . . . must fail."

Before making that statement, however, he had considered, at some length, the question whether or not the plaintiff was an invitee, and he had come to the conclusion that he was bound by *Fairman's* case (2) to hold that the plaintiff was only a licensee. First he referred to *Mersey Docks and Harbour Board v. Procter* (7), which is relied on by counsel for the defendants in the present case, and then he said (*ibid.*, 179) :

" This brings us at once to the question of what duty was owed by Daw to a person who came to the flats and used the lift for the purpose of visiting a tenant, and not on the business of the landlord. I confess that, were it not for authority which binds me, I should be strongly tempted to hold that, in the case of flats and offices, having regard to modern conditions of life and business, the plaintiff ought to be regarded as an invitee. LORD SUMNER puts the matter tersely in *Mersey Docks and Harbour Board v. Procter* (7) ([1923] A.C. 272) : ' The leading distinction between an invitee and a licensee is that, in the case of the former, invitor and invitee have a common interest, while, in the latter, licensor and licensee have none '."

LORD SUMNER was a member of the House that decided *Fairman's* case (2), and also a member of the House that decided *Mersey Docks and Harbour Board v. Procter* (7). GODDARD, L.J., then said ([1941] 3 All E.R. 180) :

" In the case of blocks of offices in the city, everyone knows that lifts are running all day, not only for the use of the tenants, but also for the use of their clients and customers. The landlord must provide facilities and conveniences to enable his tenants to carry on their business if he wants to let the offices and keep his tenants. Surely he would prejudice his prospects of letting on favourable terms a second or third floor office to a stockbroker, solicitor or merchant were he to say : ' The lift is for you only. I do not undertake to allow your clients, or even your clerks, to use it. I may do so as a matter of grace, but that is all.' The more convenient and attractive he can make his property for persons resorting thereto on business, the better the rent he can obtain. This applies equally to the case of residential flats, where tenants expect and require facilities for their visitors, whether on business or social calls."

GODDARD, L.J., then referred to *Fairman's* case (2) and mentioned that in it the court had overruled *Miller v. Hancock* (4). He then said (*ibid.*) :

"For this purpose I can see no distinction between a staircase and a lift. They are merely alternative methods of access. Both LORD SUMNER ([1923] A.C. 92) and LORD WRENBURY ([1923] A.C. 95), say in terms that the plaintiff was a licensee, and not an invitee, of the landlords', and, although they said that in that particular case it made no difference whether the plaintiff was the one or the other, I cannot regard their views on this matter as being merely *obiter*. If they were, I think it is for the House of Lords, and not for this court, to say so."

With respect, I find myself in precisely the same position as GODDARD, L.J. Whether or not what he said and what SCOTT, L.J., said in *Haseldine v. Daw & Son, Ltd.* (6) were *dicta*, I think myself bound by *Fairman's* case (2), and I find it impossible to distinguish a case in which an injured person is visiting a shop or a professional office from one in which he is visiting a residential flat. It seems to me that the language in *Fairman's* case (2) covers all this class of case, and the decision shows that in this kind of matter the landlord has not a sufficient interest in the visit of the injured person to confer on the latter a right to damages. That he has some kind of remote interest is obvious from the examples given by GODDARD, L.J., and from the fact that, if customers were not allowed to reach the demised shop, the tenant might, and probably would, be unable to pay his rent, but the cases seem to show—with the authority of the House of Lords—that that is not a sufficient interest to make a visitor to the shop or office or flat anything other than a licensee when he is using the staircase, the forecourt, or other part of the premises which is in the occupation of the landlord and has got into a state of disorder. Therefore, I think that the learned county court judge was wrong in coming to the conclusion that the plaintiff was an invitee. I think she was merely a licensee and that, if the law in this class of case requires revision, it must be for the House of Lords to revise it.

That brings me to the second branch of the claim, namely, nuisance. In regard to that the learned judge said :

"I also find that the stop-cock and surrounding stones constituted a nuisance. The cases of nuisance on land adjoining a highway are not in point, for the female plaintiff did not stray on to the forecourt by accident. She went there deliberately. But she was there lawfully and not as a trespasser. She was injured by reason of a nuisance on land of the London County Council, on which land she was present lawfully, and on this ground the county council are also liable. I think that the principles laid down in *Wringe v. Cohen* (8) are applicable, and that it is immaterial whether the county council knew of the nuisance or not."

With regard to that, counsel for the plaintiffs does not seek to uphold the reasoning by which the learned county court judge held the defendants liable in nuisance. He concedes that *Wringe v. Cohen* (8) is not an authority which is helpful in the present case. In *Wringe v. Cohen* (8) a landlord, who had reserved to himself the right to enter on premises which he had let, had allowed the premises to get into a condition constituting a nuisance, and the case dealt with the duty of the landlord to the owner of adjoining property. That case is of no assistance with regard to the duty owed to persons using the highway, and counsel for the plaintiffs concedes that, to succeed in the present case, the plaintiff, Mrs. Jacobs, must show that this accident happened to her in the course of her user of the highway. He says, with regard to that, that the learned judge was wrong in saying :

"The cases of nuisance on land adjoining a highway are not in point, for the female plaintiff did not stray on to the forecourt by accident. She went there deliberately."

Counsel for the plaintiffs says that that finding is not supported by the evidence, and that on the true view of the case the plaintiff should be regarded as having still been using the highway at all material times. He says that the forecourt, with the stop-cock in this dangerous condition only 2ft. 6ins. from the pavement, should be regarded as in exactly the same category as a dangerous fence, such as there was in *Harrold v. Watney* (9), and that it is immaterial whether the plaintiff knew she was on the highway all the time or not. He submits that, despite the fact that she had left the highway to go to the chemist's shop, she did not know whether or not she was on the highway, and, therefore, she must be treated as still using the highway at the material time. He says that this dangerous stop-cock was so near the highway that the plaintiff would have to deviate hardly more than a few inches. It is conceded that, on the authorities, if she had left the highway momentarily because of some obstruction on the highway and, in so doing, had met with precisely the same accident as that which befell her, she would have been able to recover. Counsel for the plaintiffs says that it seems curious that, if that is the case, she should not be able to recover because she was on the way to the chemist's shop. One does get remarkable consequences when one has to draw the line in particular cases, but I think the authorities are clear that in a case of this kind the plaintiff can only recover if at the material time she was, in fact, using the highway. If she was no longer on the highway, but had left it deliberately and intentionally—and by “deliberately and intentionally” I do not mean “knowing that she had left the highway,” but “pursuant to her deliberate purpose of reaching some place that was off the highway”—then, in my view, she cannot be said to have suffered the injury in the process of using the highway. Where a person has to step off the highway because of some momentary obstruction, although she is thereby physically off the highway, I think on the authorities she is regarded as still using the highway, having, so to speak, been forced off it.

To deal with the more modern cases, *Bromley v. Mercer* (10) is an authority for the proposition that a person who was not using the highway when the accident occurred is not entitled to recover damages. The headnote in that case is :

“The defendants were the owners of a house and yard abutting on a highway, and separated therefrom by a wall which was in such a defective state of repair as to constitute a public nuisance in the highway. The plaintiff, a child of nine years of age, who was visiting the tenant of the premises, while playing in the yard was injured by a heavy stone which fell from the wall upon her. In an action against the owners for damages for the injuries so sustained : *Held*, that as the plaintiff was not using the highway when the accident occurred she was not entitled to recover damages from the defendants.”

It is true that in that case, as is stated in the judgment of LORD STERNDALE, M.R. ([1922] 2 K.B. 129), there was no evidence to show that the child was ever on the highway. It is clear there was not that distinction in that case, but the legal position is stated very clearly in the judgments of LORD STERNDALE, M.R., and SCRUTTON, L.J. LORD STERNDALE, M.R., after describing the facts, said (*ibid.*) :

“The learned commissioner said in his judgment : ‘The point is a very fine one. The plaintiff was not in fact on the highway, she was in the yard. The wall, as I find, was a public nuisance abutting on a highway. Does the plaintiff lose her remedy as one of the public injured by the nuisance, because, in fact, she was not on the highway but was in the yard as the licensee or invitee of the tenant ?’ That, I think, involves a fallacy. He seems to think that where there is a nuisance to the highway every one who comes in proximity to it has a right of action which he can carry about with him on to private premises.”

SCRUTTON, L.J., said ([1922] 2 K.B. 130) :

"It is true that the defendants, the landlords, are under covenant to keep the wall in repair, and have not done so, but the commissioner has rightly held that the plaintiff cannot sue them for negligence either in contract or in tort because they are not in occupation of the premises. The authorities justify that. But the commissioner has gone on to find that the wall is in so dangerous a condition as to constitute a public nuisance to the adjoining highway. On that finding he has held that the plaintiff, who has been injured in consequence of the condition of the wall, is entitled to recover. But the only person who can successfully sue for damages is one who is injured in using the highway. There is no authority for the extension of the law which the learned commissioner has made, and in my opinion it is erroneous. He seems to have relied upon *Harrold v. Watney* (9). But there the plaintiff was using the highway, and that case cannot be extended to a case where the person injured was on the other side of a boundary fence and not using the highway at all."

In *Howard v. Walker and Lake (Trustees) and Crisp* (11) the plaintiff received injuries on a forecourt before reaching the highway after leaving a shop, and LORD GODDARD, C.J., said ([1947] 2 All E.R. 199) :

"In this case Mrs. Howard was a visitor or invitee of the tenant. Her counsel sought to put the case on the ground that she was a user of the highway, that she was about to get on it, and that the accident happened while she was so doing, and he endeavoured to support his case by reference to the well-known series of authorities which decide that, if a person creates a danger, whether by excavation or otherwise on land immediately adjoining the highway, he is liable to a person who inadvertently steps off the highway and is injured. This seems to me really to amount to the same argument as was unsuccessful in *Bromley v. Mercer* (10). There the defendants were the owners of a house and yard abutting on a highway and separated therefrom by a wall which was in such a defective state of repair as to constitute a public nuisance to the highway. The defendants were liable to maintain and keep the outside of the premises in good repair and condition. The plaintiff, who was visiting the tenant of the premises, was in the yard and was injured by a heavy stone falling on her from the wall. It was held that she had no cause of action against the landlords . . . It may well be that had Mrs. Howard been walking along the pavement and inadvertently or to avoid some obstruction stepped on the forecourt and had fallen owing to its defective state, she might have been able to recover as did the plaintiff in *Owens v. Scott & Sons (Bakers), Ltd. and Wastall* (12), but she met with the accident while she was still the invitee of the tenant whose premises she was leaving. If she were entitled to recover against the landlords, I can see no reason why a person leaving a house abutting on a highway who was injured by the defective condition of the step should not also have an action, and yet that would be entirely contrary to the line of authority of which the cases I have cited are instances. It may be that the law is not entirely satisfactory on this point."

I cannot see that it makes any difference whether the accident happened to the plaintiff when she had left the highway on the way to the shop or when she had left the shop on the way to the highway. Nor can I see that it makes any difference whether the defective stop-cock is 2ft. 6ins. or 22ft. 6ins. from the highway. On the authorities I think it is clear that the plaintiff did not meet with this accident in the course of the user of the highway. She had left the highway for the purpose of reaching some place off the highway. For these reasons, I think this appeal succeeds.

ASQUITH, L.J. : I agree. At times during the argument I had serious doubts whether the plaintiff might not have been an invitee. It might be

argued that she and the landlords had a common interest in her crossing the forecourt of the shop, her interest being that of a customer, and the council's being that which the lessor of a shop has in attracting custom and providing security for the payment of his rent. There is nothing parallel to this consideration in the effect of *Fairman's* case (2), which proceeded expressly on the footing that the defendant had no interest whatever in the presence of the plaintiff on the common stairs or elsewhere on the premises. I have also felt doubts whether *Haseldine v. Daw & Son, Ltd.* (6) binds us to any particular view of the status of the plaintiff in the present case, seeing that in *Haseldine's* case (6) the result would have been the same whether the plaintiff was a licensee or an invitee. Though I still feel this is a difficult question, I have not sufficient confidence in the grounds of my own scepticism to press them to the point of dissent. I, accordingly, agree with my Lord.

SINGLETON, L.J. : I also am of the opinion that this appeal should be allowed, and I have reached that conclusion with very considerable regret that the law which has been discussed in this court remains so obscure that it is still difficult in so many cases to determine what the precise position of the plaintiff is and what is the nature of the duty owed to the plaintiff.

[HIS LORDSHIP stated the facts and continued :] It is said that, if the London County Council were the occupiers of that forecourt, then the plaintiff was, at the most, a licensee when she was on it. The duty towards a licensee is different from that towards an invitee. The occupier of the premises is under no obligation to a licensee to make them safe for use by him. A mere licensee must be content to take the premises as they are. So it is said that when the plaintiff went across that forecourt and tripped on a water stop-cock which was projecting above the footway, she had to take the premises as she found them and the defendants are not responsible to her. That is right. If she had been an invitee—and she would have been an invitee if she had got into the shop, because she would have been giving business to the shopkeeper—a different measure of duty arises, so that one finds the plaintiff placed in these different categories, all within a very short space of time.

This question whether a person is an invitee or a licensee has been discussed for years. In the same volume of the LAW REPORTS ([1923] A.C.) are *Fairman v. Perpetual Investment Building Society* (2) and *Mersey Docks and Harbour Board v. Procter* (7) where the difference between the two are set out in full, and they have been referred to by my Lord. Other cases have been cited to us. I find it difficult to distinguish between the dock cases, *Smith v. London and St. Katharine Docks Co.* (13) and *Mersey Docks and Harbour Board v. Procter* (7), on the one hand, and the present case, on the other. The defendants, the London County Council, had developed the housing estate. They had an interest in the people on the estate, and, though they had no direct business interest in the shop to which the plaintiff was going, they had retained the forecourt, on which she was when she met with the accident, and on that forecourt was a stop-cock for the purposes of a water supply to a flat, or flats, above the shop.

The whole position is full of difficulty and doubt. I must refer to the judgment of GODDARD, L.J., in *Haseldine v. Daw & Son, Ltd.* (6), where he said ([1941] 3 All E.R. 179) :

“ This brings us at once to the question of what duty was owed by Daw to a person who came to the flats and used the lift for the purpose of visiting a tenant, and not on the business of the landlord. I confess that, were it not for authority which binds me, I should be strongly tempted to hold that, in the case of flats and offices, having regard to modern conditions of life and business, the plaintiff ought to be regarded as an invitee.”

That, in view of all the circumstances, is the view I should take of the plaintiff's position here, did I not feel bound by authority to come to an opposite conclusion. At one time I wondered whether the view formed by the learned county court judge that she was an invitee was not decisive in that it might be said, in all the circumstances, that there was some evidence that she was in that category and that the learned judge had found that on evidence, but, having regard to all the authorities which have been cited to us, and, in particular, to the decision in *Haseldine v. Daw & Son, Ltd.* (6), I do not feel able so to hold. A

The other part of the case, the ground of nuisance, presents just as many difficulties and the law on the subject is just as complicated. It is not disputed by counsel for the defendants that, if the plaintiff, Mrs. Jacobs, had been walking along the footway proper and had stepped to one side because someone got in her way or because the footway was not clear at that point and had then caught her foot on the stop-cock, the stop-cock would have constituted a nuisance and she would have been entitled to recover on the ground that there was a public nuisance and that she had suffered damage thereby. The stop-cock, in fact, was only about 2 ft. 6 ins. or 3 ft. from the footway and, so far as anyone could see, the paving was just the same. She thought that that part of the forecourt was part of the footway, without a doubt, but she had turned to her left to go to the shop and, so it was said, she had left the highway (although she did not know that she had), and thereby she cannot recover. I suppose some people would call this a distinction without a difference. It is extraordinarily difficult to see why in the circumstances she should not recover, and yet the decisions bind me to say that she cannot. B

My Lord referred to the judgment of LORD GODDARD, C.J., in 1947, in *Howard v. Walker and Lake (Trustees) and Crisp* (11). In that case the LORD CHIEF JUSTICE ended his judgment in this way ([1947] 2 All E.R. 199): C

"It may be that the law is not entirely satisfactory on this point. No doubt, it is difficult for a layman to understand why, if he is walking along the road and slips into an excavation at the side of it, he should be entitled to recover, whereas if he slips into the excavation as he is endeavouring to get on to the road he is not, but I must take the law as I find it, and I have come to the conclusion that it is not possible for me to hold that Mr. and Mrs. Howard have a cause of action against the landlords. Accordingly, Mr. and Mrs. Howard will have judgment against Mr. Crisp for £455 13s. 6d. . . . and there will be judgment for the landlords . . ." D

I too do not think that the law is satisfactory. It would be better, I think, if the London County Council have a piece of ground of this kind that it should be thrown into the highway so that someone may have responsibility for it and that they should have some means of inspecting it, but, as it stands, if a person who goes on that land is a mere licensee, he must take the premises as he finds them. Mrs. Jacobs was injured by no fault of her own. That is found by the learned county court judge. She was injured because of a projection on a place which looked just like the highway, but was not, in fact, part of the highway, and those who were the occupiers of this piece of land did not, apparently, know that they were. I think it is most unfortunate for her, and I have great sympathy with her and with her advisers, who have found it so difficult to know what her rights are, or even if she has any. I am afraid that, on the law as it stands, the appeal must be allowed, but I cannot help wishing that the law was otherwise. E

Appeal allowed with costs.

Solicitors: *J. H. Pawlyn*, Solicitor for the London County Council (for the defendants); *Shaen, Roscoe & Co.* (for the plaintiffs). F

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.] G

H

McCARTHY AND ANOTHER v. DAILY MIRROR
NEWSPAPERS, LTD.

[COURT OF APPEAL (Tucker, Asquith and Singleton, L.J.J.), March 31, 1949.]

Factory—Accommodation for clothing—“Suitable accommodation”—Consideration of risk of theft—Factories Act, 1937 (c. 67), s. 43 (1).

A Section 43 (1) of the Factories Act, 1937, provides: “There shall be provided and maintained for the use of employed persons adequate and suitable accommodation for clothing not worn during working hours . . .”

B The plaintiffs were printers’ assistants employed by the defendants on premises which were admitted to be a factory for the purposes of the Factories Act, 1937. It was the plaintiffs’ practice to change into overalls in which to work, and, although lockers with keys were available for many of the employees in which to deposit their outdoor clothes, the plaintiffs were only provided with pegs. In April, 1948, the plaintiffs’ clothing was stolen from the pegs. In an action by the plaintiffs for damages for, *inter alia*, a breach of s. 43 (1),

C HELD: the risk of theft was an element which must be taken into consideration in deciding whether the accommodation was “suitable.”

Observations by TUCKER, L.J., regarding matters proper to be taken into account in deciding this question.

[FOR THE FACTORIES ACT, 1937, s. 43, see HALSBURY’S STATUTES, Vol. 30, p. 236.]

Cases referred to:

- D (1) *Deyong v. Shenburn*, [1946] 1 All E.R. 226; [1946] K.B. 227; 174 L.T. 129; 2nd Digest Supp.
(2) *Stansbie v. Troman*, [1948] 1 All E.R. 599; [1948] 2 K.B. 48.

APPEAL by plaintiffs from a decision of His Honour JUDGE EARENGEY, at Clerkenwell County Court, on Nov. 18, 1948.

E The plaintiffs claimed damages for the loss of clothing, stolen from pegs provided by the defendants for the use of their employees while at work. The county court judge held that the defendants were not liable for the loss and gave judgment in their favour. The Court of Appeal remitted the case to the county court judge to consider the effect in the circumstances of the risk of theft when deciding whether the accommodation in question was “adequate and suitable” within the meaning of s. 43 (1) of the Factories Act, 1937.

Scott Cairns, K.C., and *Edgar Bradley* for the plaintiffs.

Paull, K.C., and *J. G. K. Sheldon* for the defendants.

G TUCKER, L.J.: This is an appeal from a decision of His Honour JUDGE EARENGEY in favour of the defendants, Daily Mirror Newspapers, Ltd., in an action in which the plaintiffs, two of the defendants’ employees, claimed damages in respect of the loss of certain clothing belonging to them which was stolen on Apr. 7, 1948, from the defendants’ premises while the plaintiffs were at work. The plaintiffs were printers’ assistants employed at the defendants’ premises, which are admittedly “a factory” within the meaning of the Factories Act, 1937.

H The facts, as found by the learned judge, are that:

“ . . . it is a well-known practice of all printers employed in the machine rooms of newspaper companies to change the whole of their outdoor dress and to work in overalls. The defendants provided some 130 to 150 lockers with keys in which the outdoor dress of the printers employed by them could be deposited. But after the last war the employees increased considerably above that number, and, to accommodate those who could

not have lockers, pegs were provided. At first these pegs were placed in the machine room, but there was so much oil about that they were removed, some to a passage-way adjoining the shop (where other pegs had for some time been fixed) and others elsewhere on the premises for different workers. The workmen not accommodated with lockers (including the plaintiffs) complained about having to use pegs which exposed their clothing to the risk of being stolen, and the defendants' representative agreed that this was inconvenient and exposed it to the said risk. The defendants ordered additional lockers, but, owing to shortage of material, delivery was long delayed."

Accordingly, the plaintiffs continued using the pegs, and on Apr. 7, 1948, their clothing was stolen. The learned judge has found that the value of Mr. McCarthy's clothes which were stolen was £35, and that of Mr. Nodan, the other plaintiff, £26.

The plaintiffs put their case before the county court judge in three ways. First, they claimed that it was an implied term of the plaintiffs' employment that the defendants would provide reasonable and adequate lockers and/or other accommodation in which the plaintiffs and each of them would be able during the said working hours with safety to deposit their said discarded clothing. Secondly, they said that during working hours the defendants were bailees of the clothing and they had not taken reasonable care of it. Thirdly, they claimed under s. 43 (1) of the Factories Act, 1937. The claim against the defendants as bailees was abandoned at the hearing before the county court judge. The claim based on an implied term in the contract was decided in favour of the defendants by the county court judge, and I think it is clear that that was right. He founded himself principally on *Deyong v. Shenburn* (1) which, I think, is indistinguishable from the present case on that issue. The county court judge pointed out that that case had decided that the defendant was not liable because he was under no duty to protect the clothing from theft, and he referred to a passage ([1946] 1 All E.R. 230) in the judgment of DU PARCQ, L.J., that "failure to provide against theft of the servant's goods is not a breach of any general obligation," nor did any contractual liability exist. He also referred to *Stansbie v. Troman* (2) which deals with a different matter. In any event, apart altogether from *Deyong v. Shenburn* (1), I think it would be impossible, in order to give the contract business efficacy, to say that there must be implied as a necessary term in it the term set out in the particulars of claim which I have just read. The claim based on that ground clearly fails.

The difficulty arises with regard to the alternative claim under s. 43 (1) of the Factories Act, 1937, which provides :

"There shall be provided and maintained for the use of employed persons adequate and suitable accommodation for clothing not worn during working hours."

The first question is : What is the meaning of the words "adequate and suitable" ? Does consideration of what is "suitable" involve consideration of the risk of theft of the clothes or is the risk of theft an element which is quite irrelevant to that question ? Referring to s. 43 (1) the learned judge said :

"... *Deyong's* case (1) shows that at common law the present defendants would not be liable for theft of their servants' goods and there appears to me to be no sufficient reason why I should regard the risk of theft as being imposed indirectly by the words 'adequate and suitable.' I think they should be regarded as meaning 'adequate in point of quantity and strength, and suitable for the purpose of hanging clothing,' which I find to be the case here. In my judgment, therefore, the defendants' committed no breach of their obligation under s. 43."

It is clear that the learned judge regarded the risk of theft by fellow employees

as a matter quite outside the purview of s. 43 (1), a risk to which it was not necessary for him to apply his mind at all. That is the basis of his decision in the defendants' favour under s. 43, and, having dealt with the matter in that way, he never returns to consider or weigh the risk or state his views with regard to the nature of the risk or the suitability of the accommodation having regard to the risk.

A In my view, risk of theft is an element which should be taken into consideration in deciding whether the accommodation provided for clothing is suitable within s. 43 (1). Counsel for the defendants has said that this is a matter of great importance to factory owners and employers of labour, and he asks: "How far are they to go? Are they to provide lockers for all their employees? If so, are they to provide Yale keys?" My answer to that is that it is unsatisfactory, and, indeed, impossible, ever to attempt to lay down any ruling on a matter of that kind. This is essentially a question of fact to be dealt with by the tribunal of fact in a common sense way, taking a broad view of all the circumstances. It must differ, I think, in every case. In some cases there may be a risk of theft by an outsider, in others there may be a risk of theft by persons inside the factory. What is suitable may depend on the number of employees or the access which some employees from other departments have to different departments in the building. All kinds of circumstances may differ in every case, but I think that the element of risk of theft must be weighed in coming to a decision on this matter.

B It is said by counsel for the defendants that in the present case there is no evidence on which the learned judge could come to the conclusion, even taking into consideration the matter of risk from theft, that this accommodation was not suitable. I do not agree, but, in sending the case back to the learned county court judge, I desire to leave the matter entirely at large for him to deal with, and in referring to certain matters I am not indicating a view with regard to them. There was evidence that the risk, such as it was, was brought to the notice of the defendants, and the defendants' representative appeared, according to the learned judge's finding, to have agreed that the provision of pegs instead of lockers did expose the clothing to some risk. Clearly it had been the practice of the employers to provide lockers for these employees, and the evidence was that they would have provided lockers for all their employees if it had not been for the difficulty of obtaining material during war-time. Those are all matters proper to be taken into consideration by the learned judge in coming to the conclusion whether, taking into account the degree of risk which existed, he thinks that the plaintiffs have established, the onus being on them that the accommodation was not suitable. On that issue I think the case should go back to the county court judge, and in the circumstances I think it should go back to the same county court judge who has already given this matter very careful consideration.

G ASQUITH, L.J. : I agree.

SINGLETON, L.J. : I agree. No one contends that s. 43 (1) of the Factories Act, 1937, places an absolute obligation on the employers to keep the clothing of the workpeople safe, but counsel for the defendants admitted at one stage that the risk of theft may come into the matter. If the learned county court judge had considered that, there would have been no purpose served by remitting the case to him. Apparently he did not. It is for him to consider the case again bearing in mind all the facts. The matter is one for him alone.

Case remitted to county court judge. Plaintiffs to have costs of appeal (not including costs of shorthand note). Costs of trial in discretion of county court judge.

Solicitors : *Shoen, Roscoe & Co.* (for the plaintiffs); *Goddard, Holme & Co.* (for the defendants).

[Reported by C. ST.J. NICHOLSON, ESQ., Barrister-at-Law.]

not *res judicata* KOENIGSBERG (deceased). PUBLIC TRUSTEE
v. KOENIGSBERG AND OTHERS.

[COURT OF APPEAL (Somervell and Evershed, L.JJ., and Wynn-Parry, J.),
March 16, 18, 1949.)

Res Judicata—Point belonging to subject of litigation, though not falling for decision—Decision of Court of Appeal—Question on administration based on that decision—Decision of Court of Appeal overruled by House of Lords —Reliance by beneficiaries under will on decision of House of Lords. A

By his will, made in 1936, a testator, who died on Apr. 26, 1941, having appointed the Public Trustee to be his executor and trustee, bequeathed three annuities free of income tax. Investments were directed to be appropriated to meet the annuities, and capital was to be resorted to if the income proved insufficient. In 1942, in *Re Waring* ([1942] 2 All E.R. 250), the Court of Appeal held that for the purposes of the Finance Act, 1941, s. 25 (1), a provision for a payment free of income tax was made when the will in which the provision was contained was executed. In 1943 the Public Trustee took out an originating summons asking *inter alia* "whether the Public Trustee ought to appropriate by way of provision for each of the said annuities payable to the defendants . . . respectively investments yielding at the date of appropriation an income sufficient to meet the said annuity and the Public Trustee's income fee in respect thereof unless commuted and ought to pay to the annuitant the amount of such annuity clear of such income fee." An affidavit in support was filed indicating that the income from the testator's estate would be just sufficient to pay the three annuities together with the income fee thereon. The figures given were based on the decision in *Re Waring*, it being assumed in consequence of that case that the amounts payable to the annuitants must be calculated in accordance with s. 25 (1). BENNETT, J., ordered that "the Public Trustee ought to appropriate by way of provision for each of the annuities payable to the defendants . . . respectively investments yielding at the date of appropriation an income sufficient to meet the said annuity and the Public Trustee's income fee in respect thereof and ought to pay to the annuitant the amount of such annuity clear of such income fee." In 1946 the House of Lords held in *Berkeley v. Berkeley* ([1946] 2 All E.R. 154) that *Re Waring* was wrongly decided and that the date of the provision by will for the purposes of s. 25 (1) was the date of the testator's death. The Public Trustee now asked whether, in view of the decision in *Berkeley v. Berkeley*, he ought to treat the annuities as not subject to s. 25 (1) of the Act of 1941 (as modified by s. 20 of the Finance (No. 2) Act, 1945). The parties to the present summons were the same as those to the summons in 1943 except that one of the annuitants had died since that date. The personal representatives of the deceased annuitant were parties to the present proceedings. B C D E F G

HELD: the question for decision in 1943 was not whether the Public Trustee could appropriate to meet the annuities, but simply whether he ought to appropriate further to meet his income fee; to answer that question it had not been necessary either to decide the present issue nor was a finding on the present issue necessarily involved; and, therefore, the matter was not *res judicata* and the principle in *Berkeley v. Berkeley* applied. H

Hoystead v. Taxation Comr. ([1926] A.C. 155; 134 L.T. 354), distinguished.

Decision of ROXBURGH, J. ([1948] Ch. 727), reversed.

[AS TO RES JUDICATA, see HALSBURY, Hailsham Edn., Vol. 13, pp. 410-419, paras. 465-472; and FOR CASES, see DIGEST, Vol. 21, pp. 156-158, Nos. 191-209.]

Cases referred to :

- (1) *Re Waring No. 1*, [1942] 2 All E.R. 250 ; [1942] Ch. 426 ; 167 L.T. 145 ; 2nd Digest Supp.
- (2) *Berkeley v. Berkeley*, [1946] 2 All E.R. 154 ; [1946] A.C. 555 ; 175 L.T. 153 ; 2nd Digest Supp.
- (3) *Re Waring No. 2*, [1948] 1 All E.R. 257 ; [1948] Ch. 221.
- (4) *Hoystead v. Taxation Comr.*, [1926] A.C. 155 ; 134 L.T. 354 ; Digest Supp.
- (5) *Whelan v. Henning*, [1926] A.C. 293 ; 134 L.T. 513 ; 28 Digest 81, 450.
- (6) *Henderson v. Henderson*, (1843), 3 Hare, 100 ; 1 L.T.O.S. 410 ; 21 Digest 174, 276.
- (7) *R. v. Hartington Middle Quarter (Inhabitants)* (1855), 4 E. & B. 780 ; 3 C.L.R. 554 ; 24 L.T.O.S. 327 ; 19 J.P. 150 ; 21 Digest 140, 49.

APPEAL by annuitants under the will of a testator from an order of ROXBURGH, J., dated July 16, 1948, whereby it was declared that they (the annuitants) were estopped by an order of BENNETT, J., dated Dec. 1, 1943, from alleging that the Finance Act, 1941, s. 25 (1), was inapplicable to their respective annuities. The Court of Appeal now allowed the appeal. The facts appear in the judgment of SOMERVELL, L.J.

Russell, K.C., and *Michael Browne* for the surviving annuitants and the representatives of the deceased annuitant.

Wigglesworth for the Public Trustee.

Michael Albery, for Charing Cross Hospital.

J. A. Reid for St. Bartholomew's and Guy's Hospitals.

Dunbar for Westminster Hospital.

SOMERVELL, L.J. : The testator made his will in 1936 and died in April, 1941. He made the Public Trustee (the plaintiff in the present proceedings) sole executor and trustee, and after certain specific bequests he bequeathed three annuities to be paid free of income tax. There was a direction for the appropriation of investments sufficient at the date of such appropriation to meet each annuity. Capital was to be resorted to if the income turned out later to be insufficient, the residuary estate being, after such appropriation, free from further liability in respect of the annuities. There was also a provision that the balance (if any) of the income of each appropriated fund not required in any year for answering the annuity was to go to the residuary estate. There were some specific monetary legacies, and then the residuary estate was divided into 206 parts, and numbers of these parts, varying from twenty down to one, were given to various charitable objects or institutions. The Finance Act, 1941, s. 25 (1), provides that any provision for the payment of a stated amount free of income tax which is contained in any will and was made before Sept. 3, 1939, shall, as respects payment falling to be made during any year of assessment the standard rate of income tax for which is 10s. 0d. in the pound, have effect as if for the stated amount there was substituted an amount equal to twenty twenty-ninths thereof. When the standard rate was reduced to 9s. 0d. in the pound, the Finance (No. 2) Act, 1945, altered the fraction, the effect of which, I think, is that the annuitant bears income tax over and above 5s. 6d. in the pound.

The only question in this appeal is whether the issue as to the application of s. 25 (1) to this will is to be decided as the House of Lords now have decided is correct in law, or whether the matter must be dealt with on the basis that it is *res judicata*, in a sense other than that laid down by the House of Lords, by reason of proceedings which took place in reference to this will in 1943. On May 24, 1943, when a summons was taken out by the Public Trustee in respect of certain matters to which I will refer more in detail in a moment, there had been a decision of this court that, in construing the words in the statute, the relevant date was the date when the will was executed—in this

case, 1936. On that basis the section applied to these annuitants, and, instead of getting the sums named in the will free of income tax altogether, they had to bear a proportion of the income tax exigible in respect of the annuities. By the summons taken out in 1943 the Public Trustee asked various questions. The main debate here arises on the second question, which I will read in full :

" Whether the Public Trustee ought to appropriate by way of provision for each of the said annuities payable to the defendants . . . respectively investments yielding at the date of appropriation an income sufficient to meet the said annuity and the Public Trustee's income fee in respect thereof unless commuted and ought to pay to the annuitant the amount of such annuity clear of such income fee."

In my opinion, that raises only the question how the income fee is to be dealt with. Is the Public Trustee, in addition to the investments necessary to produce the annuity amount, to appropriate a further amount to cover the income fee, or is the annuitant, in effect, to suffer that fee as a reduction from his annuity ?

An affidavit was filed by Mr. Shuckburgh, of the Public Trustee Office. He sets out the will, and then states :

" 5. The estimated gross amounts of the annuities bequeathed by cl. 3 of the said will as modified by the provisions of s. 25 of the Finance Act, 1941, is as follows " [then the amounts of the three annuities as so modified are set out, and they add up to £772 8s. 3d.]. 6. The income fee payable to the Public Trustee in respect of the three annuities last above mentioned will be approximately £15 10s. 0d. per annum. 7. The assets of the testator's estate are just sufficient to enable funds to be appropriated as provision for the weekly sum payable to the defendant Minnie Koenigsberg under the said order and for the three said annuities together with the income fee thereon. The said appropriation will virtually exhaust the assets and there will be no margin for the immediate payment of the pecuniary legacies bequeathed by cl. 4 of the said will. The fund appropriated to provide the said weekly sum is however available for this purpose subject to the life interest therein of the said Minnie Koenigsberg."

Those figures were on the basis of the decision of this court in *Re Waring, No. 1* (1) and that this will was within the section. If, as the House of Lords later decided, the date of the testator's death was the date for the purposes of the section, that being April, 1941, the section did not apply and the annuitants were entitled to whatever were the additional sums over the sums set out. If, on the reduced basis, the assets were just sufficient to enable funds to be appropriated, obviously, if substantially larger sums had to be paid, the assets would have been insufficient to enable funds to be appropriated. There is no dispute about that. BENNETT, J., made an order, and it is said that he made that order on the footing that, since the testator's will was made before Sept. 3, 1939, although he died after that date, the amounts of the annuities bequeathed by cl. 3 of the said will were subject to modification under s. 25 of the Finance Act, 1941. In respect of the second question raised by the summons he ordered

" . . . that the Public Trustee ought to appropriate by way of provision for each of the annuities payable to the defendants . . . respectively investments yielding at the date of appropriation an income sufficient to meet the said annuity and the Public Trustee's income fee in respect thereof and ought to pay to the annuitant the amount of such annuity clear of such income fee."

I agree with the submission of counsel for the annuitants that that order, read, as one is, I think, entitled to read it, with the question and with regard to the

surrounding circumstances, does not order the trustee to appropriate. He was ordered to do that under the will. What he was asking was, if and when he appropriated, ought he to appropriate an amount to cover the income fee or not ?

Since the date when that order was made two things have happened. First, one of the annuitants has died, and her estate is represented before us, and, secondly, the House of Lords, in *Berkeley v. Berkeley* (2), decided that *Re Waring, No. 1* (1) was wrong and that the date for the purposes of s. 25 in relation to a will is the date when the testator died. In those circumstances the Public Trustee has taken out the present summons, and the first question that he asks is :

“Whether having regard to the decision of the House of Lords in *Berkeley v. Berkeley* (2) the Public Trustee ought to treat the amount of the annuities payable to the defendants . . . under cl. 3 of the will of the testator as not being subject to modification in accordance with s. 25 of the Finance Act, 1941, and s. 20 of the Finance (No. 2) Act, 1945.”

If he is to have regard to the decision in *Berkeley v. Berkeley* (2) other questions arise.

It was argued on behalf of those interested subject to the annuities that on the issue whether the provision for the annuities was made before or after Sept. 3, 1939, for the purpose of s. 25 (1) of the Finance Act, 1941, BENNETT, J.'s order constitutes the matter *res judicata* by implication. It was argued by counsel for the annuitants that that is not so and that they are entitled to have the will construed according to the law as it is now known to be, and, therefore, to get the benefit of having the sums named in the will paid free of tax. The question is whether, as between the parties to that summons and order—and those parties are here or are represented here—the court has decided that the law is as it was laid down in *Re Waring, No. 1* (1). I would like at the outset to point out the distinction between this case and the case which came before JENKINS, J., *Re Waring, No. 2* (3). That was a sequel to *Re Waring, No. 1* (1). In *Re Waring, No. 1* (1) the question of the construction of s. 25 in its application to a will was directly raised, and it was on that issue that the Court of Appeal decided that the material date was the date when the will was executed. There followed the decision in *Berkeley v. Berkeley* (2), and the issue arose whether there was an estoppel by *res judicata* so that the trusts had to be carried out on the basis of what the Court of Appeal had decided in *Re Waring, No. 1* (1) or on the basis of what the House of Lords had said to be the law. There were two annuitants. One was a party to the earlier proceedings and the other was not, and JENKINS, J., decided that the one who was a party to the previous proceedings could not re-open the matter because it had been decided in the earlier proceedings as between the same parties, but that the annuitant who had not been a party to those proceedings was not so bound.

In the present case one thing is clear, and that is that in the originating summons taken out in 1943 the question of the construction of s. 25 in its application to a will was not directly raised. In spite of that, however, ROXBURGH, J., decided that the matter with which we are now concerned was *res judicata*. I have already stated my construction of question 2 of the earlier summons. That is the only question the answer to which it could be suggested had decided this point. It does not raise that issue on the face of it, but the answer may impliedly decide it. What happens to the income fee when you appropriate investments to satisfy an annuity is a question which might arise under any estate in regard to which the *Re Waring, No. 1* (1) problem never could arise, but what is said here is that the Public Trustee, in his affidavit in relation to the earlier summons, states expressly : “I regard s. 25 as applying. On the basis that it applies these are the figures. These figures practically

exhaust the funds." It is said that, if the *Berkeley v. Berkeley* (2) principle is applied, quite different questions arise, and the trustee could not have appropriated in accordance with the directions in the will because there would not have been sufficient investments to go round and other matters would have arisen as to how he should carry out his duties. The court, therefore, it is argued, answered the question on the basis that s. 25 applied.

The learned judge below relied, in particular, on *Hoystead v. Taxation Comr.* (4) which is the main authority on which those who support the submission that this matter is *res judicata* rely. It is important to see how the issue arose. In 1919 there was an assessment to land tax on trustees, and the trustees objected and made a claim to a deduction under s. 38 (7) of the Australian Land Tax Assessment Act, 1910-1916. I will read the first part of s. 38 (7) :

"Where, under a settlement made before July 1, 1910, or under the will of a testator who died before that day, the beneficial interest in any land or in the income therefrom is for the time being shared among a number of persons, all of whom are relatives of the settlor or testator by blood, marriage, or adoption, in such a way that they are taxable as joint owners under this Act, then, for the purpose of their joint assessment as such joint owners, there may be deducted from the unimproved value of the land . . . the aggregate of the following sums namely : In respect of each of the joint owners who hold an original share in the land under the settlement or will (a) the sum of £5,000."

The trustees claimed that they were entitled to deduct six sums of £5,000 in respect of six beneficiaries. It will be seen that to succeed on that issue they had to establish that the testator died before July 1, 1910, that the beneficiaries were relatives of the testator, that they were taxable as joint owners, and that they held an original share, and all those matters were set out expressly in the objection which the trustees took to the original assessment. The objection was disallowed by the revenue authorities, and the matter went to the High Court where the first question was :

"Whether the shares of the joint owners or of any and which of them in the land were original shares within s. 38 ; and (2) How many deductions of £5,000 the respondent should make."

It is clear that the Commissioner of Taxation could have taken, but did not take, the point that the beneficiaries were not taxable as joint owners—the point was there on the face of the section and in the objection, but he did not take it any more than he took the point that they were not relatives. The court decided that they had original shares and that they were entitled to six deductions. That was a decision that the sub-section applied. In the subsequent year the Commissioner of Taxation sought to re-open the matter and to argue that there should be no deduction because these beneficiaries were not taxable as joint owners and the question was whether that issue had already been decided. No point seems to have been taken, as was taken in *Whelan v. Henning* (5), that in regard to income tax a question relating to a subsequent year is not the same question as that relating to a previous year although all the relevant facts may be the same. No point of that kind seems to have been taken, but the Judicial Committee decided that the Commissioner of Taxation was estopped because what he was seeking to do in the subsequent year was to say : "As you are not taxable as joint owners s. 38 (7) does not avail you and there should be only one deduction of £5,000 instead of six," and so to obtain an order which was on the face of it and in form in direct conflict with the order which had been made previously. He was saying : "Whereas the previous order said six deductions, I want you to bring that down to one deduction," and also that s. 38 (7) did not apply, whereas the court had decided that it did. The case is a good example of what happens

when a party could take a point, but fails to do so. It decides that in those circumstances he cannot in subsequent litigation get the matter (in that case, the applicability of s. 38 (7)) re-litigated by taking a point which he could have taken when the matter was previously before the courts. That decision does not cover the present case at all. ROXBURGH, J., read a passage from the judgment in that case of which I will read the latter part because a good deal of the argument here was based on its wording. LORD SHAW, delivering the judgment of the Judicial Committee, said ([1926] A.C. 166):

“Thirdly, the same principle—namely, that of setting to rest rights of litigants, applies to the case where a point, fundamental to the decision, taken or assumed by the plaintiff and traversable by the defendant, has not been traversed. In that case also a defendant is bound by the judgment, although it may be true enough that subsequent light or ingenuity might suggest some traverse which had not been taken. The same principle of setting parties’ rights to rest applies and estoppel occurs.”

We were referred to a number of other authorities. There is a very famous passage from WIGRAM, V.-C., in *Henderson v. Henderson* (6), cited in *Hoystead v. Taxation Comr.* (4), which has often been quoted with approval. We were also referred to *R. v. Hartington Middle Quarter (Inhabitants)* (7), in which in the earlier proceedings (which were between the same parties) the question was where two unemancipated children were settled. That question could only be decided by deciding where their parents were settled, and it was, therefore, held in a later proceeding that the question where their parents were settled was *res judicata*. We have, however, as it seems to me, been referred to no case which covers the present one. The argument in the present case is not that the *Re Waring, No. 1* (1) point was necessary for the decision of any of the points decided by BENNETT, J., in 1943. The argument is that the relevant questions would not have arisen except on the footing that the rights of the annuitants were on the basis that *Re Waring, No. 1* (1) was right and that s. 25 applied.

If an order made by the court necessarily involves a finding (whether there was argument or not) on the point which is later sought to be litigated, the authorities lay down that that point cannot be raised, but, in my opinion, that principle does not cover the present case. The question is whether the words of LORD SHAW which have been quoted from *Hoystead’s* case (4)—they must, of course, be read in their context—justify us in extending this principle to the present case. I have come to the conclusion, differing from the learned judge, that *res judicata* by implication cannot be established here. Counsel for St. Bartholomew’s Hospital argued that in the case of administration proceedings of this kind the principles are rather wider than they would be in an action with pleadings. That may be so. I agree that each case must be considered on its own facts and that in proceedings by originating summons somewhat different questions may arise from those which arise in an action with pleadings, but I cannot hold that this order of BENNETT J.’s must be regarded as deciding this issue. The question whether an income fee is to fall on the annuitant or on the rest of the estate has nothing whatever to do with the question which arises under s. 25. That has to be conceded, but then it is said that the annuitants, faced with what is set out in the paragraphs which I have read, ought to have taken the point that the figures put forward were wrong, and that *Re Waring, No. 1* (1) was wrongly decided. I cannot see that they were under any duty to take that point. The statements in Mr. Shuckburgh’s affidavit filed in 1943 do not seem to me to be within the phrase “a matter traversable by the defendant.” I agree that the word “traversable” contemplates pleadings rather than an originating summons, but when a party takes out an originating summons he can make quite clear to those whom he has to bring before the court what point or points he wants decided, and it

is for the defendants to raise matters and file evidence which deal with the points which in the originating summons are put before the court for decision. I do not think they are called on to raise or deal with other and quite different points. As it seems to me, the point as to the effect of s. 25 (1) was plainly not put before the court for decision in the originating summons in 1943, and I cannot think that the defendants were under a duty to raise it in the sense that, if they did not do so, they would not be allowed in the future to assert their rights under the law as it was subsequently held to be. We have had an interesting argument, and I agree with what is said in Mr. SPENCER BOWER's book on *RES JUDICATA* that questions of some nicety can arise, and I think that is particularly true of procedure by way of originating summons. Once one has got the general picture of what happened in 1943 and the principles laid down in the cases, one has to decide whether this matter falls within those principles or not. For the reasons I have given I think that the learned judge was wrong, that the matter is not *res judicata*, and that the law as it has been laid down in *Berkeley v. Berkeley* (2) applies to the annuities under this will.

EVERSHED, L.J. : I agree. We have had the advantage of very full and careful arguments on the difficult question of the application of the so-called doctrine of estoppel *per rem judicatam* by implication. That is to say, the argument on behalf of the respondents is that, by virtue of that doctrine, the annuitants are estopped from asserting or claiming that the interests given to them under the will are those given according to the law as laid down by *Berkeley v. Berkeley* (2). In approaching the problem it may be not unimportant to bear in mind that this so-called doctrine of estoppel *per rem judicatam* is said to be justified on the theory that it is in the public interest that there should be no multiplicity of suits in the determination of disputes and the ascertainment of individual rights. In a case in which it is alleged that beneficiaries under a will are estopped from putting forward their real claims though the estate is not distributed, I feel that the court should be satisfied with reasonable certainty that the doctrine does, in truth, apply.

As the argument has developed it has seemed to me that two points (somewhat distinct) have been raised. The first is that which one may identify with the *Hoystead* case (4), the question being, to use the language in the *Hoystead* case (4) which SOMERVELL, L.J., has already read, whether a point fundamental to the decision of BENNETT, J., in 1943, taken or assumed by the plaintiff, has not been traversed, and is, therefore, to be treated as having been decided. The words or adjectives "fundamental," "assumed," and so forth, have to be examined in the light of the context in which they are used. It is plain that in 1943 not only the plaintiff, but all the parties and the court assumed that the law was as the Court of Appeal had said it was in *Re Waring*, No. 1 (1). They could, indeed, do no other, unless they were going to dispute in the House of Lords the validity of that decision. It is also true that the affidavit on behalf of the Public Trustee stated in paras. 5, 6 and 7 the financial position relevant to the question of the annuitants and also to the position of the testator's widow, who was then alive, on the basis that s. 25 (1) of the Finance Act, 1941, would affect the amounts. Counsel for the annuitants argued, I venture to think with some force, that para. 7 of the Public Trustee's affidavit, which stated that there was only a sufficiency of assets to provide by appropriation for the annuities and no more, was particularly directed, not to the question of the income fee and the annuities, but to the question whether the reversion to the son set aside to provide the widow's £2 10s. 0d. per week should then be sold, but assuming that that paragraph applied also, and would be read as applying also, to the annuitants and their position, is it, nevertheless, within the terms of the *Hoystead* (4) decision true to say that the assumption (which I agree was universally accepted) of the application

of the Act of 1941 was fundamental to the decision at which the learned judge, BENNETT, J., arrived ?

A ROXBURGH, J., was of the opinion that if the annuitants had challenged the application (namely, the financial statement about the annuitants and the estate and the assertion in reference to the Act of 1941), the order could not have been made without deciding whether the application of the Act of 1941 was good or not. With all respect, I think that is putting it too high.

B The question as counsel for the annuitants formulated it, I venture to think rightly, was whether, in making the appropriation which the will directed should be made, the sum was to be arrived at so that the annuitants bore the Public Trustee's income fee or not, and I am not satisfied that whatever the financial state of the estate was, or whatever was the view about the Act of 1941, that question could not properly have been determined without reference to the answers to these problems. During the course of the argument, WYNN-PARRY, J., adapting the phraseology from another case, asked whether, supposing that the three paragraphs of the affidavit had been struck out, there would have been no ground for BENNETT, J.'s decision ? I think that, so formulated, the answer to that question is in the negative. It could not be said that there would be no ground.

C I say no more on that aspect of the case save that, as was also put in argument, the matter should be tested, I think, by assuming for the moment that there had been no decision of the court in reference to s. 25 (1) of the Act of 1941, but that the view which the trustee was then adopting was that which he stated in his affidavit. If afterwards the court decides what the rights of the annuitants in the circumstances of these annuitants were under the Act of 1941, would the decision on the point about the income fee have necessarily involved a determination in advance, so to speak, of the question of construction of the Act of 1941 ? I do not wish to add anything further on that point to what has fallen from SOMERVELL, L.J., because, in my judgment, the answer to that question is in the negative, but there did remain the second point, which is founded on these observations of WIGRAM, V.-C., in *Henderson v. Henderson* (6) (3 Hare 115) :

E "The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

F It was said (and this point was particularly argued by counsel for St. Bartholomew's Hospital that in a proceeding such as that before BENNETT, J., in 1943, which was in the nature of an administration action by procedure of originating summons, it is the duty of parties to raise all points which appear to emerge on an examination of the application made and the evidence filed in support of it. Again, I think that puts the duty too high. The observation of WIGRAM, V.-C., it is to be noted, makes reference to multiplicity of litigation, referring to one of the basic theories on which estoppel by *res judicata* rests. I think, for my part, it may well be that, where multiplicity would otherwise be likely, there is a duty to raise points so as to prevent it, and I can see also, in reference to the point put by counsel for Charing Cross Hospital, that, if the summons raised in effect questions relevant to and in advance of an immediate distribution, then the parties to the summons should plainly raise all points which might affect the actual form of distribution and which it would in many cases, or might be, too late to raise after the distribution had been effected. But that is not the case here. There was no distribution immediately contemplated in 1943, and as it seems to me, if counsel for St. Bartholomew's Hospital were right (and I think he has conceded as much) it would have been necessary for the parties seeking to raise the point

to raise it in the form of some new question. I think that, in such circumstances, it is going too far to say that the observations of the VICE-CHANCELLOR which I have read apply so as to enable the parties to invoke against the annuitants the doctrine of *res judicata*.

I have added these observations of my own because we are differing from the learned judge, but I also associate myself with what has already fallen from SOMERVELL, L.J. I only add one other observation in conclusion. Counsel for Westminster Hospital has a particular interest because following the order of 1943 there was an appropriation and one of the annuitants has since died and counsel represents the party who is entitled under the will to the sum which represents the appropriation made to answer the annuity. He argues that it is right to say that, whatever now is the position, in view of the decision of this court he must or should be entitled to raise and argue the point that the appropriations made in fact should not, so to speak, be unscrambled, but that he remains the only person entitled to the sum put aside to answer the annuity of the deceased annuitant. I express no view whether that is right or wrong. Certainly nothing I have said has been intended to pre-judge that question, and, therefore, I say that, so far as that is concerned, I express no opinion whatever. For these reasons, I agree that this appeal succeeds.

WYNN-PARRY, J. : I agree. So far as the annuitants are concerned, the *lis* in the 1943 proceedings was confined to question 2 of the originating summons. The fair construction of that question is whether the appropriation, when made, should be of a sum sufficient to meet the annuity alone or also to meet the annuity and the Public Trustee's fee payable in respect thereof. The object of the question is made clear by the last words which are, "and ought to pay to the annuitant the amount of such annuity clear of such income fee." If that be the correct way of viewing question 2, then *prima facie* it was unnecessary, for the purpose of answering it, to consider whether or not s. 25 (1) of the Finance Act, 1941, applied. It is true that the evidence in support of the originating summons taken out in 1943 in the affidavit of Mr. Shuckburgh contained the statements which appear in paras. 5, 6 and 7. In para. 7 it is said :

"The assets of the testator's estate are just sufficient to enable funds to be appropriated as provision for the weekly sum payable to the defendant Minnie Koenigsberg [the widow] under the said order and for the three said annuities together with the income fee thereon. The said appropriation will virtually exhaust the assets and there will be no margin for the immediate payment of the pecuniary legacies bequeathed by cl. 4 of the said will. The fund appropriated to provide the said weekly sum is however available for this purpose subject to the life interest therein of the said Minnie Koenigsberg."

That statement was necessary because of the form of question 5 in that originating summons, which was :

"Whether the Public Trustee ought to sell the reversionary interest in the sum appropriated to provide for the said weekly sum payable to the defendant Minnie Koenigsberg or retain the said sum until her death."

The latter part of para. 7, which I have read, makes clear that this was the object of the statement, but it is said that, in view of the statements in those three paragraphs, the parties and the court must have proceeded on the basis that *Re Waring, No. 1* (1) applied because otherwise there would not have been sufficient to provide for the full amount of the annuities. Therefore, it is said that it follows as a matter of necessary implication that, as between the annuitants and the parties with contrary interests, the court decided that the annuitants were only entitled to be paid the annuities calculated on the

basis of the principle enunciated in *Re Waring*, No. 1 (1). I cannot accept this. The parties came to the court to ask for an answer to a simple question of construction relating to appropriation. It must be borne in mind that the obligation to appropriate arises under the will. The Public Trustee did not ask whether he should appropriate or not. In answer to that question the court declared that when the Public Trustee appropriated he should do so on a particular basis, *i.e.*, making provision for his income fee. They made
 A no order on him to appropriate, and here I think that the learned judge was wrong when he said ([1948] Ch. 734) that "accordingly the estate was sufficient to justify the court in ordering the appropriations as specified."

In those circumstances, the decision in 1943 appears to me to be independent of any question of the application, or otherwise, of *Re Waring*, No. 1 (1).
 B In *R. v. Hartington Middle Quarter (Inhabitants)* (7), COLERIDGE, J., in the course of his judgment, said (4 E. & B. 794) :

"Strike either of these facts out, and there is no ground for the decision : these facts therefore were necessarily and directly matter of inquiry."

If one strikes out paras. 5, 6 and 7 of Mr. Shuckburgh's affidavit, it cannot be said that there was no ground for answering question 2 of the summons of
 C 1943. Those facts, therefore, were not necessarily and directly matter of inquiry in 1943. It follows, therefore, that on question 1 of the present originating summons the annuitants cannot be met by the plea of *res judicata*. I desire to add nothing to what has fallen from the other members of the court as regards the special point which was taken by counsel for the Westminster Hospital. For these reasons I agree that the appeal should be allowed.

D *Appeal allowed. Costs of all parties as between solicitor and client to be paid out of the estate.*

Solicitors : *Bartlett & Gluckstein* (for the annuitants) ; *W. R. Bennett & Co.* (for the Public Trustee) ; *Fladgate & Co.* (for Charing Cross Hospital) ; *Wilde, Sapte & Co.* (for St. Bartholomew's and Guy's Hospitals) ; *Trollope & Winckworth* (for Westminster Hospital).

E [Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

R. v. DOLMAN.

[LEEDS ASSIZES (Streatfeild, J.), March 7, 8, 1949.]

Criminal Law—Bigamy—Defence—Belief of invalidity of first marriage—Belief that first wife already married at time of marriage with accused—Offences against the Person Act, 1861 (c. 100), s. 57.

G *Per STREATFEILD, J.* : On a charge of bigamy it is a good defence if the accused person can prove that at the time of the second marriage he had reasonable cause to believe, and honestly believed, that his first marriage was void on the ground that the woman he then married was already married to another man.

H [AS TO GROUNDS OF DEFENCE TO CHARGE OF BIGAMY, see HALSBURY, Hailsham Edn., Vol. 9, pp. 389-391, paras. 657-660 ; and FOR CASES, see DIGEST, Vol. 15, pp. 741-745, Nos. 8007-8038.]

Cases referred to :

(1) *R. v. Tolson*, (1889), 23 Q.B.D. 168 ; 60 L.T. 899 ; 54 J.P. 4, 20 ; 15 Digest 743, 8026.

(2) *R. v. Thomson*, (1905), 70 J.P. 6 ; 15 Digest 743, 8027.

(3) *R. v. Wheat*, *R. v. Stocks*, [1921] 2 K.B. 119 ; 124 L.T. 830 ; 85 J.P. 203 ; 15 Digest 745, 8038.

(4) *R. v. Weiwow*, (1945), Notts. Summer Assizes, MACNAGHTEN, J. (unreported).

TRIAL on a charge of bigamy.

The accused person, William Dolman, was charged on an indictment with bigamy, contrary to the Offences against the Person Act, 1861, s. 57, the particulars being that on April 23, 1940, at Maymyo (in Burma) he married Florence Fitzgerald and on July 1, 1948, in her lifetime and while he was so married to her, at Don Valley Register Office he unlawfully married Grethe Jensen. The evidence for the defence was that in 1945, when the accused was serving in the Army in the Middle East and was living away from his wife, as a result of certain rumours he had heard he wrote to her and said that he was not going back to her because he had information that she was already married. He received no reply to that letter. In 1946 he met her in Karachi and asked her if it was true that she had been previously married to one Private Gray of the Royal East Kent Regiment. She admitted it and produced what appeared to be a genuine marriage certificate showing that she had married Private Gray in the Methodist Church, Rangoon, in 1928. Later, she showed the accused a photograph in which she appeared as a bride and told him it was a photograph of the wedding group at her wedding in 1928. In 1947, when the accused was in Cyprus, he consulted the Army Legal Aid Department and was there advised by the Chief Chaplain that he had ascertained that a Private Gray of the Royal East Kent Regiment existed and had married Miss Fitzgerald. The accused had made a statement to the police giving details of the matters he alleged in his defence. Mrs. Dolman, in her evidence for the Crown, denied that she had previously been through, or told the accused she had been through, a form of marriage with Private Gray or with anyone else, nor had she shown him the marriage certificate or the photograph as he alleged. Other witnesses were called by the Crown tending to disprove the existence of Private Gray and the alleged photograph of the wedding group.

G. H. Hartley for the Crown.

Russell Gurney for the defence.

STREATFEILD, J., in directing the jury, recited the facts and continued : The crime of bigamy is the creation of statute, the Offences against the Person Act, 1861. By s. 57 of that Act an offence is committed by any person, who, being married, shall marry any other person during the lifetime of the former husband or wife. If the prosecution prove that the party accused was married to one person and then went through a form of marriage with another person, that constitutes the crime of bigamy, but it has been held that bigamy, like many other offences, requires that there shall be what is known as guilty knowledge. There must be an appreciation that a crime is being committed. In many cases the law requires that in addition to an unlawful act there shall be a specific intention to do something or other. That does not apply here, but the person accused must have a culpable, guilty knowledge that he is doing something unlawful. Accordingly, it has been held now for many years that, even although there is a subsisting marriage, it is open to an accused person to defend himself on a charge of bigamy by showing that he had reasonable cause to believe, and did believe, that his real wife was dead. If he believed that she was dead, although she was not in fact dead, it would follow that when he afterwards went through a form of marriage, he believed he was entering into a lawful marriage with the second woman, and, therefore, there would not be that guilty knowledge and appreciation of wrong-doing which is necessary to constitute this offence. Therefore, although the statute itself does not say that a man shall not "knowingly" or "unlawfully" go through a form of marriage, it has for many years been held that a man does not commit

the criminal offence of bigamy unless he realises that he is committing that offence. Therefore, it is open to a man to say: "I had reasonable cause to believe, and I did believe, that my wife was dead."

- What is suggested here is that just as it would afford a defence to the accused if he could prove that he had reasonable cause to believe that his real wife was dead, so it is a defence if he can satisfy the jury that he had reasonable cause to believe, and did believe, that what he thought at the time to be a legal and subsisting first marriage had turned out not to be a legal and subsisting first marriage—that he honestly believed, although it was not a fact, and had reasonable cause for believing that his first marriage was void and so he was free to enter into the marriage which is alleged to be bigamous. It would, of course, be a defence if the accused could show that his first marriage was, in fact, null and void—for instance, if his wife was already married—for then he would not be a person who, when already married, had gone through a form of marriage with another person. It is suggested, not that it is proved that Mrs. Dolman was, in fact, married before, but that the accused had reasonable cause to believe, and did believe honestly, that she had been married to a man called Gray before he married her, and, therefore, that his marriage to her was void. If you think that that is proved to your satisfaction, then it has been held before, and I so direct you now, that that affords him a good defence.

- The question you have to answer is whether when the accused went through that form of marriage with Miss Jensen, he honestly believed on reasonable grounds that his first marriage to Mrs. Dolman was void because she was already married to Private Gray? If you think he did believe that on reasonable grounds, then, you will find him "Not Guilty." If, on the other hand, you do not think that he had any reasonable grounds to believe, and did not believe, that his first marriage was void, the offence of bigamy will be made out.

Verdict: Guilty.

- Solicitors: *V. Douglas Knox*, Doncaster (for the Crown); *R. Stanley Pennington*, Doncaster (for the accused).

[Reported by G. M. SMAILES, Esq., Barrister-at-Law.]

Dictum of DENNING, L.J., at p. 824, applied. MINISTRY OF AGRICULTURE AND FISHERIES v. MATTHEWS. [1949] 2 All E.R. 724.

LEWISHAM BOROUGH COUNCIL AND ANOTHER v. ROBERTS.

[COURT OF APPEAL (Bucknill and Denning, L.J.J., and Jenkins, J.), February 24, 25, March 21, 1949.]

- G Requisition—House—Delegation of powers—Letter of authority from official of Ministry of Health to town clerk—Right of local authority to sue for possession—Requisition "necessary or expedient"—Defence (General) Regulations, 1939 (S.R. & O., 1939, No. 927), reg. 51 (1), (2) (a), (5)—(as amended)—Emergency Powers (Defence) Act, 1939 (c. 62), s. 7.*

- The Defence (General) Regulations, 1939, reg. 51, (1), authorises the Minister of Health, if it appears to him to be necessary or expedient so to do, to take possession of any land, and, by para. (2) (a), the Minister "may do, or authorise persons using the land . . . to do, in relation to the land, anything which any person having an interest in the land would be entitled to do by virtue of that interest." By para. (5) the Minister may "to such extent and subject to such restrictions as [he] thinks proper, delegate all or any of [his] functions under paras. (1) to (3) of [this] regulation to any specified person or class of persons." By the Emergency

Powers (Defence) Act, 1939, s. 7 "Every document purporting to be an instrument made or issued by any Minister . . . in pursuance of any provision contained in, or having effect under, Defence Regulations, and to be signed by or on behalf of the said Minister . . . shall be received in evidence, and shall, until the contrary is proved, be deemed to be an instrument made or issued by that Minister . . ."

In 1941 the plaintiff council requisitioned a house, which had been left vacant by the defendant, for persons rendered homeless by enemy action. In 1944 the defendant wished to resume possession, and it was agreed between him and the town clerk that the ground floor should be released from requisition so that he could occupy it, the upper part (to which access could be obtained only through the ground floor) being retained under requisition. Accordingly, in June, 1946, the town clerk, acting under powers delegated to him by the Minister of Health, gave notice to the defendant that he had given up possession of the ground floor of the house, but he omitted to include a provision, which the Ministry had instructed him to include, that the release would not affect access to the upper part which was still under requisition. The defendant went into occupation of the ground floor, changed the lock of the front door, and refused to allow access to the upper part. On Nov. 7, 1946, the town clerk applied to the Ministry for authority again to requisition the whole premises with the object of granting a licence to the defendant to occupy the ground floor, with the necessary safeguards for access to the upper part. On Nov. 12, 1946, an official of the Ministry of Health replied to the town clerk that he was directed by the Minister of Health "to say that in the circumstances he hereby delegates to you, as town clerk, his functions under reg. 51 of the Defence (General) Regulations, 1939, for the purpose of requisitioning the whole of the above-mentioned premises for re-housing purposes, and consent is hereby given to such requisitioning." No precise instructions had ever been given to the official by the Minister personally as to the extent of his powers in general or in relation to the requisitioning of property in particular, and the Minister personally had not authorised the letter of Nov. 12. On Nov. 22, the town clerk issued a requisitioning notice in respect of the whole of the premises, but the defendant continued to deny access to the upper part, and the council and the town clerk began proceedings for possession.

HELD: (i) the letter of Nov. 12 was a document purporting to be an instrument issued by the Minister within the meaning of s. 7 of the Emergency Powers (Defence) Act, 1939, and, until the defendant had proved the contrary, it was to be received in evidence and to be deemed to be an instrument made or issued by the Minister; the defendant had failed to prove the contrary; and, therefore, the letter must be deemed to constitute a valid delegation by the Minister to the town clerk of his functions under reg. 51 (1) of the Defence (General) Regulations, 1939.

Dictum of LORD GREENE, M.R., in Carltona, Ltd. v. Works Comrs. ([1943] 2 All E.R. 563), *applied*.

(ii) the plaintiffs were competent to sue the defendant for possession, they having been validly authorised to do so by the Minister under reg. 51 (2) (a).

Lewisham Borough Council v. Maloney ([1947] 2 All E.R. 36; [1948] 1 K.B. 50; 177 L.T. 175), *applied*.

(iii) the delegation by the Minister to the town clerk was a purely administrative act which could be performed by any authorised official of the department without the specific consent or direction of the Minister.

Carltona, Ltd. v. Works Comrs. ([1943] 2 All E.R. 563), *applied*.

(iv) the principle *delegatus non potest delegare* did not apply to the delegation by the official since such an act done by a departmental official was equally the act of the Minister as if he had done it personally.

Per DENNING, L.J. (*dissenting* on this point): in the circumstances of the case it could not have appeared to the Minister to be necessary or expedient to take possession of the ground floor of the defendant's house since the intention was not to take possession of that floor but to leave the defendant in possession as a licensee, and, therefore, the Minister had no power to requisition the house again in November, 1946.

[FOR THE DEFENCE (GENERAL) REGULATIONS, 1939 (S.R. & O., 1939, No. 927 (as amended)), reg. 51 (1) (5), see HALSBURY'S STATUTES, Vol. 40, pp. 1,362, 1,363.]

FOR THE EMERGENCY POWERS (DEFENCE) ACT, 1939, s. 7, see HALSBURY'S STATUTES, Vol. 32, p. 936.]

Cases referred to :

- (1) *Carltona, Ltd. v. Works Comrs.*, [1943] 2 All E.R. 560 ; 2nd Digest Supp.
- (2) *Carlish v. East Ham Corpn.*, [1948] 2 All E.R. 550 ; [1948] 2 K.B. 380.
- (3) *James Macara, Ltd. v. Barclay*, [1944] 2 All E.R. 589 ; [1945] K.B. 148 ; 172 L.T. 8 ; 2nd Digest Supp.
- (4) *Lewisham Borough Council v. Maloney*, [1947] 2 All E.R. 36 ; [1948] 1 K.B. 50 ; 177 L.T. 175 ; 2nd Digest Supp.
- (5) *Minister of Health v. Bellotti*, [1944] 1 All E.R. 238 ; [1944] K.B. 298 ; 170 L.T. 146 ; 2nd Digest Supp.
- (6) *Progress Building, Ltd. v. Westminster City Corpn.*, [1947] 1 All E.R. 684 ; 111 J.P. 300 ; 2nd Digest Supp.
- (7) *R. v. Burah*, (1878), 3 App. Cas. 889 ; 17 Digest 450, 197.
- (8) *Hampton v. United States*, (1928), 276 U.S. 394.
- (9) *King-Emperor v. Benoari Lal Sarma*, [1945] 1 All E.R. 210 ; [1945] A.C. 14 ; 2nd Digest Supp.
- (10) *Huth v. Clarke*, (1890), 25 Q.B.D. 391 ; 63 L.T. 348 ; 55 J.P. 86 ; 33 Digest 17, 68.
- (11) *Gordon, Dadds & Co. v. Morris*, [1945] 2 All E.R. 616 ; *sub nom.*, *Gordon, Dadds & Co. v. Minister of Health*, 174 L.T. 136 ; 110 J.P. 119 ; 2nd Digest Supp.
- (12) *Blackpool Corpn. v. Locker*, [1948] 1 All E.R. 85 ; [1948] 1 K.B. 349 ; 112 J.P. 130.
- (13) *Southgate Borough Council v. Watson*, [1944] 1 All E.R. 603 ; [1944] K.B. 541 ; 171 L.T. 26 ; 108 J.P. 207 ; 2nd Digest Supp.
- (14) *Erith Corpn. v. Holder*, [1949] 1 All E.R. 389 ; 113 J.P. 154.
- (15) *Clanricarde (Marquess) v. Congested Districts Board for Ireland*, (1914), 79 J.P. 481 ; 11 Digest 118, 116.
- (16) *Sydney Municipal Council v. Campbell*, [1925] A.C. 338 ; 133 L.T. 63 ; 42 Digest 723, 1422.
- (17) *China Mutual Steam Navigation Co. v. Maclay*, [1918] 1 K.B. 33 ; 117 L.T. 821 ; 11 Digest 549, 521.

APPEAL by the defendant from an order of His Honour JUDGE COLLINGWOOD sitting at Lambeth County Court, dated Aug. 5, 1948, whereby he granted possession of a house, the property of the defendant, to the Lewisham Borough Council as the result of a requisitioning order made by the town clerk under authority purported to have been delegated to him by the Minister of Health. The Court of Appeal (DENNING, L.J., *dissenting*) dismissed the defendant's appeal, holding that a valid delegation of authority must be presumed to have taken place. The facts appear in the judgment of BUCKNILL, L.J.

H. L. Parker and Colin Pearson for the plaintiffs.

Croom-Johnson for the defendant.

Cur. adv. vult.

March 21. The following judgments were read.

BUCKNILL, L.J. : This is an appeal from a judgment of His Honour JUDGE COLLINGWOOD whereby he decided that the plaintiffs were entitled to recover possession of the house, 24, Boveney Road, Forest Hill, in the county of London, against the defendant.

The defendant, Joseph Roberts, was at all material times the owner of 24, Boveney Road. He lived there until 1941. Then, owing to the war, he, for business reasons, had to live in Leicester, and he and his wife took the furniture out of No. 24 and left it empty. Shortly afterwards the town clerk of Lewisham validly requisitioned the house and took possession of it under powers delegated to him by the Minister of Health under reg. 51 (1) of the Defence (General) Regulations, 1939, for the accommodation of persons rendered homeless through enemy action. In 1944 the defendant wished to return to his house for urgent business reasons, and on Sept. 16, 1944, he wrote to the council asking how soon the house could be released from requisition. The town clerk replied that the borough had suffered very severely during the flying bomb attacks, that there was an acute housing shortage, and that he was unable to say when the house would be released. The defendant then wrote to the Ministry of Health, saying that, in his view, he was not being treated very fairly in the matter, and asking for the Ministry's special attention to his case. The senior regional officer of the Ministry wrote in reply that he was directed by the Minister of Health to repeat that the house could not at present be released from requisition owing to the acute housing shortage. On Feb. 21, 1946, the Ministry wrote the following letter to the defendant :

"I am directed by the Minister of Health to refer to your letter of Jan. 2, and to inform you that your case has been investigated, and it has been ascertained that the above-mentioned property is at present occupied by families rendered homeless by enemy action for whom other accommodation is not available. In these circumstances and in view of the acute housing shortage in the area, it is regretted that it is not possible at the present date to authorise the release of the property. The responsibility of allocating housing accommodation rests with local authorities who must necessarily decide on priority of release having regard to the relative needs of the various cases before them. I am to add, however, that the local authority are prepared to offer you alternative accommodation as soon as possible and you are advised to communicate with them in the matter."

An offer of alternative accommodation was made to the defendant, but it was not satisfactory, and on May 24 the defendant and the town clerk agreed provisionally that the council should fix up cooking apparatus in the back room on the ground floor, and that that floor could be released for occupation by the defendant. On June 20, the town clerk wrote to the secretary to the Ministry of Health saying that the lower flat of No. 24 was becoming vacant shortly, and asking for the Minister's consent to release it from requisition as the defendant wished to return there, and received the following reply, signed by Mr. J. O'Gara :

"I am directed by the Minister of Health to refer to your letter of the 20th, and to say that he consents to the proposal therein to release from requisitioning the lower flat of the above mentioned premises. The Minister's consent is given on the understanding that the release will not affect access to the remainder of the premises still under requisition and that there will be no question of the occupants therein being regarded as trespassers. This department should be notified in due course of the actual date of release."

I presume that Mr. J. O'Gara was directed by the secretary to the Ministry to answer the letter sent to the secretary by the town clerk. Meantime, on

June 24, the town clerk had issued a notice to the defendant that he, acting on behalf of the Minister, had given up possession of the lower flat of the house. The position, therefore, was that from June 24 the requisitioning of the lower flat had ceased entirely, but the upper part of the house remained requisitioned by the council. On July 8 the defendant went into occupation of the lower flat. The upper part was unoccupied by this time, and the defendant put some of his surplus furniture in it. He also changed the lock on the front door of the house to prevent prospective occupiers of the upper floor from coming into the house in his absence. The obvious inconvenience of having another family living in the upper part of the house prompted the defendant's solicitors to write to the town clerk on Oct. 15, 1946, a letter in the following terms :

" We have your letter of the 24th instant upon which we have again seen our client. We note that you agree that a ' house of this type of property to accommodate two families is not ideal,' but we would go much further in emphasising that, in our opinion, the property is not at all suitable and was never intended for the accommodation of two families.

We note from the notice served upon our client, dated June 24, 1946, that the lower flat has been released from the requisitioning notice under which the council originally entered into possession of the whole of the property. This, in our opinion, deprives an occupier of the upper part from the user of the hall and garden or any access thereto, through the ground floor premises. We would also point out that, if the original requisitioning notice stands so far as the upper part of the premises are concerned, the

occupants of the lower portion are deprived of the use of the only lavatory and bathroom in the house. We understand from our client that the hot water system in the bathroom is served by a boiler in the kitchen of the lower portion, the fuel for which is, of course, provided by our client. You will, therefore, appreciate that, if the council insists upon the upper part being occupied for the purpose of accommodating another family, our client has no sanitary arrangements whatsoever, and, in addition, he will be supplying hot water to the occupier of the upper part at his own expense.

In these circumstances, we have advised our client that the upper portion cannot be used by another family without a trespass being committed over the de-requisitioned portion of the house in his occupation, and that he is legally entitled to take steps to prevent any such trespass being committed on his premises. Therefore, we would suggest that you advise the family to whom you have allocated the upper portion that our client does not intend to permit trespass to be committed over his property, and, accordingly, that the council should take immediate steps to de-requisition the remainder of the property as being totally unsuitable for the accommodation of two families."

The town clerk, in face of the uncompromising attitude of the defendant who had obtained the release of the ground floor by agreeing to live there as a separate flat, then decided to apply to the Ministry of Health for a special consent to requisition the whole of the property again. He informed the defendant's solicitors of this intention by letter on Nov. 7, and on the same date he wrote to the secretary to the Ministry of Health the following letter :

" I would refer to your letter of June 28, and would inform you that, although it was definitely established by correspondence and interviews with the owner that only the lower portion of the above property would be released from requisitioning and that the council would instal their licensees in the upper portion and that the bathroom and lavatory would be shared and that right of access was reserved, these restrictions were not included in the formal release. Difficulty has been experienced culminating in a letter

from the owner's solicitors dated Oct. 15, as per copy enclosed herewith. I, therefore, formally apply for the Ministry's special authority to re-requisition the whole of the above premises so that the owner may be permitted to occupy the lower portion as licensee and the proper precautions taken to reserve right of access to the upper portion and garden for the occupants of the upper portion and the necessary provision made for the sharing of the bathroom and lavatory. I shall also be pleased to have the department's advice regarding the payment of compensation for the upper portion for such period as access to it has been denied. I would add that by changing the lock of the front door the owner has debarred the council access to this portion."

The reply of the Ministry was dated Nov. 12, and was as follows :

"I am directed by the Minister of Health to refer to your letter of the 7th instant and to say that in the circumstances he hereby delegates to you, as town clerk, his functions under reg. 51 of the Defence (General) Regulations, 1939, for the purposes of requisitioning the whole of the above-mentioned premises for re-housing purposes, and consent is hereby given to such requisitioning. With regard to the point raised in the penultimate paragraph of your letter, I am to say that the Minister is of opinion that compensation should be withheld for the period during which access was denied to the upper portion of the premises. I am Sir, Your obedient Servant, J. O'Gara."

It may be noted that Mr. J. O'Gara again answered the letter addressed by the town clerk to the secretary to the Ministry. The town clerk then issued the following notice :

"Take notice that in the exercise of the powers delegated to me by the Minister of Health under and by virtue of reg. 51 of the Defence Regulations, 1939, I have this day taken possession of the premises known as 24, Boveney Road, S.E.23. Signed Alan Milner Smith, Town Clerk. Dated Nov. 22, 1946. To the owner, occupier, and whom it may concern."

This notice was served by fixing a copy of it in the porch of the front door of the house, in the presence of the defendant's wife. The defendant, however, still refused to allow access to the upper portion of the house, and on Feb. 15, 1947, the town clerk wrote to the secretary to the Ministry a letter asking for the Minister's instructions. The reply was to the effect that the only suggestion which the department could make was that the council might bring pressure to bear on the owner by threatening to deprive him of his licence to occupy the lower part of the house. On June 28, 1947, the town clerk wrote to the defendant's solicitors warning them that, if the defendant continued to refuse to allow the council access to the upper part of the house, he would have no alternative but to take steps to recover possession of the lower part. He also enclosed the usual form of licence to occupy the lower part for signature by the defendant and his wife. They did not sign this, and the town clerk on Oct. 16, 1947, wrote to the Secretary, Ministry of Health, pointing out that the defendant's attitude put the council in a position in which they were faced with two alternatives, either to de-requisition the house, leaving the defendant and his wife in victorious possession of the whole of it, or else to terminate the licence and to sue for possession. The reply was that the Minister agreed that the council should terminate the licence, and, if necessary, sue for possession. Accordingly, on Dec. 4, 1947, the town clerk wrote :

"I would refer to your letter of June 30, 1947, and as I do not appear to have heard further from you in reply to my letter of June 28, and in view of your client's continued obstruction to the council allocating the upper portion of the above mentioned property and to the fact that he has not returned the licence enclosed with my letter of June 28, duly completed and

signed, I have no alternative but to terminate such licence forthwith and to require him to give possession of the premises within fourteen days of today's date. Failure to comply with this request will leave me no alternative but to institute proceedings without further notice with a view to recovery of possession of the above mentioned premises."

A On Feb. 17, 1948, the town clerk delivered particulars of the plaintiffs' claim in the Lambeth County Court in which they asked for possession of the house and mesne profits. The case was heard on June 21, 1948, and on Aug. 5 the judge delivered a written judgment ordering the defendant to give possession of the house on Sept. 5 and to pay £25 7s. 0d. as rent and mesne profits.

B The main point argued on behalf of the defendant on this appeal and before the trial judge was that Mr. O'Gara had no authority to act on behalf of the Minister. Mr. O'Gara was called as a witness at the trial and it was contended on behalf of the defendant that the evidence given by Mr. O'Gara showed that there had been no actual delegation of authority to him, that he had, in fact, been acting without authority in the matter, and that the purported delegation of Nov. 12 by the Minister of Health to the town clerk was, therefore, bad in law. The learned judge, when dealing with this point, said that it was clear
C that no precise instructions were ever given to Mr. O'Gara as to the scope of his powers in general or in relation to the requisitioning of property in particular. After quoting from the judgment of LORD GREENE, M.R., in *Carltona, Ltd. v. Works Comrs.* (1) the learned county court judge continued:

"... applying these considerations to the present case, I am unable to say that the evidence shows that Mr. O'Gara in purporting to sanction
D on behalf of the Minister the requisitioning of property, and in particular in issuing the document of Nov. 12, 1946, was acting without authority to do so. On the contrary, the presumption being that ministerial acts will be performed, not by the Minister in person, but by responsible officials in his department, I think that where such acts of an official nature, all of them involving the knowledge and some of them requiring and receiving the concurrence of other officials, have, as here, continued over a long
E period, this of itself affords cogent evidence that the person in fact acting in such an official capacity was duly authorised to act."

If Mr. O'Gara had not been called as a witness by the plaintiffs they could have relied on the Emergency Powers (Defence) Act, 1939, s. 7, which is in the following terms:

"Every document purporting to be an instrument made or issued by any Minister or other authority or person in pursuance of any provision contained in . . . Defence Regulations, and to be signed by or on behalf of the said Minister, authority or person, shall be received in evidence, and shall, until the contrary is proved, be deemed to be an instrument
G made or issued by that Minister, authority or person; and *prima facie* evidence of any such instrument as aforesaid may, in any legal proceedings (including arbitrations), be given by the production of a document purporting to be certified to be a true copy of the instrument by, or on behalf of, the Minister or other authority or person having power to make or issue the instrument."

H The plaintiffs could have successfully contended that that section relieved them of the burden of proving that the Minister of Health personally decided that the ground floor of No. 24 should be requisitioned again. This appears from *Carlsh v. East Ham Corpn.* (2).

In *Carltona, Ltd. v. Works Comrs.* (1) a notice signed on behalf of the Commissioners of Works was sent to the owners of a factory, stating that the commissioners were taking possession of the premises under reg. 51 (1) of the Defence Regulations. The notice was signed by a Mr. Morse for and on behalf of the

commissioners, and was written on the headed letter paper of the Ministry of Works and Planning, and was in the following terms :

" I have to inform you that the department have come to the conclusion that it is essential, in the national interest, to take possession of the above premises . . . "

The owners of the factory argued before the Court of Appeal that the requisition was bad because the persons constituting the requisitioning authority never brought their minds to bear on the question. LORD GREENE, M.R., in the course of his judgment, said that, in his opinion, there was no substance in the argument that the First Commissioner did not personally direct his mind to the matter. He said ([1943] 2 All E.R. 563) :

" In the administration of government in this country the functions which are given to ministers (and constitutionally properly given to ministers because they are constitutionally responsible) are functions so multifarious that no minister could ever personally attend to them. To take the example of the present case no doubt there have been thousands of requisitions in this country by individual ministries. It cannot be supposed that this regulation meant that, in each case, the minister in person should direct his mind to the matter. The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department. Public business could not be carried on if that were not the case. Constitutionally, the decision of such an official is, of course, the decision of the minister. The minister is responsible. It is he who must answer before Parliament for anything that his officials have done under his authority, and, if for an important matter he selected an official of such junior standing that he could not be expected competently to perform the work, the minister would have to answer for that in Parliament. The whole system of departmental organisation and administration is based on the view that ministers, being responsible to Parliament, will see that important duties are committed to experienced officials. If they do not do that, Parliament is the place where complaint must be made against them. In the present case the assistant secretary, a high official of the ministry, was the person entrusted with the work of looking after this particular matter and the question, therefore, is, relating those facts to the argument with which I am dealing, did he direct his mind to the matters to which he was bound to direct it in order to act properly under the regulation ? "

In my opinion, the finding of His Honour JUDGE COLLINGWOOD on this point is a finding of fact which may properly be drawn from the evidence placed before him at the trial. Mr. O'Gara was a public official in the employment of the Crown and was the man in the Ministry of Health who had the task given to him by the responsible authority of examining questions of *ad hoc* requisitions of property in a particular district, and of making decisions thereon. It is true that there is no evidence that the Minister of Health personally told O'Gara to act on his behalf in matters of this kind. Such a suggestion seems to be unreasonable. The question of appointment ultimately rests with the Minister, as also does the question of dismissal, subject in each case to the intervention of Parliament, but in practice the appointment of the responsible official is made by the Minister through the Secretarial Department of the Ministry. The question whether in this case the Minister, acting through O'Gara, lawfully delegated his powers of requisitioning the ground floor of this house to the town clerk must be considered in the light of the particular circumstances of this case. In this case no discretion was left to the town clerk whether he should again requisition the ground floor or not. All the facts were placed before the Minister, and in the special circumstances he delegated

his powers to requisition the property to the town clerk. If the Minister decided to requisition the property himself, I do not think that he would have been doing anything unconstitutional or high-handed by authorising the town clerk to act on his behalf, and I cannot myself see any material difference between such a course and the course which was actually taken of delegating to the town clerk the power of requisition which the Minister undoubtedly had.

A It was argued that the delegation by the Minister of this power to the town clerk was a legislative act, and that such delegation could only be performed by the Minister himself. I understand this to mean that, if the Minister had expressed his personal approval of the letter written by O'Gara, that would have made it a valid delegation, but the absence of any such ministerial approval made the delegation unlawful. I do not agree with this proposition, which does not seem to have any clear legal authority. So to hold would seem to make B unreasonable difficulties in the administration of a very urgent problem, the requisition of houses owing to the scarcity of housing accommodation caused by war damage. It seems to me to draw an artificial distinction between the procedure to be followed in the case of the requisition of a house by the Minister, which, I think, it must be conceded could be done by O'Gara under the general departmental practice, such as is described by LORD GREENE, M.R., and, on C the other hand, a delegation of the Minister's powers to the local authority for the same purpose, which he can also lawfully do under reg. 51 (5) of the Defence (General) Regulations, 1939. Counsel for the defendant also took the point that the power to requisition was not effectively exercised by the town clerk because he did not actually enter the house, but merely affixed the notice in the porch. Counsel conceded that this court is bound by the decision, D adverse to his contention, of the Court of Appeal in *James Macara, Ltd. v. Barclay* (3), and I, therefore, need say no more on that point. His last point was that the proper plaintiff in the action should have been the Minister of Health and not the town clerk or the council. This point is, I think, covered by the terms of reg. 51 (2) (a) which authorises the competent authority to :

E " . . . do, or authorise persons using the land . . . to do, in relation to the land, anything which any person having an interest in the land would be entitled to do by virtue of that interest."

The Minister delegated his powers, which included those under this sub-paragraph, to the town clerk, and the town clerk or the council on his behalf had, F in my view, authority to bring the action. The point is covered by the decision of the Court of Appeal in *Lewisham Borough Council v. Maloney* (4). For these reasons I would dismiss the appeal.

Since writing this judgment I have had the opportunity of reading the judgments of DENNING, L.J., and JENKINS, J., on the point on which DENNING, L.J., considers that the appeal should be allowed. I agree with the judgment of the G trial judge on the point. I am unable to see that the Ministry mistook their powers. The procedure adopted by the town clerk on the authority of the Ministry seems to me to have been reasonable in the circumstances. In my opinion, it is the defendant who has behaved unreasonably because he has deliberately prevented the local authority from exercising those powers to which he had consented as a condition of his regaining possession of the ground floor H of his house. The action which the Ministry took seems to me to have been the only effective and reasonable way of solving the problem created by the defendant's attitude about this house.

DENNING, L.J. : The town clerk of Lewisham claims possession of a house from the defendant, who is the freeholder, and is living there himself with his wife. The town clerk bases his claim on a regulation, which was brought into force at the beginning of the war, empowering the executive to requisition property for the efficient prosecution of the war. Since the war,

however, the regulation has been continued for the purpose of maintaining, controlling and regulating the supply of housing accommodation. This case raises the important question : How far does this regulation in the post-war period enable the executive to turn a man out of his home ?

Before I deal with this question I must refer to a number of points raised on behalf of the defendant contending that the procedure was out of order. The right to requisition is, of course, not a right which belongs to any private individual, or even to any local authority. It is a power which Parliament has conferred on the Crown, that is to say, on the executive acting by the government departments. Whenever anyone requisitions property he must be duly authorised to act on behalf of His Majesty : see s. 1 (2) (b) (i) of the Emergency Powers (Defence) Act, 1939, and s. 1 (1) (a) of the Compensation (Defence) Act, 1939 ; *Minister of Health v. Bellotti* (5) ; *Progress Building v. Westminster City Corpn.* (6). The first point taken here was that the town clerk was not authorised to requisition this house because his only authority was derived from a letter from an official in the Ministry of Health who could point to no authority from the Minister himself. I take it to be quite plain that when a Minister is entrusted with administrative, as distinct from legislative, functions he is entitled to act by any authorised official of his department. The Minister is not bound to give his mind to the matter personally. That is implicit in the modern machinery of government : see the *Carltona* case (1), and an article by PROFESSOR WILLIS in 21 CANADIAN BAR REVIEW, p. 257. When, therefore, a government department requisitions property itself under reg. 51 (1) of the Defence (General) Regulations, it is not necessary for the Minister himself to consider the matter. It is sufficient if one of the officials of that department brings his mind to bear on the propriety of it. When the government department delegates its functions to a town clerk under reg. 51 (5) it is only putting someone in its place to do the acts which it is authorised to do. The town clerk is, so to speak, an agent of the department and a sub-agent of the Crown. The delegation to the town clerk is simply administrative machinery so as to enable the administrative functions of requisitioning to operate smoothly and efficiently, and, like all administrative functions, the act of delegating can be exercised by any authorised official of the government department. The delegation, whether general or specific, is not a legislative act, but an administrative one : see the principles stated in *R. v. Burah* (7) (3 App. Cas. 905-6), *Hampton v. United States* (8), (276 U.S. 407), *King-Emperor v. Benoari Lal Sarma* (9) ([1945] 1 All E.R. 213) ; and it does not divest the government department of its powers : see *Huth v. Clarke* (10), *Gordon, Dadds & Co. v. Morris* (11) ([1945] 2 All E.R. 621). Having regard to those authorities, I cannot agree with the observations of SCOTT, L.J., to the contrary in *Blackpool Corpn. v. Locker* (12) ([1948] 1 All E.R. 90-92, 96). They were, I think, unnecessary for the decision, which turned on the fact that the town clerk there acted outside his actual authority and his action could not be ratified. The first point taken on behalf of the defendant, therefore, fails.

The second point was that the only power given by reg. 51 (1) was to take possession, and that, as that had not been done here, the town clerk had no title to sue. In order to consider this point it is necessary to consider the nature of the power to requisition land. It is only a power to take possession of land. It is not a power to acquire any estate or interest in any land : see s. 1 (2) (b) (i) of the Emergency Powers (Defence) Act, 1939, and ss. 1 and 2 of the Compensation (Defence) Act, 1939. Once possession is taken the Crown can exercise all the powers incident to possession, such as to licence other people to use the premises : see *Southgate Borough Council v. Watson* (13), but it cannot grant a lease or create any legal interest in the land in favour of any other person because it has itself no estate in the land out of which to carve any interest. Once possession is taken, the Crown, of course, has all the rights incident to posses-

sion, and may, by itself or its agents or sub-agents, exercise all the possessory remedies. A government department, or a town clerk, or a local authority, who is in possession on behalf of the Crown may, therefore, like a bailiff, bring an action of trespass against anyone who disturbs that possession: see *Erith Corpn. v. Holder* (14); and the fact of being in possession is good as against purchasers without being registered on the Land Charges Register: see *Lewisham Borough Council v. Maloney* (4). None of this, however, confers a legal estate or even an equitable interest on the Crown. The basis of it all is possession. It has sometimes been assumed that, when the Crown or its agent or sub-agent posts up a notice of requisition on a house saying that "I have this day taken possession," that notice in itself without actual entry operates to transfer possession to the Crown. That may be so in the case of an empty house, because it may be evidence of sufficient control, coupled with the necessary intent, to constitute possession, but where a house is occupied, then, at any rate since reg. 85 of the Defence (General) Regulations, 1939, was amended in February, 1946, by S.R. & O., 1946, No. 161, the Crown does not take possession merely by posting a notice of requisition in that form on the door. It has no right to enter unless it serves on the occupier 24 hours' notice of the intended entry, and it has no right to turn out the occupier unless he has disobeyed its direction to give up possession: see reg. 51 (1A) and (6). The Crown cannot by any possibility be said to be in possession of a building which is occupied by another and which it has no right to enter. I agree, therefore, with the second point to this extent, that in this case neither the Crown nor any of its agents took possession. Even so, however, the Crown may be able to bring an action for possession, for it has been held that a notice of requisition is not a nullity, even though actual possession had not been taken. Once it is posted on the door it operates as a direction to the occupier to give up possession. He is bound to comply with that direction, and, if he does not do so, he is liable to be turned out by force: see reg. 51 (1) (1A) (6). He cannot, therefore, give vacant possession to another, *Macara, Ltd. v. Barclay* (3), and the court will, if necessary, order him to go.

What is the nature of the action for this purpose, and who can bring it? Can the town clerk bring it in his own name? Trespass does not lie because it is based on actual possession. Nor does ejectment, because that only lies in favour of a plaintiff who can prove a legal title in himself, which the town clerk cannot do, and indeed the Crown itself cannot do. It has a statutory power to take possession, but a power and a right are very different things: see SALMOND ON JURISPRUDENCE, 9th ed., p. 302. The action is, therefore, neither trespass nor ejectment, but an action in aid of the statutory power to take possession and, as such, it can be brought in the name of any agent or sub-agent who has been authorised to take possession on behalf of the Crown: see *Lewisham Borough Council v. Maloney* (4). It can be brought, therefore, by the town clerk at any time after a notice of requisition has been served. It is not necessary to serve a notice of intended entry under reg. 85 because that only applies to entry without the process of the courts. The second point taken on behalf of the defendant, therefore, also fails.

I agree with my brothers, therefore, that the procedural points taken on behalf of the defendant cannot prevail, and I turn to the substantial point in the case, which is whether the requisition was within the powers conferred on the executive by Parliament. The power to requisition is only given in respect of supplies and services which are essential to the well-being of the community: see reg. 51 (1) of the Defence (General) Regulations, 1939, and s. 1 (1) of the Supplies and Services (Transitional Powers) Act, 1945. Housing accommodation is, no doubt, an essential supply, and the power can be exercised if it appears to the competent authority to be necessary or expedient to take possession for the purpose of so maintaining the supply of housing accommodation as to secure

a sufficiency of it. In order to be valid, the requisition must come within that authority or it will be bad : see *Clanricarde (Marquess) v. Congested Districts Board for Ireland* (15), *Sydney Municipal Council v. Campbell* (16), the *Carltona* case (1). On the true interpretation of reg. 51 (1), I think it is plain that there are three requisites which must be satisfied before a competent authority can requisition a house. (1) The competent authority must decide that it is necessary or expedient to take possession. (2) Its purpose in taking possession must be to secure sufficient housing accommodation. (3) It must act in good faith. A There is no doubt here that requisites (2) and (3) were satisfied. The decision was made in good faith for securing sufficient housing accommodation, but the question is whether requisite (1) was satisfied. Did it appear to the competent authority to be necessary or expedient to "take possession of" the ground floor in which the defendant was living ? On this point the material facts are these. (i) At the time of the requisition the defendant was lawfully in occupation of the ground floor of his own house. He was not there as a licensee, B but as freeholder in as full a right as if the house had never been requisitioned. (ii) The upper floor was still requisitioned and the town clerk had of necessity an implied right of access to it. The defendant had no legal justification for refusing access to it. (iii) The competent authority had power to gain full access to the upper floor by giving "directions" under reg. 51 (1) or "authority" C under reg. 85 (1) (c) and then prosecuting the defendant, if necessary, under regs. 83 and 92, or, indeed, by requisitioning the entrance passage and staircase of the house. (iv) At the time of the requisition the competent authority had no intention of taking actual possession of the ground floor rooms. They did not contemplate that anyone should occupy these rooms except the defendant and his wife. No direction was given to him at that time to give up possession. D Nor was any notice of intended entry served on him. (v) The purpose of the competent authority was to acquire a legal right to possession of the whole house and to treat the defendant as their licensee of the ground floor, thus bringing the whole house within their control without actually turning the defendant out. (vi) When the defendant still refused to give access to the upper floor, the competent authority, "in order to bring pressure to bear" on him, threatened E to deprive him of the licence which they assumed to exist. Subsequently, they did, in fact, purport to terminate the supposed licence and brought this action for possession. On those facts, it is clear, to my mind, that on Nov. 22, 1946, the competent authority did not deem it necessary or expedient to take possession of the ground floor. If that had been their intention, it could only have been effected by directing the defendant forthwith to give up possession and, if he F refused to comply, turning him out. If they had realised that a requisition would have that effect, they would, I expect, have hesitated before it appeared to them to be "necessary or expedient" to do it. They would, no doubt, have considered the alternative of getting an order from the court to ensure access to the upper floor, but those questions did not arise—the letters at the time show that—for the simple and intelligible reason that it was not their G intention to take possession at all. Their intention was to get a legal right to possession and to treat the defendant as a licensee without taking possession themselves. A legal right of that kind is nothing more nor less than a legal estate in the land. Their intention was, therefore, in effect to acquire a legal estate such as would for the time being over-ride the freehold. But Parliament H has been very careful not to give the executive any power to acquire any estate in land but only to take possession of it. They were attempting, therefore, to acquire a legal right or title which they had no power to requisition : see *China Mutual Steam Navigation Co. v. MacLay* (17).

My conclusion is that, although the officials acted in good faith, they mistook their powers. They had ample powers to compel the defendant to give access to the upper floor, and they should have exercised those powers. In that way justice would have been done. Instead of doing that, they have treated them-

selves as if they were owners of the house and the defendant as their licensee, a thing, which in my opinion, they have no power to do. They have sought to bring pressure to bear on him by threatening to turn him out of his house, and have now carried out the threat and brought these proceedings to eject him. This is a very great power which they claim—to turn a man out of his own house long after the war has ended—and I am not disposed to give effect to it unless I am satisfied, in LORD GREENE'S words in the *Carltona* case (1) ([1943] 2 All E.R. 564), that it "falls within the four corners of the powers given by the legislature". I do not think it does, and I would allow the appeal.

JENKINS, J. : This case concerns the validity of a requisitioning, or purported requisitioning, of the defendant's house, No. 24, Boveney Road, Forest Hill, effected, or claimed to have been effected, by the plaintiff, Alan Milner Smith, town clerk of the plaintiff council, in exercise, or purported exercise, of the functions of the Minister of Health under reg. 51 of the Defence (General) Regulations, 1939, delegated, or purporting to have been delegated, to the plaintiff town clerk by a letter from the Ministry of Health dated Nov. 12, 1946, for the purpose (as expressed in the letter) of requisitioning "the whole" of No. 24, Boveney Road "for re-housing purposes."

[HIS LORDSHIP stated the facts and continued:—] It is common ground that under para. (1) of reg. 51 of the Defence (General) Regulations, 1939, the Minister of Health (as a "competent authority" within the meaning of the regulation: see reg. 49 (1)), had power to take possession of No. 24, Boveney Road (even if occupied) for re-housing purposes. It is further common ground that the Minister of Health had express power under para. (5) of reg. 51 to delegate all or any of his functions under para. (1) of that regulation "to such extent and subject to such restrictions" as he thought proper "to any specified persons or class of persons." If, therefore, the delegation purporting to have been effected by the Ministry's letter of Nov. 12, 1946, is to be regarded as a delegation by the Minister of Health, it would seem to follow that the delegation in question was a valid delegation and that the requisition notice founded on it was a valid notice. I have not overlooked the fact that in the letter of Nov. 12, 1946, the delegation was expressed to be with respect to "the whole" of No. 24, Boveney Road, whereas actually the upper part was still subject to the original requisition. No point was made of this for the defendant, and I am satisfied that, if the delegation was otherwise valid, it operated as an effective delegation as to the part of No. 24, Boveney Road not then subject to requisition.

In considering the question whether the delegation purporting to have been effected by the letter of Nov. 12, 1946, is to be regarded as a delegation effected by the Minister of Health, regard must be had to s. 7 of the Emergency Powers (Defence) Act, 1939, which (so far as material) provides that:

"Every document purporting to be an instrument made or issued by any Minister . . . in pursuance of any provision contained in, or having effect under, Defence Regulations, and to be signed by or on behalf of the said Minister . . . shall be received in evidence, and shall, until the contrary is proved, be deemed to be an instrument made or issued by that Minister . . ."

The letter of Nov. 12, 1946, is headed: "Ministry of Health," with the address of the Regional Offices. It is signed by one J. O'Gara, and it is expressed on its face to comprise a communication which he is directed by the Minister to make. It seems, therefore, clearly to be a document purporting to be an instrument made or issued by the Minister of Health and to be signed by J. O'Gara on behalf of the Minister of Health within the meaning of s. 7, with the result that until the contrary is proved it must be deemed by virtue of the section to be made or issued by the Minister of Health. I think it follows

from this that, unless the defendant has succeeded in "proving the contrary," the letter of Nov. 12, 1946, must be deemed to constitute a delegation by the Minister no less than if it had been signed by the Minister himself personally, with the result that as the Minister's power to effect the requisition in question, and his power to delegate that function to the town clerk, are not in dispute, the defendant's main ground of attack on the validity of the requisition notice of Nov. 22, 1946, must fail. This accords with the view taken by LORD A GODDARD, C.J., with regard to the effect of s. 7 in relation to a substantially similar letter purporting to delegate the Minister of Health's requisitioning powers with respect to specified premises in *Carlish v. East Ham Corpn.* (2). Mr. J. O'Gara, the signatory of the letter of Nov. 12, 1946, who is a general B inspector at the Ministry of Health and was at the material time in charge of requisitioning in the London Region, gave evidence before the learned county court judge, and it was sought on behalf of the defendant to "prove the contrary" out of his own mouth by showing that on his own evidence he had, in fact, no authority to sign the letter of Nov. 12, 1946, on behalf of the Minister. It is, perhaps, surprising that Mr. O'Gara could not be more precise as to the manner in which his authority was conferred and defined and was unable to point to any specific document or instructions on the subject, but it is clear that, according C to the internal organisation and practice of the department, his duties as the official in charge of requisitioning included the writing of letters of *ad hoc* delegation such as the letter of Nov. 12, 1946, in the present case, and that he was, in fact, at the material time writing as many as ten of such letters per week. Whatever might be said of his evidence, if the onus had lain on the plaintiffs to adduce strict proof of his authority, I think it fell very far short of proof D that he had no authority, and it is clear that under s. 7 the onus lay on the defendant to prove that he had none. I am, accordingly, of opinion that the learned county court judge rightly rejected the defendant's contention that Mr. O'Gara, in fact, had no authority to sign the letter of Nov. 12, 1946.

The validity of the delegation which Mr. O'Gara purported by this letter to effect on behalf of the Minister was further attacked on the ground that, even E if he was, in fact, authorised by the Minister to effect such delegations in the sense that the duties entrusted to him in terms extended to the making of such delegations, he could only be so authorised as a delegate of the Minister's powers with the result that as a matter of law he could not himself validly effect any further delegations, in view of the well-known principle of *delegatus non potest delegare*. I think this contention is based on a misconception of the F relationship between a Minister and the officials in his department. A Minister must perforce, from the necessity of the case, act through his departmental officials, and where, as in the Defence Regulations now under consideration, functions are expressed to be committed to a Minister, those functions must, as a matter of necessary implication, be exercisable by the Minister either G personally or through his departmental officials, and acts done in exercise of those functions are equally acts of the Minister whether they are done by him personally, or through his departmental officials, as in practice except in matters of the very first importance they almost invariably would be done. No question of agency or delegation as between the Minister and Mr. O'Gara seems to me to arise at all. I think this view is borne out by the observations of LORD H GREENE, M.R., in *Carltona, Ltd. v. Commissioners of Works* (1). The delegation effected by the letter of Nov. 12, 1946, must, therefore, in my view, be regarded as a delegation by the Minister acting through one of his departmental officials in the person of Mr. O'Gara, and not as a purported delegation by Mr. O'Gara of functions delegated to him by the Minister. I am, accordingly, of opinion that this ground of objection also fails.

It was further argued that, though it might be proper for the Minister to perform his functions under reg. 51 through his departmental officials so far as

- purely executive acts were concerned, the delegation purporting to have been effected by the letter of Nov. 12, 1946, was a legislative act, and as such could only be validly done by the Minister personally. Assuming for the moment that the delegation in question can properly be described as a legislative act, I do not see why it should follow on that account that the Minister could not do it in the way which his functions under reg. 51 are normally and necessarily performed, *i.e.*, through the appropriate departmental official. Regulation 51
- A (5) confers on the Minister express power to delegate all or any of his functions under para. (1) and makes no special provision as to the manner in which such power of delegation is to be exercised. I see no sufficient justification for implying a special provision to the effect that it is only to be exercised by the Minister himself in person. I do not, however, agree that the delegation here in question was a legislative act. It related simply and solely to the requisitioning of one
- B particular house and delegated nothing more than the power required for that specific purpose. There is, so far as I can see, nothing in the nature of legislation in that. Reference was made to *Blackpool Corpn. v. Locker* (12), but the court had there to consider the effect of a general delegation to local authorities of the Minister's power of requisitioning effected by circulars which laid down what amounted to a code of regulations and restrictions governing the exercise of
- C the delegated powers. I do not think it follows from that case that every delegation of power to requisition, however specific, and, in particular, that even a delegation of power to requisition one particular house, is a legislative act. Still less does it follow that the power of delegation conferred by para. (5) of reg. 51 can only be exercised by the the Minister himself personally, the mode in which the power should be exercised (*i.e.*, whether by the Minister personally
- D or through his departmental officials) being an aspect of the matter with which the case of *Blackpool Corpn. v. Locker* (12) was not, as I understand it, concerned. It would certainly cause great embarrassment in the administration of reg. 51 if a specific delegation such as is here in question, directed simply and solely to the requisitioning of one particular house, could only be effected by the Minister himself in person, and I see no sufficient reason for so holding. Accord-
- E ingly, in my opinion, this ground of appeal also fails.
- It remains to consider a number of points of a more or less subsidiary character which were raised on behalf of the defendant. The requisitioning was attacked on the ground that the power of requisitioning was delegated for the purposes set out in the town clerk's letter of Nov. 7, 1946, *i.e.*, "so that the owner may be permitted to occupy the lower portion as licensee and the proper precautions taken
- F to reserve the right of access to the upper portion and garden for the occupants of the upper portion and the necessary provision made for the sharing of the bathroom and lavatory." In my view, there is no substance in this contention. The short answer is that, whatever the town clerk may have asked for, what he, in fact, received was a plain delegation of power to requisition the premises for re-housing purposes. Moreover, I do not think the town clerk's letter can
- G fairly be regarded as doing anything more than stating the reasons why the power asked for was necessary, and the way in which the re-requisitioning, in the event of his being given power to effect it, would enable him to get over the difficulties which were being made by the defendant. Finally, the plaintiffs were perfectly willing to carry out the terms of the letter of Nov. 7, 1946, but were unable to do so because the defendant would not agree. Then it was said
- H that the premises were requisitioned with the ulterior object of putting pressure on the defendant. That is in a sense true, but I see nothing improper in it. The position was that unless control of the whole house could be obtained the upper part was entirely useless for re-housing purposes owing to the defendant's denial of access. Accordingly, the requisitioning cannot on this account be said to have been effected otherwise than *bona fide* for the purposes of re-housing. The point was formally taken that the requisitioning was invalid because actual physical possession was not obtained, but it was conceded that, so far as this

court is concerned, that ground of objection is concluded adversely to the defendant by the decision in *James Macara, Ltd. v. Barclay* (3). Finally, a question was raised as to the capacity of the plaintiffs to sue, but I understood counsel for the defendant to concede, in effect, that, if the delegation effected by the letter of Nov. 12, 1946, was valid, the town clerk, on requisitioning the property in exercise of the delegated power, would have a sufficient interest in, and right to, possession of the property to enable him to maintain an action for possession.

For all these reasons I am of opinion that the learned county court judge came to a right conclusion in this case and I agree with my Lord that the appeal fails and should be dismissed.

Appeal dismissed with costs.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Alan Milner Smith*, town clerk, Lewisham (for the plaintiffs); *Tanner & Worley* (for the defendant).

[Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.]

Re CROSBY'S CONTRACT. CROSBY v. HOUGHTON.

[CHANCERY DIVISION (Romer, J.), March 30, 1949.]

Option—Option to purchase freehold—Implication that vacant possession be given on exercise of option—Proviso that tenant should "accept without objection the title of the landlord"—Whether reference to title at date of lease or on exercise of option.

By a lease, dated Nov. 8, 1945, the landlord demised the ground floor of premises known as No. 52, Connaught Avenue, Frinton-on-Sea, to the tenant for a term of 21 years from Dec. 25, 1945, at a yearly rental. Clause 3 (iii) of the lease provided: "That if the tenant shall desire to purchase the fee simple of No. 52 Connaught Avenue Frinton-on-Sea of which the demised premises form part and shall within seven years from the commencement of the term hereby created give to the landlord three months' notice in writing of such desire then the landlord will upon the expiration of such notice and on payment of the sum of £2,000 together with all arrears of rent up to the expiration of the notice and of interest on the said sum of £2,000 at the rate of 5 per cent. per annum from the expiration of the notice until payment thereof convey the said property to the tenant in fee simple. The tenant shall accept without objection the title of the landlord but shall have delivered to him at his own expense such abstract of title as he shall require and the landlord shall be able to furnish." The landlord, Mrs. C., and her husband occupied the upper part of the premises as a residence. On Jan. 29, 1948, the tenant purported to give a notice in exercise of the option to purchase, but subsequently agreed that the notice was bad. On Mar. 1, 1948, the landlord granted to her husband a lease of that part of the premises occupied by them for a term of 21 years at a full rack rent. On June 21, 1948, the tenant served a further notice on the landlord exercising the option to purchase the premises.

Held: the words "the tenant shall accept without objection the title of the landlord" referred to the landlord's title as at the date when the lease was granted, and was not intended to enable the landlord subsequently to introduce a defect in his title, and, therefore, in those words there was nothing to exclude the implication in the preceding part of cl. 3 (iii), that the landlord would, on the exercise of the option, convey the premises with vacant possession.

Cook v. Taylor ([1942] 2 All E.R. 85; 167 L.T. 87), applied.

[AS TO EFFECT OF EXERCISE OF OPTION TO PURCHASE, see HALSBURY, Hailsham Edn., Vol. 20, pp. 67, 68, para. 72; and FOR CASES, see DIGEST, Vol. 30, pp. 473-477, Nos. 1363-1393.]

Cases referred to :

(1) *Lake v. Dean*, (1860), 28 Beav. 607; 42 Digest 506, 724.

(2) *North v. Loomes*, [1919] 1 Ch. 378; 120 L.T. 533; 42 Digest 460, 290.

A (3) *Cook v. Taylor*, [1942] 2 All E.R. 85; 167 L.T. 87; [1942] Ch. 349; 2nd Digest Supp.

ADJOURNED SUMMONS for a declaration that a tenant to whom an option to purchase a freehold had been granted by the landlord was bound to accept the conveyance of the freehold subject to a lease of part of the property granted after the date of the option, and also a declaration that the tenant was not B entitled to vacant possession of the whole property on completion of the sale and purchase effected pursuant to the exercise by the tenant of the option. ROMER, J., in answer to the first question, declared that the tenant was not so bound, and, in answer to the second question, that the tenant was so entitled. The facts appear in the judgment.

J. F. Bowyer for the landlord.

C M. Berkeley for the tenant.

ROMER, J. : This is a summons for the determination of a difference which has arisen under an option which was contained in a lease made on Nov. 8, 1945, between the applicant, the landlord, Mrs. Emily Sarah Crosby, of the one part, and the respondent, the tenant, Herbert Charles Houghton, D of the other part. That lease related to premises known as No. 52, Connaught Avenue, Frinton-on-Sea, and demised to the tenant the ground floor of the premises consisting of a lock-up shop, an office, and a workroom, and the use of the outside lavatory "to hold the same unto the tenant from Dec. 25, 1945, for the term of 21 years," determinable as thereafter provided, at the yearly rent therein mentioned. Clause 3 of the lease contains covenants by the landlord, one of which is to be found in sub-cl. (iii) which provides :

"That if the tenant shall desire to purchase the fee simple of No. 52 Connaught Avenue Frinton-on-Sea of which the demised premises form part and shall within seven years from the commencement of the term hereby created give to the landlord three months' notice in writing of such desire then the landlord will upon the expiration of such notice and on payment of the sum of £2,000 together with all arrears of rent up to the expiration of the notice and of interest on the said sum of £2,000 at the rate of 5 per cent. per annum from the expiration of the notice until payment thereof convey the said property to the tenant in fee simple. The tenant shall accept without objection the title of the landlord but shall have delivered to him at his own expense such abstract of title as G he shall require and the landlord shall be able to furnish."

The relevant facts of the case are sufficiently stated in a joint and several affidavit sworn by the landlord and her husband and filed in support of the summons. She says that the lease comprised only the ground floor of the premises, which she describes and thereafter calls "The shop." Then : "The remainder of the said premises which was not included in the said lease consisted of the upper storey and entrance and staircase at the side of the said shop leading to the said upper storey together with the garage at the rear of the said premises and the rear entrance to the said upper storey (hereinafter called 'the flat') which were at the date of the said lease and had always previously been used as residential quarters." Then she says that the tenant registered the option to purchase given in the lease as a land charge on Nov. 12, 1945. On Jan. 29, 1948, the tenant purported to give a notice to the landlord to the effect that he elected and agreed to purchase from her the reversion H

in fee simple of 52, Connaught Avenue, Frinton-on-Sea, at the price of £2,000 and on the other terms and conditions in the lease mentioned. The affidavit goes on to say that at the date of the notice the landlord and her husband were, and still are, most anxious not to have to turn out of the flat and they decided to ask the tenant to waive or abandon his right to purchase the property, or else to permit them to remain in occupation of the flat. The notice which the tenant gave on Jan. 29, 1948, and which purported to indicate his determination to purchase the reversion in the fee simple of 52, Connaught Avenue, was regarded by the landlord as ineffectual because of the reference to the reversion. Eventually, I understand, the tenant accepted the view that that notice was not an effectual document. On Mar. 1, 1948, the landlord granted to her husband a lease of the flat for a term of 21 years from Mar. 1, 1948, at a rent of £72 a year, and in the affidavit to which I have referred she states that that rent was and is, in the view of the landlord and her husband, a full rack rent for the property comprised therein. On June 21, 1948, the tenant's solicitors served a further notice on the landlord duly exercising the option to purchase contained in the lease of Nov. 8, 1945, and I understand that it was not until correspondence passed on the question of title that the landlord disclosed that she had granted the lease of Mar. 1 to her husband. When that fact became known to the tenant, relations between the parties became somewhat strained. Ultimately, the tenant issued a writ against the landlord, but the landlord took the view that the question between them, namely, whether in the events which have happened the tenant is entitled to a conveyance of the premises, 52, Connaught Avenue, with vacant possession and without regard to the lease of Mar. 1, 1948, could properly and sufficiently be dealt with by originating summons, and, as this view was eventually accepted also by the tenant, the present summons was issued. By it the landlord asks for a declaration that the tenant is bound to accept the conveyance of this property subject to a lease dated Mar. 1, 1948, and made between the landlord, of the one part, and William Crosby, of the other part, and affecting part of the property, and a declaration that the tenant is not entitled to enter that part of the property on completion of the sale and purchase in accordance with the contract. Counsel for the landlord says that where no reference to vacant possession is expressly made in a contract for the sale of land, it is a question on the terms in which the contract is couched, read in the light of the surrounding circumstances, whether an implied term should be read in entitling the purchaser to vacant possession on completion.

I was referred to two text books and to certain authorities as showing what the position with regard to vacant possession in contracts for the sale of land has been held to be by the courts. I need not refer to them all because it is clear to my mind, and was, I think, conceded by counsel for the landlord, that if one takes cl. 3 (iii) of the lease, paying no regard for the moment to the concluding part of that sub-clause, there would be ground for implying that, on the exercise of the option, the donee of the option would be entitled contractually to a conveyance in fee simple with vacant possession. That view arises from the general law applicable to the matter. I propose only to refer to an extract from WILLIAMS ON VENDOR AND PURCHASER, 4th ed., vol. 1, p. 201, where the learned author expresses himself thus :

"So also, where land is expressly or impliedly sold with vacant possession, a good title is not shown if it is subject to any tenancy for years or less, which will not expire before the day fixed or the proper time for completion."

In a footnote to that passage it is stated :

"It is apprehended that, where land is sold under a contract expressly or impliedly promising to convey the fee simple, free from incumbrances,

it is *prima facie* a term of the contract that the purchaser shall on completion be put into actual (and not constructive) possession of the property. . . . But it is a question of the intention of the parties, to be gathered from the terms of the contract, whether the land is sold with vacant possession on the completion of the purchase or subject to the terms of some tenancy or occupation."

A Reference is made to *Lake v. Dean* (1) and *North v. Loomes* (2).

I desire also to refer to the more recent judgment of SIMONDS, J., in *Cook v. Taylor* (3). The headnote is as follows ([1942] 2 All E.R. 85) :

B "The contract for sale of certain freehold property incorporated the Law Society's conditions of sale. In the definition clause of those conditions a contract is defined as meaning any contract incorporating those conditions including the particulars, if any, used in connection with the contract. The particulars in this case included the statement : ' . . . vacant possession on completion of the purchase,' and made no reference to tenancies. Completion date was fixed as on or before Feb. 25, 1941 ; and on Feb. 19 the property was requisitioned by the local authority under the Defence (General) Regulations, reg. 51. The keys of the property were handed over to the requisitioning authority on that day, and actual possession was taken on Mar. 1 and Mar. 8 following. The defendant repudiated the contract on the ground that the property was sold with vacant possession which the vendor could no longer give. The plaintiff claimed specific performance and damages, or rescission ; and the defendant counterclaimed for a declaration that he was discharged from the contract and for a return of the deposit. *Held*, (i) the particulars issued in connection with the sale was a document on which the defendant could rely as implying that vacant possession would be given. (ii) where property is vacant when inspected by the purchaser and no mention is made in the particulars of any tenancies, the purchaser is entitled to assume that the property is sold with vacant possession on completion."

E SIMONDS, J., said on the subject of the second holding (*ibid.*, 87) :

F "The second point, which is a much larger one, is this. Apart altogether from that particular document, is there, according to the general law, here to be implied a contract of sale with vacant possession ? As I pointed out in the course of reading the documents, there is no reference to vacant possession, but equally there is no reference to any tenancy to which the property is subject, and I think that in that regard it is material to observe that that property was in fact vacant when inspected by the defendant, the intending purchaser, and it must have been known to the plaintiff that it would be found to be vacant by the intending purchaser. Therefore we have this property which is in fact vacant and which is contracted G to be sold without any reference to any tenancy. Is there in such a case an implication that it is sold with vacant possession ? I think the answer to that is in the affirmative."

He refers to the passage from WILLIAMS ON VENDOR AND PURCHASER which I have read and continues :

H "In reference to that statement he [the learned author] cites in note (e) a number of cases which appear to me to support the view that where a contract is silent as to vacant possession, but also silent as to anything to which the property is subject, there is impliedly a contract that vacant possession will be given upon completion. I may fairly add that that appears to me to be plainly the common sense of the matter, for it would be strange if, the vendor saying nothing about the matter which lay within his knowledge and not within the knowledge of the purchaser, the pur-

chaser were to find himself purchasing a property subject to a tenancy of which he could know nothing. Therefore I hold as a matter of law upon a contract of this character that there is the implied term that vacant possession shall be given upon completion."

With the guidance of that statement of the general law, it appears to me to be reasonably plain that the conveyance which the landlord here was to give the tenant on the tenant's exercising his option would, by implication, be a conveyance of the property with vacant possession if cl. 3 (iii) stopped short before the final passage which starts: "The tenant shall accept without objection . . .", because, at the date of the lease, the owner of the property, namely, the landlord who granted the lease, was herself in occupation and possession of the flat which was not the subject-matter of the demise. Accordingly, by contracting, if she did contract, to grant an option on the whole of the premises, it appears to me that she conferred an option the exercise of which would give the right to vacant possession of that part of the premises which at the date of the lease was occupied by the landlord herself. Counsel for the landlord, however, rightly says that, in construing the sub-clause, one cannot exclude the final part and the sub-clause must be taken as a whole for the purpose of considering whether there is room for the implication which I am invited by the tenant to make. The sheet anchor in his case, as he frankly concedes, is that, having regard to the concluding part of sub-cl. (iii), there is no room for the implication which, but for that concluding part, the law would assume, because, by that concluding part the donee of the option bound himself to accept without objection the title of the landlord and so contracted to purchase this property in the state in which he found it at the time that he exercised the option. That means, it is argued, that he would be precluded from objecting to any defect in the title, and an example of a defect in the title would be a lease granted by the landlord at any time prior to the exercise by the donee of his option. Therefore, says counsel, to imply the right to vacant possession would run counter to that unqualified obligation accepted by the tenant. He says that if a lease had already been granted of the flat to some person before Nov. 8, 1945, that would, undoubtedly, have been a defect in the landlord's title which the donee of the option would be bound to accept. Similarly, he was bound to accept the defect which arises from the fact that the landlord granted this lease of Mar. 1, 1948. He points out that the tenant was not bound to exercise his option if anything had happened, whether by reason of something inherent in the property itself or by reason of some action taken by the landlord, whereby the property became diminished in value, but, if he did exercise the option, he would have to buy the land in the state of title in which he found it. I understood that that argument was subject to the qualification that the landlord would not be able at any time after granting this option to do something which fraudulently or deliberately reduced the value of the property and thereby substantially altered the substrata of the option, but, provided that the landlord acted fairly, and granted, as it is said she did grant, a *bona fide* lease at a rack rent, then the tenant was getting the value in property which he contracted to buy for £2,000 and he could not complain.

As against that view of the matter counsel for the tenant argued that the effect of the latter part of cl. 3 (iii) was that the lessee was bound to accept the title of the landlord at the date of the lease, but that the landlord was not entitled to introduce a defect of title after the granting of the lease. He argued that the clause in question is not an enabling clause, but merely one restrictive of the tenant's right, if he exercised the option, to requisition on title. Commenting on the description of the rights which, according to counsel for the landlord, the landlord could exercise with regard to the property, he said that it might be a difficult matter to draw the line

between what was a fair rental or an unfair rental reserved by a lease which the landlord at some time subsequently to Nov. 8, 1945, should think proper to grant. He then drew attention to an argument of counsel for the landlord that, if the tenant is right, in effect the landlord would be more or less sterilised in relation to her rights to deal with the property and dispose of it for what might be a period of seven years. Counsel for the landlord said that that was an indication that his view of the matter was right and that the landlord was to be allowed to do what she thought proper with the property provided that she acted fairly and reasonably and did not deliberately do anything to diminish the value of the property. Counsel for the tenant, however, said that the landlord could grant a lease of this flat giving the tenant the same security of tenure as she herself enjoyed and that there would be no difficulty in finding a tenant on a weekly or a monthly basis, having regard, in particular, to the shortage of accommodation which is such a well known feature of English life at the present moment. Counsel suggested that an option of this sort is something more than a mere offer, that it creates some interest in the land over which it is intended to operate, as is demonstrated by the fact that it can be, as, indeed, this one was, registered as an estate contract, and he said that, after the granting of the lease the landlords were in a sense trustees for the donee of the subject-matter of the option.

In my judgment, the view which counsel for the tenant has put forward is the right one. I think that, taking this lease as a whole and reading it in the light of the circumstances which existed when it was granted, there is room for implying in this option the term that, if the option were to be exercised, the landlords should convey the property to the tenant in fee simple with vacant possession. It appears to me that the concluding part of sub-cl. (iii) of cl. 3 is truly directed to the landlord's title as at the date when this lease was granted, that the tenant was bound to accept that freehold title which was then vested in the landlord, and that it was not intended to enable or entitle the landlord to introduce at any subsequent time a defect in the title which did not exist at the date when the lease was granted. In my view, to accept the landlord's view of the matter would be to attribute to this more or less common form clause an effect which it does not fairly bear. It is true, although I use the phrase "common form," that counsel for the landlord referred me to *KEY AND ELPHINSTONE, PRECEDENTS IN CONVEYANCING*, 14th ed., vol. 1, p. 960, where a form is given of a power to a lessee to purchase the freehold. After setting forth the option, there is a proviso as to title in these terms :

"Provided also that the title of the lessor to the premises having been already investigated and approved of by the lessee shall be deemed to be accepted by him up to the date of these presents."

The alternative form is :

"Provided also that the title of the lessor to the premises shall not be investigated prior to but shall be deemed to be approved of by the lessee up to the date of these presents."

Counsel for the landlord emphasised, with reference to the phrase "the date of these presents", that that phrase does not appear in the lease which is before me. That is true, but I think the language in this clause has the same effect, and I am not prepared to put on it a construction which would result in the landlord being able at any time after granting this option to bring into being tenancies of the flat which would constitute a defect of title to which the tenant was unable to object.

In my view, the tenant was bound, by reason of the concluding part of sub-cl. (iii), to accept the state of the title as it was when the lease was granted, and would have been unable to object to any lease or tenancy which at that

time had subsisted, but that is far removed from compelling him to take the property subject to any other defect which the landlord might at any time think right to bring into being and would have the effect of preventing the tenant from getting possession of the property. I see great difficulties in the way of carrying the views of counsel for the landlord into effect because, as counsel for the tenant pointed out, it might be, if the landlord were right, that a landlord, at any time after the lease was granted, could mortgage the property and then say to the tenant: "Well, this mortgage is on the property and you have got to buy the property subject to the mortgage." Or again, if a lease were granted, questions of difficulty might arise whether the rent reserved was a fair rent or an unfair rent. I do not know where the line can fairly be drawn between what counsel for the landlord contends that the landlord can do and what he concedes that he cannot do, and, in the absence of any authority on the point, I am not prepared to hold that he could, on the true construction of this particular clause, bring into being anything which could be regarded as a defect in title which was not in being at the date when the lease was granted. For these reasons I have arrived at the conclusion that the lease which the landlord granted to her husband, Mr. Crosby, on Mar. 1, 1948, was not a lease which is binding on the donee of the option, and that the landlord does not make a good title to the property so long as that lease remains on foot.

Declaration accordingly. Landlord to pay the costs.

Solicitors: *J. N. Nabarro & Sons* (for the landlord); *Beaumont, Son & Rigden*, agents for *White, Reynolds & Beechcroft*, Clacton-on-Sea (for the tenant).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

RAILWAY EXECUTIVE v. YORKSHIRE (WEST RIDING) COUNTY COUNCIL.

[COURT OF APPEAL (Somervell and Evershed, L.JJ., and Wynn-Parry, J.), March 24, 25, 1949.]

Railway—Level crossing—Railway constructed under statutory authority above level of road—Inclined approaches to level of railway—Subsidence of railway and road—Railway restored to original level—Liability of railway authority to restore level of inclined planes—Railways Clauses Consolidation Act, 1845 (c. 20), s. 16—South Yorkshire, Doncaster and Goole Railway (Deviation and Extension of Elsecar Branch) Act, 1850 (c. xxxv), s. 3.

In 1850 a railway company, predecessors in title of the Railway Executive, were authorised by the South Yorkshire, Doncaster and Goole Railways (Deviation and Extension of Elsecar Branch) Act, 1850, which incorporated the Railways Clauses Consolidation Act, 1845, to make and maintain a railway "across and upon the level of" a public road at W. It was necessary to construct the railway above the level of the road, and it, therefore, became the railway company's statutory duty to build inclined approaches to facilitate the passage of users of the highway across the railway line. These inclined approaches were properly constructed by the company. In 1942 mining operations carried on by third parties caused a subsidence of both the railway and the road, and it became necessary for the safe user of the railway that the railway line should be restored to its original level. This restoration would cause an obstruction of the road unless the level of the inclined approaches was also made up, and the question arose whether the Railway Executive or the highway

authority should execute and bear the cost of the restoration of the level of the approaches. Under s. 3 of the special Act of 1850 and s. 16 of the Act of 1845, the railway company had power to maintain what they had constructed under statutory authority.

HELD : the Railway Executive were entitled to restore the railway line to its original level without themselves raising the inclined approaches or contributing to the cost incurred by the highway authority in doing so.

A

West Lancashire Rural Council v. Lancashire and Yorkshire Ry. Co. ([1903] 2 K.B. 394 ; 89 L.T. 139), *applied*.

Decision of ROXBURGH, J., affirmed.

B

[AS TO POWERS AND DUTIES IN RESPECT OF LEVEL CROSSINGS, see HALSBURY, Hailsham Edn., Vol. 27, pp. 50-53, paras. 101-105 ; and FOR CASES, see DIGEST, Vol. 38, pp. 307-309, Nos. 322-328.]

Cases referred to :

(1) *West Lancashire Rural Council v. Lancashire and Yorkshire Ry. Co.*, [1903] 2 K.B. 394 ; 89 L.T. 139 ; 67 J.P. 410 ; 38 Digest 280, 178.

(2) *Sharpness New Docks and Gloucester and Birmingham Navigation Co. v. A.-G.*, [1915] A.C. 654 ; 112 L.T. 826 ; 79 J.P. 305 ; 26 Digest 581, 2716.

C

APPEAL by the West Riding of Yorkshire County Council from an order of ROXBURGH, J., dated July 15, 1948.

D

ROXBURGH, J., held that the Railway Executive were under no liability to restore the level of inclined approaches constructed by their predecessors in title to facilitate the passage of road traffic across their railway line, notwithstanding the fact that, in restoring the level of the railway, which was necessitated by a subsidence affecting both the railway and the road, they would cause an obstruction of the roadway. The Court of Appeal dismissed the appeal. The facts appear in the judgment of SOMERVELL, L.J.

E

Simes, K.C., and *Parrish* for the county council.

Sir Andrew Clark, K.C., and *Herbert, K.C.*, for the Railway Executive.

F

G

H

SOMERVELL, L.J. : In 1850 the predecessors of the plaintiffs, the South Yorkshire, Doncaster and Goole Railway Co., were authorised by a special Act, which incorporated the Railways Clauses Consolidation Act, 1845, to make and maintain certain railways, and, in particular, to construct a railway "across and upon the level of" a public road in the township of Worsborough. That level crossing, as it is ordinarily called, was constructed, and, although I do not think that this affects the issue of the present appeal, the railway company wanted the level of their railway to be somewhat above the level of the road as it had existed. In those circumstances, it was their statutory duty to build what are called "inclined planes," so that those who used the highway were gradually taken up a slight incline to the new higher level at which it suited the railway to cross the road. The road in question is a county road and the defendants, as highway authority, are responsible for it under the Local Government Act, 1933. There are minerals under the level crossing and the road and there has been subsidence due to mining operations, causing the railway line at the level crossing and the road to sink. So far as the highway alone is concerned, the subsidence has caused no inconvenience. Because of the railway, however, it is agreed that the road must be put back to the old level. In the agreed statement of facts this matter is dealt with in these words :

"Owing to such subsidence of the railway lines at the said level crossing the maintenance and safe working of the railway could only be ensured by the plaintiffs restoring the same to the level shown on an agreed plan section and cross sections annexed hereto . . . being a level authorised

by the said special Act and such restoration was carried out by the plaintiffs in or about August, 1945."

In other words, the line was then restored to the old level authorised under the statute at which it was constructed in 1850 or shortly afterwards, and if nothing were done about the road it would clearly become obstructed and unusable for the purposes for which highways exist. It is common ground that, the railway line having been restored to its old level, the highway, if it was to remain usable, had to be inclined up to it.

The question in this case can be formulated in this way : Have the plaintiffs, on executing these works, themselves to see, at their own expense, that the highway remains usable ? It is necessary to refer to some of the provisions of the special Act, the South Yorkshire, Doncaster and Goole Railway (Deviation and Extension of Elsecar) Act, 1850 (13 and 14 Vict., c. xxxv). That Act incorporates the Railways Clauses Consolidation Act, 1845. Section 3 of the special Act provides :

" . . . it shall be lawful for the said company to make and maintain the new or substituted lines of railway, and also the extension railway and branch railways hereinafter particularly described, with all proper works, stations, approaches, and conveniences connected therewith, in the lines and upon the lands delineated on the said plans and described in the said books of reference, and according to the levels defined on the said sections, and to enter upon, take and use such of the lands as shall be necessary for such purposes."

Section 8 deals with the level crossing and provides :

" . . . it shall be lawful for the company to construct the railways hereby authorised across and upon the level of the turnpike roads and public roads numbered in the first mentioned deposited plans as follows . . . "

Then they are numbered and the one in question here is No. 103. By s. 12 :

" . . . the powers of the company for the compulsory purchase of lands for the purposes of this Act shall not be exercised after the expiration of three years from the passing of this Act."

By s. 13 :

" . . . the works hereby authorised shall be completed within five years from the passing of this Act, and on the expiration of such period the powers by this Act granted to the company for executing such works, or otherwise in relation thereto, shall cease to be exercised, except as to so much thereof as shall then be completed."

We were referred to some sections of the Railways Clauses Consolidation Act, 1845. Section 16 re-asserts what is contained in s. 3 of the special Act, *i.e.*, the right of the railway company from time to time to alter and repair the works and to substitute others and to "do all other acts necessary for making, maintaining, altering or repairing, and using the railway." It re-asserts the right of maintenance which is in question here. Counsel for the Railway Executive submitted that any power contained in an earlier part of s. 16, for example, to make inclined planes, was a power which related only to the period of construction and lapsed after five years. I think that to decide this case it is unnecessary to lay down that that as a matter of law is necessarily right. I can see that difficult questions might arise, though I do not think that they arise in this case. The railway company being authorised to maintain, if it could be shown that some power in the earlier part of s. 16 was necessary for the proper exercise of their right (and, in a sense, their duty) of maintenance, it may be that such a right would necessarily be implied. Section 46 of the Act of 1845 is important. In effect it provides that, if a railway company gets power from Parliament to construct a line across a road,

it must cross the road by a bridge unless it derives, in its special Act to do so by a level crossing. Section 53 was relied on as emphasising (and I think that this is the effect of it) the undoubtedly great stress laid in this Act on the necessity for railway companies, in constructing their works, to ensure that the public right of user of highways is not interfered with. If they are going to interfere with that user, they have to provide a substituted road.

A ROXBURGH, J., regarded this case as covered and concluded by the decision of WRIGHT, J., in *West Lancashire Rural Council v. Lancashire and Yorkshire Ry. Co.* (1), subsequently approved in the House of Lords in *Sharpness New Docks and Gloucester and Birmingham Navigation Co. v. A.-G.* (2). The head-note in the *West Lancashire* case (1) is :

B “A railway company, being authorised to carry their railway across a high road upon the level, constructed the railway at a slightly higher level than the road, and, in order to bring the road up to the level of the railway, raised it by means of inclined planes on either side of the railway under the powers conferred by s. 16 of the Railways Clauses Act, 1845. Held, that there was no obligation upon the railway company to repair the roadway upon the inclined planes, notwithstanding that their act in inclining its surface might have made its maintenance more expensive than before.”

C In a short judgment WRIGHT, J., said ([1903] 2 K.B. 397) :

D “ . . . I agree with Mr. Rowlatt that under s. 56 the obligation of the company is discharged as soon as they have restored the road to as good a condition as it was in before it was altered.”

I think that the effect of that decision is that, where a railway company, because it wants to cross a highway at a higher level, constructs inclined planes, provided that it has constructed them properly and that they are in good and proper condition, they are then to be treated as part of the highway, and the fact that they have been constructed by the railway company becomes from that moment irrelevant. The highway authority thenceforward have such duties and such obligations towards them as if they had not been constructed by the railway company. If that is right, the question in this case is unaffected by the fact that these inclined planes were constructed by the railway company. It would be curious if the relation between highway authority and railway company depended on whether, when a level crossing was made, there had been a slight raising of the level or not. I think that one has to approach this problem on the basis that when the railway was made, for the purposes of carrying out the statute enabling the railway to be made a level crossing was constructed, and the actual altitude of that level crossing was a matter of importance to the railway. The gradients which railways can have are limited.

G The next point to bear in mind is that the railway company have authority to “maintain” what they have constructed under statutory authority. I regard the maintaining which they are authorised and entitled to do in the present circumstances as including the maintenance of this particular portion of railway line at the level at which it was constructed. The only question is whether they have to do the work on the highway which results.

H The most attractive way of putting the case for the county council is to say that from the point of view of what they were interested in and that of their duties, there was no need to do anything, but that, so far as they were concerned, the highway was a perfectly good highway after the subsidence. I was at one time attracted by that way of putting it, but I have come to the conclusion that the learned judge was right, though I cannot regard the case as so completely covered by the judgment of WRIGHT, J., as he did.

I approach it by a simple method, but one which, I hope, leads to the right

result. If the highway had sunk and the railway had remained at its level, I do not think that there is any doubt that the highway authority would have had to have borne the expense of raising the highway and keeping it in a usable condition. They would have had no case for saying that the railway was in any way liable, and they could not have based any case on the argument that, but for the railway, it would not matter that the highway had subsided, as it has, a foot or two. Equally, of course, if the railway had sunk without the highway, the railway company would have been entitled to maintain their line so as to bring it up to the old level which had been fixed under the statute. In the course of the argument I suggested this possible view of the facts. Supposing that a subsidence had taken place, and, while the railway company had been able to take steps to see that the railway line did not subside, the roadway had subsided, I do not think that it could have been suggested that the highway authority would have had any claim against the railway company to pay or contribute to the cost of the raising of the highway. I do not think that it makes any difference that the two things have happened together. I think that the result of the railway being built at the level at which it was built was to throw on the highway authority duties and obligations to keep the highway available for the public which would not have been placed on them if the railway had not been built under statutory authority. For those reasons I think that the learned judge was right and that in the events which have happened the plaintiffs are entitled to put back their railway in the position in which it was without themselves raising the highway (even if they have power to do so, which I doubt), or bearing the expense which the defendant council incur in so doing. No doubt, they have to give, and have given, due notice to the highway authority, so that the highway authority can make proper arrangements to see that the highway is put into a usable condition and is obstructed as little as possible in the course of the work. I think that the appeal fails.

EVERSHED, L.J. : I agree. I think that the case is by no means free from difficulty, and I was at one time impressed with the possible view that, if the railway company was entitled to restore the level of its line without any obligation to do anything as regards the inclined planes or approaches, they would in the end have crossed a turnpike road or public highway other than on the level as authorised by the special Act, or otherwise than by a bridge, as authorised by s. 46 of the Railways Clauses Consolidation Act, 1845, but I think that the answer to that point is provided by counsel for the Railway Executive when he says that both the provision in the special Act and s. 46 are directed to the construction of the line. Therefore, that particular point fails.

The facts of the case are very special. This is not a case of ordinary repair of the approaches, though it is significant that s. 46 does impose an obligation, as I follow it, to maintain the approaches to bridges, though not the approaches to level crossings. As **SOMERVELL, L.J.**, has pointed out, in this case, owing to the activities of third parties, namely, a colliery undertaking, the land on which the railway line and the highway rested subsided. They might not have subsided together, and, on any view, each party concerned might have had to do restoration work, but, as it turned out, the subsidence has so operated that the highway authority is able to allow things to remain as they now are, though that is not the case with the railway company. As pointed out in the agreed statement of facts, unless the level is restored, the line cannot be safely maintained, so that the railway company, in effect, must restore their line to the level at which it was before the subsidence took place. Put in another way, they seem to me to have put themselves in the position that they would have been in had the subsidence affected only the approaches to the railway.

I think, for the reasons which my Lord has already stated, that the highway

authority cannot call on the plaintiffs to undertake the obligation of bringing the highway up to the original level, now restored, of the railway. For these reasons, as well as those stated by my Lord, I think that this appeal fails.

WYNN-PARRY, J. : I agree. It was argued attractively by counsel for the county council that after the subsidence the road was still fit for its purpose as a highway although the railway was not fit for its purpose, and that in those circumstances, if the railway company wanted to raise the railway to the old level, they must also be responsible for raising the approaches. I do not consider that that position follows. The result of the exercise by the railway company of the powers given to it by the special Act and the Railways Clauses Consolidation Act, 1845, was that at the expense of the railway company the level of the road at and approaching the level crossing was raised, and it was so raised to enable the railway to cross it at the higher level which was necessary. So long as the railway exists and is operated, the railway and the road must, as it seems to me, be linked in the sense that they must be at a common level to allow the railway to operate across the road and the public to use the road across the railway. To my mind, the road was, so to speak, tied to a particular level, because *ex hypothesi*, the railway, to be safe, must operate at the higher level, and there was a duty on the highway authority to maintain the approaches at that level which was required to enable the public to use the road, having regard to the right and obligation of the railway company to maintain the railway at the higher level. A common disaster occurred in the shape of a subsidence affecting both the road and the railway and it is agreed that, in order to discharge its statutory obligations, the railway company had to raise the railway to its former level. It follows, in my view, that the highway authority had cast on it the duty to raise the road to the "tied" level so that the public should be enabled to continue to use the road, which Parliament has authorised to be crossed by a railway at a higher level than the road originally was. For these reasons, I agree that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors : *Cummings, Marchant & Ashton*, agents for *B. Kenyon*, Wakefield (for the county council) ; *E. Coleby* (for the Railway Executive).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

MIDDLETON (EARL) v. COTTESLOE AND OTHERS.

[HOUSE OF LORDS (Lord Simonds, Lord du Parcq, Lord Normand, Lord Morton of Henryton and Lord Reid), February 21, 22, April 8, 1949.]

Estate duty—Settlement—Investments in England representing proceeds of sale of land in Eire—Whether investments notionally land in Eire for fiscal purposes—Settled Land Act, 1882 (c. 38), s. 22 (5).

The Settled Land Act, 1882, which, although repealed and replaced by the Settled Land Act, 1925, in England, still applies to Eire, provides by s. 22 (5) : "Capital money arising under this Act while remaining uninvested or unapplied, and securities on which an investment of any such capital money is made, shall, for all purposes of disposition, transmission, and devolution, be considered as land, and the same shall be held for and go to the same persons successively, in the same manner and for and on the same estates, interests, and trusts, as the land wherefrom the money arises would, if not disposed of, have been held and have gone under the settlement."

Various portions of land situate in Eire, the subject of an Irish strict settlement made on May 15, 1909, were from time to time sold both under the Settled Land Act, 1882, and the Irish Land Purchase Act and parts of the proceeds were invested by the trustees of the settlement in their names in the purchase of inscribed or registered stocks or shares transferable in the books of the Bank of England or on registers kept in England. The trustees were resident in England, and both the former and the present life tenants were domiciled in England. On the death of the first life tenant estate duty was claimed in respect of the securities.

HELD: the provisions of s. 22 (5) did not operate so as to convert, for fiscal purposes, the proceeds of sale of the settled land from securities situate within the United Kingdom to land situate in Eire, and, therefore, the claim to estate duty should be upheld.

Re Stoughton ([1941] I.R. 166 not approved).

Decision of the COURT OF APPEAL ([1947] 2 All E.R. 134; [1947] Ch. 583; 177 L.T. 117), affirmed.

[AS TO DUTIES ON FOREIGN PROPERTY, see HALSBURY, Hailsham Edn., Vol. 13, pp. 246-248, paras. 237, 238; and FOR CASES, see DIGEST, Vol. 21, p. 17, Nos. 89-96.]

Cases referred to:

- (1) *Re Cartwright*, [1938] 4 All E.R. 209; [1939] Ch. 90; 159 L.T. 538; Digest Supp.
- (2) *Re Cutcliffe's Will Trusts*, [1940] 2 All E.R. 297; [1940] Ch. 565; 163 L.T. 284; 2nd Digest Supp.
- (3) *Re Mackenzie*, [1940] 4 All E.R. 310; [1941] Ch. 69; 164 L.T. 375; 2nd Digest Supp.
- (4) *Re Stoughton*, [1941] I.R. 166; 2nd Digest Supp.
- (5) *Marlborough (Duke) v. A.-G.* (No. 2), [1945] Ch. 145; 2nd Digest Supp.

APPEAL from a decision of the Court of Appeal, dated June 10, 1947, and reported [1947] 2 All E.R. 134, affirming a decision of ROXBURGH, J., dated Jan. 28, 1947, and reported [1947] 1 All E.R. 345.

ROXBURGH, J., held that investments in the United Kingdom representing the proceeds of sale of land situate in Eire and subject to the trusts of an Irish settlement were not property situate out of the United Kingdom, and were liable to estate duty. That decision was affirmed by the Court of Appeal. The House of Lords now affirmed the decision of the Court of Appeal, but found it unnecessary to decide whether the Settled Land Act, 1882, s. 22 (5), had any operation in regard to the English investments, because, even if it had some operation, it could not, in their Lordships opinion, have the operation contended for, namely, to convert the English securities into Irish land for fiscal purposes. The facts appear in the opinion of LORD SIMONDS.

Upjohn, K.C., and *D. Buckley* for the appellant, the life tenant.

Sir Frank Soskice, K.C., S.-G., and *J. H. Stamp* for the Attorney-General.
N. C. Armitage for the trustees of the settlement.

The House took time for consideration.

Apr. 8. The following opinions were read.

LORD SIMONDS: My Lords, this appeal raises a question which is said to be of general importance and to affect other cases than that which your Lordships have to consider. It concerns the right of the Crown to levy estate duty on English investments which represent the proceeds of sale of Irish land settled by an admittedly Irish settlement. This right which has been established by the decision of ROXBURGH, J., and the Court of Appeal is challenged on this appeal.

The relevant facts are simple and not in dispute. By an indenture dated

May 15, 1909, and made between the late Earl of Middleton, of the first part, the appellant, the present Earl of Middleton, of the second part, the Rt. Hon. Madeleine Cecilia Carlyle Viscountess Middleton, of the third part, and the Hon. Arthur Grenville Brodrick and the Hon. Thomas Francis Fremantle (now Lord Cottesloe), of the fourth part, certain mansion houses and lands at Middleton in the county of Cork and other lands and hereditaments in that part of Ireland which is now known as Eire over which the late Earl of Middleton and the appellant had a general power of appointment were appointed and settled to the use of the trustees thereof for a term of 1,500 years on trust to raise a certain capital sum (which does not affect the investments now in question) and subject thereto on trust that the said trustees might, during the joint lives of the late earl and the appellant, receive a rentcharge of the amount (in an event which happened before the death of the late earl) of £700 per annum on trusts thereby declared for the benefit of the appellant and subject thereto to the use of the late earl during his life, with remainder (subject to certain family charges) to uses under which the appellant is now tenant for life in possession (such life estate being determinable in the events therein mentioned) with remainders over. The respondents, the Rt. Hon. Thomas Francis Baron Cottesloe and Sir Henry Charles Lloyd, are the present trustees of the settlement for the purposes of the Settled Land Acts, 1882-1890, having been appointed by a deed dated Nov. 1, 1935. Since the date of the settlement and in the lifetime of the late earl, various sales of lands comprised in the settlement were effected, both under the Settled Land Acts, 1882-1890, and under the Irish Land Purchase Acts. Parts of the proceeds of such sales were invested by the trustees of the settlement in the purchase, in their names, of inscribed or registered stocks or shares transferable in the books of the Bank of England or on registers kept in England. They were of an approximate value of £90,000. The late earl died on Feb. 13, 1942, domiciled in England. The appellant was also then, and still is, domiciled in England. On the death of the late earl a conflict of opinion arose between the revenue authorities of England and Eire respectively. The English authorities claimed estate duty on the investments as being property situate in England which had passed under the dispositions of the settlement on the death. The Eire authorities contended, on the other hand, that, having regard to the origin of the investments and the provisions of s. 22 (5) of the Settled Land Act, 1882, the investments were for fiscal purposes to be treated as if they were lands situate in Eire, and, consequently, they were not subject to English estate duty, and they refused relief under the Double Taxation (Relief) Order, 1926 (Irish) (S.R. & O., 1926, No. 42), unless the claim of the English revenue authorities should have been affirmed by the English Court. Accordingly, the respondent trustees issued an originating summons in the Chancery Division to which the Attorney-General and the appellant, the present earl, were defendants, to have determined the question which is now before the House.

The Settled Land Act, 1882, s. 22 (5), is in the following terms :

Capital money arising under this Act while remaining uninvested or unapplied, and securities on which an investment of any such capital money is made, shall, for all purposes of disposition, transmission, and devolution, be considered as land, and the same shall be held for and go to the same persons successively, in the same manner and for and on the same estates, interests, and trusts, as the land wherefrom the money arises would, if not disposed of, have been held and have gone under the settlement.

The Settled Land Act, 1882, has been repealed *in toto* by the Settled Land Act, 1925, which extends only to England and Wales, but it is still in force in Eire in circumstances which in another case may demand closer examination.

To succeed in his claim the appellant must, as it appears to me, establish

two propositions :—(a) that the provisions of s. 22 (5) of the Settled Land Act, 1882, are still operative as an Act of the Imperial Parliament in regard to English investments representing the proceeds of sale of Irish land, and (b) that, being so operative, they have the effect for fiscal purposes of converting such proceeds from securities situate within the United Kingdom to land situate in Ireland. In my opinion, the appellant fails to establish the second of these propositions, and it becomes unnecessary to determine the first of them.

On the second point, on which I concur in, and can really add nothing to, the judgment of the MASTER OF THE ROLLS, I see no reason why the words “including fiscal purposes” should be read into the section after the word “devolution.” I refer to the necessity of reading such words into the section, for it seems to me clear that by themselves the words “for all purposes of disposition, transmission and devolution” do not naturally include a purpose which only arises under a taxing Act. Moreover, it appears to me that the context in which these words are to be found, *viz.*, the following sentence, in which the beneficial interests of successors are dealt with, lends support to the view that it is only with the right of beneficiaries in regard to disposition, transmission and devolution that the sub-section is dealing. It would, further, be an anomalous result if, in a statute which does not profess to bind, and clearly does not bind, the Crown, the words “for fiscal purposes,” which vitally affect the Crown, were by some implication to be read into the section. Learned counsel for the appellant, whose argument lacked nothing in clarity and cogency, urged on your Lordships that the fiscal burden which is imposed on the “passing” of property by the Finance Act, 1894, is an incident of transmission, and, further, that the provision that capital money is to be enjoyed “in the same manner” as “the land wherefrom the money arises” indicates that it is to be subject to the same fiscal burden, but I hope I do not dismiss the argument too lightly if I say that the relevant words mean just what they say and no more, and that there is no justification for implying other words which, more than most words, demand explicit expression.

Reliance was placed on certain cases, but (with one exception) they do not appear to me to support the appellant's contention. Neither in *Re Cartwright* (1), nor in *Re Cutcliffe's Will Trusts* (2), nor in *Re Mackenzie* (3), was the question now under consideration relevant, and I do not think it necessary to consider whether they were rightly decided. The exception to which I refer is the Irish case of *Re Stoughton* (4). Like the learned MASTER OF THE ROLLS, I must regret that I cannot accept the view of the learned judges who decided that case, but it would seem from the report that they did not have the advantage of a full argument on the point. The appellant failing to establish the second of his propositions, that is an end of the matter and I do not think it necessary to discuss the first proposition. On this, too, the decision of both ROXBURGH, J., and the Court of Appeal was adverse to him. It was conceded that, unless the Settled Land Act, 1882, is still in force, not only in Eire as an Act deriving its validity from art. 73 of the Constituent Act which is scheduled to the Irish Free State Constitution Act, 1922 (Session 2), but also in England as an Act of the Imperial Parliament, it cannot have any operation in regard to English investments. I will say no more than that grave, if not overwhelming, difficulties appear to me to lie in the way of the contention that at any time since the Irish Free State Constitution Act, 1922 (Session 2), came into force any Act which by art. 73 of the Constituent Act thereafter remained in force in Eire could have any extra-territorial operation so as to affect English investments, but I do not think it necessary finally to decide a question which, no doubt, raises a nice constitutional problem. I move that the appeal be dismissed with costs.

LORD DU PARCQ : My Lords, I concur in the opinion which has been delivered, and in the motion proposed.

LORD NORMAND : My Lords, I also concur.

LORD MORTON OF HENRYTON : My Lords, it is plain that the question raised by the originating summons must be answered in the affirmative if your Lordships come to the conclusion that the incidence of death duties is not one of the "purposes of disposition, transmission, and devolution" with which alone s. 22 (5) of the Settled Land Act, 1882, is concerned. For my part, I do not doubt that this is the correct conclusion. The sub-section carefully limits the purposes for which capital money and investments thereof are to be considered as land, and, in my view, the appellant is really asking this House to give no effect to the limiting words "of disposition, transmission, and devolution," no one of which aptly applies to the incidence of death duties. I think that, if the legislature had intended the sub-section to have any effect on questions of death duties, the words just quoted would have been omitted, or a fourth "purpose," referring expressly to death duties, would have been inserted. I need not further elaborate my reasons for thinking that the appeal fails on this first point, as I am in substantial agreement with the views expressed thereon by the Court of Appeal. As to the cases relied on by counsel for the appellant, I do not think he can derive any real assistance from any of the observations of SIR WILFRID GREENE, M.R., in *Re Cartwright* (1) or of myself in *Re Outcliffe* (2). These observations were not directed to any question of death duties. Nor can counsel rely on the concession made by the Crown, in very special circumstances, in *Duke of Marlborough v. A.-G.* (5). With all respect to HANNA, J., I cannot accept as correct his observations as to the construction of s. 22 (5) in *Re Stoughton* (4). It does not appear from the report that the learned judge had had the assistance of argument upon this point. As the appellant fails on this first and vital point, it is unnecessary to arrive at a conclusion on the other very ingenious arguments advanced by counsel for the appellant. I concur in the motion proposed.

LORD SIMONDS : My noble and learned friend, **LORD REID**, who is unable to be here today, has asked me to say that he concurs in the opinion which I have read.

Appeal dismissed with costs.

Solicitors : *Warrens* (for the appellant, and the respondent trustees) ; *Solicitor of Inland Revenue* (for the Attorney-General).

[*Reported by* C. ST. J. NICHOLSON, Esq., *Barrister-at-Law.*]

NOTE.

G PESQUERIAS Y SECADEROS DE BACALAO DE ESPANA S.A.
v. BEER.

[HOUSE OF LORDS (Lord Porter, Lord Simonds, Lord du Parc, Lord Normand and Lord Morton of Henryton), January 11, 12, 13, 14, 17, 18, April 8, 1949.]

H Marine Insurance—War risks—Exclusion—Civil war—Liability of underwriters.

APPEAL by shipowners from a decision of the Court of Appeal (LORD GREENE, M.R., SOMERVELL, L.J., and ROMER, J.) dated Feb. 20, 1947, reversing a decision of ATKINSON, J., dated May 2, 1946, in an action in which the appellants sued the respondent, a representative underwriting member of Lloyds, on a policy of insurance, in respect of the loss of or damage to four fishing trawlers seized by the republican government of Spain during the Spanish civil war.

The appellants, a Spanish company, owned a fleet of fishing trawlers operating from Pasajes, a port in the Basque provinces of Spain, near San Sebastian. On July 6, 1936, they entered into an insurance policy with Lloyds' underwriters against the loss of or damage to the trawlers and their gear "caused by . . . civil commotions or arising from incendiarism . . . or from any other malicious act whatsoever by any persons, including general average, salvage and salvage charges as a direct result of malicious damage not recoverable under the marine policies. Excluding war risk and excluding all other risks ordinarily covered under the vessels' marine policy." In 1936 a new government was elected in Spain which met with opposition culminating in July in a military uprising headed by a number of generals including General Mola who was in command of the army in the Basque provinces. The government, unable to rely on the regular army, were forced to depend for support on civilians enrolled from the various political parties, who were badly equipped and without uniforms. Fighting took place around San Sebastian and General Mola was nearing the town when, on Aug. 6, one of the appellants' trawlers was seized by government supporters on the authority of the local governor and taken to Bilbao where it was handed over to the governor of that area and used for patrolling the coast. Subsequently, the remainder of the appellants' trawlers were seized and sailed from Pasajes to Bilbao carrying government refugees, both military and civilian, and equipment. On Sept. 8 General Mola captured Pasajes. In October the government formally requisitioned the appellants' vessels, armed them and used them for patrol work. Finally, Bilbao was captured by General Mola. Two of the appellants' trawlers escaped to Bordeaux whence they were ultimately recovered by the appellants; a third, unable to escape from Bilbao, was scuttled, but was subsequently raised and returned to the appellants; and a fourth was sunk by a rebel cruiser.

In a claim under the policy the appellants submitted that in August and September, 1936, the time of the loss or damage, a state of civil war did not exist in the Basque provinces in Spain and that their claim was, therefore, not defeated by a clause in the policy excluding war risk. ATKINSON, J., gave judgment in their favour, but his decision was reversed by the Court of Appeal. In the House of Lords (which dismissed the appellants' appeal), it was further argued that "war" in the phrase "excluding war risk" in the policy did not include civil war.

[AS TO WAR RISKS, see HALSBURY, Hailsham Edn., Vol. 18, p. 314, para. 439; and FOR CASES, see DIGEST, Vol. 29, pp. 226-230, Nos. 1836-1861.]

Cases referred to :

- (1) *Curtis & Sons v. Mathews*, [1918] 2 K.B. 825; 119 L.T. 78; *affmd.*, [1919] 1 K.B. 425; 120 L.T. 154; 29 Digest 315, 2597.
- (2) *Bolivia Republic v. Indemnity Mutual Marine Assurance Co., Ltd.*, [1909] 1 K.B. 785; 100 L.T. 503; 29 Digest 219, 1759.
- (3) *Cooper v. General Accident, Fire & Life Assurance Corpn., Ltd.*, (1923), 128 L.T. 481; 29 Digest 418, 3266.
- (4) *Motor Union Insurance Co., Ltd. v. Boggan*, (1923), 130 L.T. 588; 29 Digest 418, 3267.
- (5) *London and Lancashire Fire Insurance Co., Ltd. v. Bolands, Ltd.*, [1924] A.C. 836; 131 L.T. 354; 29 Digest 419, 3268.

Sir Robert Aske, K.C., *Sir Valentine Holmes, K.C.*, and *A. J. Hodgson* for the appellants.

Pritt, K.C., and *Eustace Roskill* for the respondent.

THEIR LORDSHIPS held: (i) on the facts, a civil war was in existence in the Basque provinces when the trawlers were seized, the action of General Mola being intended to overthrow the recognised government by force, and

the government supporters, although without uniform, nevertheless, constituting an organised force recognised by the government.

(ii) the evacuation of refugees from Pasajes, including, as it did, military personnel, was an operation of war.

On the third point, on which their LORDSHIPS approved *Curtis & Sons v. Mathews* ([1919] 1 K.B. 425 ; 120 L.T. 154),

A LORD PORTER : Finally, it was argued that civil war was not excepted from the risk on the ground that the words " war risk " did not include war between nationals of the same country. So far as the Court of Appeal was concerned, that argument was untenable, the contrary having been decided in *Curtis & Sons v. Mathews* (1). Before your Lordships three cases were cited dealing with the disturbances in Ireland in the early nineteen twenties. Their names are set out in the speech about to be delivered by LORD MORTON OF HENRYTON, and, as he says, the sole question at issue in those cases was whether the loss was due to theft or to riot and civil commotion. The question of war, civil or otherwise, was never raised. Like the noble Lord, I see no reason for refusing to include civil war under the expression " war-risk." I would dismiss the appeal with costs.

C LORD SIMONDS, LORD DU PARCQ, and LORD NORMAND concurred.

LORD MORTON OF HENRYTON : Counsel for the appellants submitted that the word " war " in the phrase " excluding war risk " in the policy of July 6, 1936, ought not to be construed as including civil war. If, however, this first submission should fail, he submitted, secondly, that there was no civil war in Spain at the relevant times and places. In support of his second submission he relied on certain authorities to which I shall presently refer. The first submission was not put forward in the Court of Appeal as it was thought that that court was bound by the decision of ROCHE, J., in *Curtis v. Mathews* (1) approved by the Court of Appeal. Counsel, however, contended that the decision in *Curtis v. Mathews* (1) turned on the word " bombardment " and, alternatively that the decision was wrong if and so far as it was a decision that the word " war " in a policy *prima facie* includes civil war. I desire to say quite plainly that, in my view, the word " war " in a policy of insurance includes civil war unless the context makes it clear that a different meaning should be given to the word. There is no such context in the policy now under consideration. I can see no good reason for giving to the word " war " a meaning which excludes one type of war. It is, therefore, unnecessary to analyse the reasons which led the Court of Appeal to its conclusion, with which I agree, in *Curtis v. Mathews* (1).

In making his second submission, counsel conceded that there was ultimately a civil war in Spain, but contended that there was no civil war in the neighbourhood of Pasajes or San Sebastian, either on Aug. 6, 1936, when the Mistral was seized or on the date, early in September, 1936, when the Vendaval, the Hispania and the Euskal-Erria were seized. In each case, he contended, the seizure, and the consequent loss or damage to the appellants, was caused by " riot or civil commotion," within the meaning of the policy. It is, of course, not unusual to find civil war preceded by rioting and civil commotion, and it may well be very difficult to decide when the stage of civil war has been reached. The difficulty is well illustrated by *Bolivia Republic v. Indemnity Mutual Marine Assurance Co., Ltd.* (2). In the present case, however, I entertain no doubt that there was civil war in the relevant area before Aug. 6, 1936, and that this civil war was the proximate cause of the ships being seized and taken to Bilbao. I shall not take up your Lordships' time by giving my reasons for this view, as I cannot improve on the reasoning set out in the judgments of LORD GREENE, M.R., and SOMERVELL, L.J. It may, however, be desirable that I should say a few words about three decisions of this House,

relied on by counsel for the appellants, which are not mentioned in these judgments. They are *Cooper v. General Accident, Fire and Life Assurance Corp'n., Ltd.* (3), *Motor Union Insurance Co., Ltd. v. Boggan* (4) and *London and Lancashire Fire Insurance Co., Ltd. v. Bolands, Ltd.* (5). In *Cooper's* case (3) a car was taken from the owner's garage in co. Cork in October, 1920; in *Boggan's* case (4) a car was seized by four armed men while it was in the care of the owner's chauffeur in co. Wexford in November, 1920; and in the last-mentioned case four armed men entered the City of Dublin Bakery in June, 1921, held up the employees with revolvers, and took £1,250 cash from the cashier's office. Counsel argued that the circumstances in which the ships were taken in the present case bore a strong resemblance to the circumstances in which, for instance, the car was taken in *Cooper's* case (3), having regard to the state of affairs in Southern Ireland in 1920 and the purpose for which the car was taken. In none of these three cases, however, was it suggested that the loss was due to civil war. Your Lordships' House had to choose in each case between theft on the one hand and riot or civil commotion on the other hand, as the cause of the loss to the assured, and in each case the cause was held to be riot or civil commotion. This being so, it would, I think, serve no useful purpose to point out the differences between the surrounding circumstances in these three cases and the surrounding circumstances in the present case. I agree that this appeal fails.

Appeal dismissed with costs.

Solicitors: *Thomas Cooper & Co.* (for the appellants); *Ince & Co.* (for the respondents).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

GILMOUR v. COATS AND OTHERS.

[HOUSE OF LORDS (Lord Simonds, Lord du Parc, Lord Normand, Lord Morton of Henryton, and Lord Reid), January 26, 27, 31, February 1, 2, April 8, 1949.]

Charitable Purpose—Advancement of religion—Public benefit—Carmelite convent—Association of strictly cloistered and purely contemplative nuns.

The income of a trust fund was to be applied to the purposes of a Carmelite convent, if those purposes were charitable. The convent comprised an association of strictly cloistered and purely contemplative nuns who devoted themselves entirely to worship, prayers and meditation and engaged in no activities for the benefit of anyone outside their own association. They were regarded, however, in the Roman Catholic Church as causing, by means of their private worship, prayers and meditations, the intervention of God to bring about the spiritual improvement of members of the public (both Catholic and non-Catholic) outside the convent, and also as providing an example of self-denial and concentration on religious matters which was of spiritual benefit to the public. The question was whether the gift would involve public benefit, so as to be a valid charitable trust. It was contended on behalf of the convent (a) that, since the evidence in this case established that in the belief of the Roman Catholic community the prayers of the sisters of the convent and the sanctity of their lives brought Divine Grace on mankind in general and Roman Catholics in particular, this belief should be accepted by the court as true for the purpose of establishing public benefit; (b) that the sisters, by the holiness of their lives, afforded such measure of edification by example as to provide the requisite public benefit; (c) that the element of public benefit was also to be found in the fact that qualification for admission to membership of the community was not

limited to any group of persons but was open to any Roman Catholic woman who had the necessary vocation.

HELD : (i) the decision in *Cocks v. Manners* (1871) (L.R. 12 Eq. 574 ; 24 L.T. 869) that a gift to a community which was similar to the Carmelite convent in this case was not a gift on a charitable trust as it lacked the element of public benefit had for so long been followed and was so well established that it could not now be repudiated unless a radical change of circumstances, established by sufficient evidence, should compel the court to accept a new view on the matter, and no such change of circumstances had been so established.

(ii) though the advancement of religion was, generally speaking, one of the heads of charity, it did not follow that the court must accept as proved whatever a particular church believed, and a gift to cloistered nuns in the belief that their prayers would benefit the world at large did not derive validity from that belief alone any more than did the belief of any other donor for any other purpose : *Re Hummeltenberg* ([1923] 1 Ch. 237 ; 129 L.T. 124) approved ; the court could only act on proof, and no temporal court of law could determine the truth of any religious belief ; and, therefore, since the purpose of a trust must be one which the court itself could determine, the court was not entitled to accept and act on the belief of the Roman Catholic Church that the spiritual benefit to mankind flowing from intercessory prayer was sufficient to establish the necessary element of public benefit.

(iii) the benefit to be derived by others from the example of pious lives was something too vague and intangible to satisfy the test of public benefit.

(iv) as the law was disabled from recognising any public benefit resulting from the existence of the community, the fact that admission to membership was open to any Roman Catholic woman having the necessary vocation did not provide the element of public benefit to make the gift a valid charitable gift.

Decision of the Court of Appeal ([1948] 1 All E.R. 521 ; [1948] Ch. 340) affirmed.

[AS TO RELIGIOUS PURPOSES, see HALSBURY, Hailsham Edn., Vol. 4, pp. 118-122, paras. 155-160 ; and FOR CASES, see DIGEST, Vol. 8, pp. 248-254, Nos. 74-160, and Supplements.]

Cases referred to :

- (1) *Bourne v. Keane*, [1919] A.C. 815 ; 121 L.T. 426 ; 8 Digest 250, 106.
- (2) *National Anti-Vivisection Society v. Inland Revenue Comrs.*, [1947] 2 All E.R. 217 ; [1948] A.C. 31 ; 177 L.T. 226 ; 2nd Digest Supp.
- (3) *Cocks v. Manners*, (1871), L.R. 12 Eq. 574 ; 24 L.T. 869 ; 36 J.P. 244 ; 8 Digest 248, 75.
- (4) *Re White*, (1893), 2 Ch. 41 ; 68 L.T. 187 ; 8 Digest 249, 39.
- (5) *Dunne v. Byrne*, [1912] A.C. 407 ; 106 L.T. 394 ; 8 Digest 294, 718.
- (6) *Re Caus*, [1934] Ch. 162 ; 150 L.T. 131 ; Digest Supp.
- (7) *A.-G. v. Hall*, [1897] 2 I.R. 426 ; 8 Digest 251, *t*.
- (8) *O'Hanlon v. Logue*, [1906] 1 I.R. 247 ; 8 Digest 251, *a*.
- (9) *Munster and Leinster Bank v. A.-G.*, [1940] I.R. 19 ; 2nd Digest Supp.
- (10) *Maguire v. A.-G.*, [1943] I.R. 238 ; 2nd Digest Supp.
- (11) *Re Keogh*, [1945] I.R. 13.
- (12) *Re Hummeltenberg*, [1923] 1 Ch. 237 ; 129 L.T. 124 ; Digest Supp.
- (13) *A.-G. v. Delaney*, (1875), I.R. 10 C.L. 104.
- (14) *Re Cranston*, [1898] 1 I.R. 431 ; 8 Digest 259, 214*i*.
- (15) *Hoare v. Hoare*, (1886), 56 L.T. 147 ; 8 Digest 264, 262.
- (16) *Charities Comrs. v. M'Cartan*, [1917] 1 I.R. 388 ; 8 Digest 276, *a*.

APPEAL by the prioress of the Carmelite Priory, St. Charles Square, Notting Hill, London, from a decision of the Court of Appeal (LORD GREENE, M.R.,

ASQUITH and EVERSLED, L.JJ.), dated Mar. 9, 1948, and reported *sub nom. Re Coats' Trusts, Coats v. Gilmour*, [1948] 1 All E.R. 521, affirming an order of JENKINS, J., dated July 16, 1947, and reported [1947] 2 All E.R. 422.

The trustees of a declaration of trust took out a summons to determine whether the purposes of a Carmelite convent were charitable purposes within the legal definition of charity. The nuns of the convent belonged to one of the strictly cloistered and purely contemplative orders of the Roman Catholic Church. JENKINS, J., held that the purposes of the convent were not charitable purposes and his judgment was upheld by the Court of Appeal. The appeal of the prioress from the decision of the Court of Appeal was now dismissed by the House of Lords. The facts appear in the opinion of LORD SIMONDS.

Russell, K.C., and *Hewins* for the prioress.

Gray, K.C., and *Humphrey King* for the Converts' Aid Society.

The House took time for consideration.

Apr. 8. The following opinions were read.

LORD SIMONDS : My Lords, the appellant, Ethel Gilmour, is the present prioress of the Carmelite Priory of St. Charles Square, Notting Hill, London. In that capacity she appeals against a judgment of the Court of Appeal whereby that court dismissed an appeal from a judgment of JENKINS, J., who had in effect declared the purposes of the Carmelite Priory not to be charitable in the technical sense which the law ascribes to that word. The question arises in this way. By a declaration of trust made on June 10, 1946, between the respondent, Evelyn Dudley Coats, of the one part, and herself and George Bellow (therein called "the trustees"), of the other part, a sum of £500 cash was settled on trust, after payment of costs, for investment as therein mentioned and to hold the resulting trust fund :

"... upon trust, if the purposes of the Roman Catholic community situate and known as the Carmelite Priory, St. Charles Square, Notting Hill, in the county of London, are charitable to apply the income of the trust fund to all or any such purposes ... but if the purposes of the said community are not charitable then upon trust to apply the trust fund to all or any of the purposes of the Converts Aid Society of 20, Holmes Road, Twickenham, Middlesex."

This settlement was admittedly made for the purpose of raising the question which has now reached this House. Accordingly, within a short time an originating summons was issued in the Chancery Division by the trustees, to which the prioress and certain persons representing the Converts Aid Society, who are the present respondents, were made defendants, asking how the trustees ought to apply the income of the trust fund. The question, though framed in this general way, was intended to raise the issue whether the purposes of the Carmelite Priory were charitable. For it was clear that the settlement created a perpetuity in favour of that community, so that, if the purposes were not charitable, the gift over in favour of the Converts Aid Society would take effect.

What, then, were the purposes of this Carmelite Priory, which I will sometimes refer to as "the convent" or "the community" ? On this matter evidence was given by the prioress herself and by His Eminence Cardinal Griffin, the Roman Catholic Archbishop of Westminster. This evidence is stated at length in the very careful judgment of JENKINS, J., and I will refer to certain salient features of it. The whole of it has been carefully considered by the House. It appears that this community is one of the communities of the Discalced Nuns of the Order of Our Blessed Lady of Mount Carmel, and that the Discalced Friars and Nuns have been a separate branch of the order under the jurisdiction of their own Father General since the General Chapter of the whole order held at Cremona in 1593. They were founded by St. Theresa of Avila with the

object of restoring the strict enclosure and intensifying the contemplative life of the communities and promoting their share in the apostolate. The first convent of nuns was founded by her at Avila in 1562. The convent here in question was founded in 1878 from the Convent of the Incarnation in Paris and from it 33 other convents have been founded in England, Scotland and Wales. The Discalced Carmelite Nuns throughout the world follow the Primitive Rule, which was drawn up by St. Albert Patriarch of Jerusalem and confirmed by Pope Innocent IV in 1247, and the Constitutions of 1591, as modified in 1926 to bring them into conformity with the new code of canon law of the Roman Catholic Church. Each Carmelite convent consists of not more than 20 or 21 nuns who live in community and are presided over by a prioress. Each convent is autonomous and all are subject to the jurisdiction of the General of the Discalced Carmelite Friars or of the local bishop. The purposes of the nuns are conveniently summarised in the prologue to the Constitutions of the Discalced Carmelite Friars which states :

“ . . . two vocations in their due order have been distinctly ordained.

The more important aim of our life shall be the love and contemplation of divine things and the secondary aim the apostolate, particularly all that pertains to our neighbours' salvation.”

The nuns take vows of perpetual poverty, chastity and obedience and live under rules which impose and regulate the strict enclosure and observance of silence, which are said to be the conditions of the true and fruitful following of the contemplative life. So, too, their rules prescribe the occupations which are to fill their lives. They must assist devoutly and every day at the celebration of the mass and the recital of the Divine Office and other offices and prayers of the Church, must spend so many hours a day in mental prayers which are offered with general or special intentions in furtherance of their aims, must never be idle but must spend all the time that is not occupied in community duties in prayer or spiritual reading or work in their cells. Further, the rules prescribe practices to further the spirit of humility and particular mortifications, as, for example, a monastic fast lasting from Sept. 14 to Easter, and the prohibition throughout their lives of those aids to comfort which by ordinary women are regarded as necessities rather than luxuries of life.

This, then, is the life which it is the purpose of this community to promote in the women who join it. Is it a charitable purpose and is a trust for its furtherance a charitable trust ? The community does not engage in—indeed,

it is by its rules debarred from—any exterior work, such as teaching, nursing, or tending the poor, which distinguishes the active branches of the same order. A Catholic woman, it is said, joins such a contemplative order as this to promote in herself more fully and perfectly the love of God, expressed in as perfect a submission to His will as she can achieve with the help of His Grace, to promote that love in her neighbour and to make reparation to God for the sins of man-

kind. It is the teaching of the Church that the religious life thus led is, as it is called, “ the state of perfection.” But it is not a complete statement of their purpose to say that it is merely to work out their own salvation. For it is the established belief of the Roman Catholic Church, as appears from the Apostolic Constitution “ *Umbratilem* ”, that the prayers and other spiritual penances and exercises, in which the nuns engage for the benefit of the public, in fact

benefit the public by drawing down on them grace from God, which enables those who are not yet Christians to embrace the Christian religion and those who are already Christians to practice Christianity more fully and fruitfully, and, further, that the prayers and other spiritual exercises of the nuns are the more efficacious by virtue of the fact that they devote their lives with especial devotion to the service of God. It is this benefit to all the world, arising from the value of their intercessory prayers, that the prioress puts in the forefront of her case in urging the charitable purpose of the trust. Nor

is it only on the intercessory value of prayer that the prioress relies for the element of public benefit in the lives of the nuns. For it is the evidence of Cardinal Griffin—and I do not pause to ask whether it is evidence of fact or opinion—that the practice of the religious life by the Carmelite nuns and other religious is a source of great edification to other Catholics—and, indeed, in innumerable cases to non-Catholics—leading them to a higher estimation of spiritual things and to a greater striving after their own spiritual perfection, and that the knowledge that there are men and women who are prepared to sacrifice all that the worldly in man holds dear in order to attain a greater love of God and union with Him inculcates in them a greater estimation of the values and importance of the things which are eternal than they would have if they had not these examples before them. Here, then, is the second element of public benefit, on which the prioress relies, the edification of a wider public by the example of lives devoted to prayer.

I will reserve for final consideration an argument which was not urged in the courts below—that the trusts declared by the settlement are beneficial to the public in that qualification for admission to the community is not limited to any private group of persons, but any person being a female Roman Catholic may be accepted, and, therefore, those trusts provide facilities for the intensified and most complete practice of religion by those members of the public who have a vocation for it. Your Lordships were reluctant to listen to an argument on which you have not the advantage of the opinions of the learned judges in the courts below, but in the special circumstances of this case thought fit to admit it.

I turn then to the question whether, apart from this final consideration, the prioress has established that there is in the trusts which govern this community the element of public benefit which is the necessary condition of legal charity. If now for the first time the necessity for determining that question arose, it might be a more difficult one to answer than it now appears to me to be. But, my Lords, when I consider the law of charity, its origin and the manner of its development, when I find that, though communities such as this have existed over a considerable period and their charitable character has been rarely advocated and never sustained, I do not think that it is possible to open the door and admit them to the house of charity unless there is some novel and compelling reason for doing so.

When I speak of the law of charity, I mean that law which the Court of Chancery and its successor, the High Court of Justice, has evolved from a consideration of the statute 43 Eliz., c. 4. It is a commonplace that that statute, as its title implied, ["An Act to redress the misemployment of lands, goods and stocks of money heretofore given to certain charitable uses."], was directed not so much to the definition of charity as to the correction of abuses which had grown up in the administration of certain trusts of a charitable nature. But from the beginning it was the practice of the court to refer to the preamble of the statute in order to determine whether or not a purpose was charitable. The objects there enumerated and all other objects which by analogy "are deemed within its spirit and intendment," and no other objects, are in law charitable. This is settled and familiar law. I refer to it for two reasons. First, I think that it follows that, however valuable an investigation of the earlier law may be for determining the legality of religious practices (as was shown in *Bourne v. Keane* (1)), it is of negligible importance for determining whether an object is charitable. Three hundred and fifty years have passed since the statute became law; few, if any, subjects have more frequently occupied the time of the court. In the law of mortmain, the law of perpetuity, and in latter days the revenue law, in all these aspects it has over and over again been the vital issue whether or not an object is charitable, and always it is primarily to the statute of Elizabeth and not behind it that the court has looked for guidance.

This leads me to my second reason. A great body of law has thus grown up. Often it may appear illogical and even capricious. It could hardly be otherwise when its guiding principle is so vaguely stated and is liable to be so differently interpreted in different ages. But, be that as it may, I suppose that, if there was any question on which in this branch of the law an answer based on authority could confidently be given, it would be the question whether a gift to a community such as this was a gift for charitable purposes. This is no question of a patent misinterpretation of a statute. If it were, following *Bourne v. Keane* (1), I might not hesitate to say that a new departure should be made. But it is far otherwise. It is a matter in which the court has consistently over a long period of time, acting on those principles which it has laid down for its own guidance, held that a particular object is not charitable. I do not seek to qualify what I recently said in *National Anti-Vivisection Society v. Inland Revenue Comrs.* (2) that there may be circumstances in which the court will in a later age hold an object not to be charitable which has in earlier age been held to possess that virtue. And the converse case may be possible. That degree of uncertainty in the law must be admitted, but I would ask your Lordships to say that it is only a radical change of circumstances established by sufficient evidence that should compel the court to accept a new view of this matter. Let me then examine briefly the law as it is today and, having done so, ask what are the compelling reasons for a change.

I need not go back beyond *Cocks v. Manners* (3), which was decided nearly eighty years ago by WICKENS, V.-C. In that case the testatrix left her residuary estate between a number of religious institutions, one of them being the Dominican Convent at Carisbrooke, a community not differing in any material respect from the community of nuns now under consideration. The learned judge, who was, I suppose, as deeply versed in this branch of the law as any judge before or since (for he had been for many years junior counsel to the Attorney-General in equity cases), used these words (L.R. 12 Eq. 585) which I venture to repeat, though they have already been cited in the courts below :

“On the Act [the statute of Elizabeth] unaffected by authority I should certainly hold that the gift to the Dominican convent is neither within the letter nor the spirit of it ; and no decision has been referred to which compels me to adopt a different conclusion. A voluntary association of women for the purpose of working out their own salvation by religious exercises and self-denial seems to me to have none of the requisites of a charitable institution, whether the word ‘charitable’ is used in its popular sense or in its legal sense. It is said, in some of the cases, that religious purposes are charitable, but that can only be true as to religious services tending directly or indirectly towards the instruction or the edification of the public ; an annuity to an individual, so long as he spent his time in retirement and constant devotion, would not be charitable, nor would a gift to ten persons, so long as they lived together in retirement and performed acts of devotion, be charitable. Therefore the gift to the Dominican convent is not, in my opinion, a gift on a charitable trust.”

No case, said the learned Vice-Chancellor, had been cited to compel him to come to a contrary conclusion, nor has any such case been cited to your Lordships. Nor have my own researches discovered one. But since that date the decision in *Cocks v. Manners* (3) has been accepted and approved in numerous cases. They are referred to in the judgment of JENKINS, J., and I need only remind your Lordships, first, that LINDLEY, L.J., in *Re White* (4) used these words ([1893] 2 Ch. 51) :

“A society for the promotion of private prayer and devotion by its own members, and which has no wider scope, no public element, no purposes of general utility, would be a ‘religious’ society, but not a ‘charitable’ one : see *Cocks v. Manners* (3).”

—and, secondly, that in *Dunn v. Byrne* (5) ([1912] A.C. 410) LORD MACNAGHTEN, in delivering the judgment of the Privy Council, referred to *Cocks v. Manners* (3) as the exemplar of a case in which the purpose would be considered by a devout Catholic to be “conducive to the good of religion” but which is “certainly not charitable.”

I have thus stated the law as it was universally accepted in case-law (except in some recent Irish cases) and also in all text-books of authority at the date when these proceedings were begun, and I now ask what is the argument on which your Lordships are invited to unsettle it. Apart from what I have called the final argument, which I will deal with later, the contention of the prioress rests, not on any change in the lives of the members of such a community as this, nor, from a wider aspect, on the emergence of any new conception of the public good, but solely on the fact that for the first time certain evidence of the value of such lives to a wider public together with new arguments based on that evidence has been presented to the court. Never before, it was urged, has the benefit to be derived from intercessory prayer and from edification been brought to the attention of the court; if it had been, the decision in *Cocks v. Manners* (3) would, or, at least, should, have been otherwise. I have examined the records of *Cocks v. Manners* (3) which were supplied to me by the Record Office and I find that the case has been fully and accurately reported. There was no such evidence as was adduced in this case by the prioress and Cardinal Griffin. Nor, as appears from the report, was any argument addressed to this specific point nor any judgment on it. What weight is to be attributed to this, which is the mainstay of the prioress's case? To me, my Lords, despite the admirable argument of counsel for the prioress, the weight is negligible. True it is that WICKENS, V.-C., emphasised that aspect of the religious life which is admittedly its more important aim, “the love and contemplation of divine things.” But “its secondary aim, the apostolate, particularly all that pertains to our neighbour's salvation” (I use the prioress's words) is no new thing and I cannot suppose that it was absent from the learned judge's mind that those who devote their lives to prayer pray not for themselves alone, or that they believe that their prayers are not in vain. Nor, as I think, can he have been unaware of the effect which the example of their lives may have on others. As I venture to think, these aspects of the case were neither insisted on in evidence or argument, nor discussed by the learned judge, because they do not afford any real support for the contention that there is in the purpose of the community the element of public benefit which is the condition of legal charity.

My Lords, I would speak with all respect and reverence of those who spend their lives in cloistered piety, and in this House of Lords Spiritual and Temporal, which daily commences its proceedings with intercessory prayers, how can I deny that the Divine Being may in His wisdom think fit to answer them? But, my Lords, whether I affirm or deny, whether I believe or disbelieve, what has that to do with the proof which the court demands that a particular purpose satisfies the test of benefit to the community? Here is something which is manifestly not susceptible of proof. But, then it is said, this is a matter not of proof but of belief, for the value of intercessory prayer is a tenet of the Catholic faith, therefore, and, in such prayer there is benefit to the community. But it is just at this “therefore” that I must pause. It is, no doubt, true that the advancement of religion is, generally speaking, one of the heads of charity, but it does not follow from this that the court must accept as proved whatever a particular church believes. The faithful must embrace their faith believing where they cannot prove: the court can act only on proof. A gift to two or ten or a hundred cloistered nuns in the belief that their prayers will benefit the world at large does not from that belief alone derive validity any more than does the belief of any other donor for any other purpose. The importance of this case leads me to state my opinion

in my own words but, having read again the judgment of LORD GREENE, M.R., I will add that I am in full agreement with what he says on this part of the case.

A I turn to the second of the alleged elements of public benefit, edification by example, and I think that this argument can be dealt with very shortly. It is, in my opinion, sufficient to say that this is something too vague and intangible to satisfy the prescribed test. The test of public benefit has, I think, been developed in the last two centuries. Today it is beyond doubt that that element must be present. No court would be rash enough to attempt to define precisely or exhaustively what its content must be. But it would assume a burden which it could not discharge if now for the first time it admitted into the category of public benefit something so indirect, remote, imponderable and, I would add, controversial as the benefit which may be derived by others from the example of pious lives. The prioress called in aid the use by B WICKENS, V.-C., of the word "indirectly" in the passage that I have cited from his judgment in *Cocks v. Manners* (3), but I see no reason to suppose that that learned judge had in mind any such question as your Lordships have to determine.

C I must now refer to certain cases on which the prioress relied. They consist of a number of cases in the Irish Courts and *Re Caus* (6), a decision of LUXMOORE, J. A consideration of the Irish cases shows that it has there been decided that a bequest for the saying of masses, whether in public or in private, is a good charitable bequest: see e.g., *A.-G. v. Hall* (7) and *O'Hanlon v. Logue* (8). In *Re Caus* (6) LUXMOORE, J., came to the same conclusion. I would expressly reserve my opinion on the question whether these decisions should be sustained in this D House. So important a matter should not be decided except on a direct consideration of it. It is possible that, particularly in regard to the celebration of masses in public, good reason may be found for supporting a gift for such an object as both a legal and a charitable purpose. It follows, however, from what I have said in the earlier part of this opinion that I am unable to accept the view, which at least in the Irish cases is clearly expressed, that in intercessory E prayer and edification that public benefit which is the condition of legal charity is to be found. It is, perhaps, significant that even in Ireland, where in regard to the saying of masses the law has thus been established, there is no consensus of opinion that a gift to a community of contemplative nuns is charitable: see *Munster and Leinster Bank v. A.-G.* (9), *Maguire v. A.-G.* (10), and *Re Keogh* (11). From the judgment of BLACK, J., in *Munster and Leinster Bank* F *v. A.-G.* (9) I would quote these words ([1940] I.R. 30) which succinctly express my own view:

G "There are perhaps few forms of human activity, good in themselves, but solely designed to benefit individuals associated for the purpose of securing that benefit, which may not have some repercussions or consequential effects beneficial to some section of the general community; and unless a further and sweeping inroad is to be made on the rule against perpetuities, the line must be drawn somewhere. *Cocks v. Manners* (3) has drawn it."

H Of the decision of LUXMOORE, J., in *Re Caus* (6), I would only say that his *ratio decidendi* is expressly stated to be, first, that it (i.e., a gift for the saying of masses) enables a ritual act to be performed which is recognised by a large proportion of Christian people to be the central act of their religion, and, secondly, that it assists in the endowment of priests whose duty it is to perform the ritual act. The decision, therefore, does not assist the prioress's argument in the present case and I make no further comments on it.

It remains, finally, to deal with an argument which, as I have said, was not presented to the Court of Appeal but appears in the prioress's formal case. It is that the element of public benefit is supplied by the fact that qualification

for admission to membership of the community is not limited to any group of persons but is open to any woman in the wide world who has the necessary vocation. Thus, it is said, just as the endowment of a scholarship open to public competition is a charity, so also a gift to enable any woman (or, presumably, any man) to enter a fuller religious life is a charity. To this argument, which, it must be admitted, has a speciously logical appearance, the first answer is that which I have indicated earlier in this opinion. There is no novelty in the idea that a community of nuns must, if it is to continue, from time to time obtain fresh recruits from the outside world. That is why a perpetuity is involved in a gift for the benefit of such a community, and it is not to be supposed that, to mention only three masters of this branch of the law, WICKENS, V.-C., LORD LINDLEY, or LORD MACNAGHTEN failed to appreciate the point. Yet, by direct decision or by way of emphatic example, a community such as this is by them regarded as the very type of religious institution which is not charitable. I know of no consideration applicable to this case which would justify this House in unsettling a rule of law which has been established so long and by such high authority. But that is not the only, nor, indeed, the most cogent, reason why I cannot accede to the prioress's argument. It is a trite saying that the law is life, not logic. But it is, I think, conspicuously true of the law of charity that it has been built up, not logically, but empirically. It would not, therefore, be surprising to find that, while in every category of legal charity some element of public benefit must be present, the court had not adopted the same measure in regard to different categories, but had accepted one standard in regard to those gifts which are alleged to be for the advancement of education and another for those which are alleged to be for the advancement of religion, and it may be yet another in regard to the relief of poverty. To argue by a method of syllogism or analogy from the category of education to that of religion ignores the historical process of the law. Nor would there be lack of justification for the divergence of treatment which is here assumed. For there is a legislative and political background peculiar to so-called religious trusts, which has, I think, influenced the development of the law in this matter. Thus, even if the simple argument that, if education is a good thing, then the more education the better, may appear to be irrefutable, to repeat that argument substituting "religion" for "education" is to ignore the principle, which I understand to be conceded, that not all religious purposes are charitable purposes. It was, no doubt, this consideration which led WICKENS, V.-C., to say [in *Cocks v. Manners* (3) (L.R. 12 Eq. 585)] that a gift to a Dominican convent was "one of the last gifts which the legislature which passed the Act would have thought of including in it." On this final argument I would add this observation. I have stressed the empirical development of the law of charity and your Lordships may detect some inconsistency in an attempt to rationalise it. But it appears to me that it would be irrational to the point of absurdity, on the one hand, to deny to a community of contemplative nuns the character of a charitable institution, but, on the other, to accept as a charitable trust a gift which had no other object than to enable it to be maintained in perpetuity by recruitment from the outside world.

Finally, I would say this. I have assumed for the purpose of testing this argument that it is a valid contention that a gift for the advancement of education is necessarily charitable if it is not confined within too narrow limits. But that assumption is itself difficult to justify. It may well be that the generality of the proposition is subject to at least two limitations. The first of them is implicit in the decision of RUSSELL, J., in *Re Hummeltenberg* (12). The second is one that is not in the nature of things likely to occur, but, if it can be imagined that it was made a condition of a gift for the advancement of education that its beneficiaries should lead a cloistered life and communicate to no one, and leave no record of, the fruits of their study, I do not think that

the charitable character of the gift could be sustained. For the reasons that I have given I am of opinion that this appeal should be dismissed.

LORD DU PARCQ : My Lords, I cannot usefully add any words of my own to what has been said by my noble and learned friend on the Woolsack in support of the view that a principle which has for so long been followed and is so well established as that laid down in *Cocks v. Manners* (3) cannot now be repudiated. For the reasons which he has so convincingly stated, I believe it to be the duty of your Lordships' House to treat that decision as conclusive of this appeal, unless it be possible to find a real distinction between that case and this. It is on the question whether any such distinction exists that I wish to add some observations.

The appellant, the prioress, seeks to draw the necessary distinction on three grounds, none of which, as my noble and learned friend has pointed out, was very likely to have been overlooked in earlier cases if it had any validity. As to the third of these grounds I have only to express my concurrence in what my noble and learned friend has said. The two other contentions were founded on evidence which had not been before the court in *Cocks v. Manners* (3). First, there was here evidence (in the affidavit of Cardinal Griffin) that in the belief of the Roman Catholic Church :

“ . . . the prayers and mortifications of the members of the Church for their neighbour both inside and outside the Church advance religion and are an inestimable spiritual benefit to their neighbour.”

Secondly, there was evidence, which again was lacking in *Cocks v. Manners* (3), that the practice of the religious life by the Carmelite nuns is a source of great edification to other Roman Catholics and also (it is said) “ in innumerable cases to non-Catholics.” Under both these heads, it was submitted, the necessary element of public benefit is found.

My Lords, the first of these three heads of the argument must stand or fall with a further submission which was powerfully urged at the Bar and is not without the support of authority. This submission requires the acceptance of the proposition that, when a question is raised as to the spiritual efficacy of religious acts, the court is bound to assume that the doctrines of the religion which practises them are true, and must ascertain according to those doctrines whether or not they have the spiritual efficacy which is claimed for them. The learned counsel for the prioress, in their presentation of this argument, naturally relied on the decision of the Court of Appeal in Ireland in *O'Hanlon v. Logue* (8), and, in particular, on the judgment of PALLES, C.B., in that case. Earlier, in *A.-G. v. Delaney* (13) the learned Chief Baron had stated the law in these words (I.R. 10 C.L. 126, 129) :

“ I am of opinion that a gift for a religious, or for any other purpose, to be charitable within the statute of Elizabeth, must, to some extent at least, be in the nature of a general public use. It must be of such a nature that the court can determine that its execution shall confer a benefit upon the public or upon some section of the public . . . To constitute a charitable use in analogy to the statute of Elizabeth the purpose must be one which the court itself can ascertain and declare to be public or beneficial to the public. It cannot, in my opinion, derive the element of public benefit from the efficacy spiritual or temporal which, according to the faith of the testatrix, the religious act may possess.”

Over thirty years later, in *O'Hanlon v. Logue* (8) the learned Chief Baron was persuaded that he had been wrong in the view which he had expressed in *Delaney's* case (13) and reached the conclusion that if, according to the doctrines of the religion in question, an act of divine service does result in public benefit, either temporal or spiritual, the act must, in law, be deemed charitable.

My Lords, in my respectful opinion the earlier of these two opinions of PALLES, C.B., is, and the later is not, consonant with the law as it has developed in England. I must add, after giving careful consideration to the reasoning of the learned Chief Baron in the later case, that it does not seem to me to be convincing. I am now referring to the third reason which the Chief Baron gave ([1906] 1 I.R. 275) for his decision, a reason which, as he said, was "of wider application" than the others which he gave, and would, if valid, be applicable to the present case. It may be stated fairly, I think, in this way. The law can only know what spiritual efficacy religious acts have by knowing first what efficacy the doctrines of the particular religion concerned ascribe to them :

"But when it knows those doctrines, although it knows that, according to them, such an act has the spiritual efficacy alleged, it cannot know it objectively and as a fact, unless it also knows that the doctrines in question are true."

It cannot know this, and, therefore, one of two results must follow :

"... either (1) the law must cease to admit that *any* divine worship can have spiritual efficacy to produce a public benefit ; or (2) it must admit the sufficiency of spiritual efficacy, but ascertain it according to the doctrines of the religion whose act of worship it is."

My Lords, the learned Chief Baron ruled out the former of these alternatives as impossible, because to accept it, he said (*ibid.*, 276) would be "to refuse to recognise the essence of all religion." The other result, therefore, he held, must necessarily ensue.

It must be remembered that the law of England recognises as proper objects of charitable endowment at least all those varied forms in which the Christian religion is professed and practised. In some respects there are differences and irreconcilable conflicts of opinion between some of the many religious bodies which are thus recognised. An argument which leads to the conclusion that the courts, when they are considering whether it is for the public benefit that property should be devoted for ever to a religious purpose, are compelled to accept as true any doctrine of a particular religion which ascribes efficacy, spiritual or temporal, to acts which that religion enjoins on its followers, cannot, I think, be sound. The learned Chief Baron spoke of a "hypothetical admission" of the truth of the religious belief, but a court is not performing its duty if it treats a hypothesis as a proved fact and proceeds to draw inferences from it. It appears to me, therefore, that the conclusion to which one is forced is that expressed by the learned Chief Baron earlier, in *A.-G. v. Delaney* (13), that the purpose of the trust must be one which the court itself can determine and declare to be beneficial to the public. Judged by this test, the case before your Lordships cannot, in my opinion, be distinguished on the first ground from that of the convent in *Cocks v. Manners* (3). The conclusion which PALLES, C.B., feared [in *O'Hanlon v. Logue* (8)], that the law would deny spiritual efficacy to all prayers and religious exercises, by no means follows from the adoption of his original opinion. The law may assume, without inconsistency, that all intercessory prayer for spiritual benefits, offered by devout persons of no matter what religion, is capable of benefiting the public generally or a section of it. This will not suffice the prioress. It is not merely on the ground that the nuns offer intercessory prayer that the prioress's case must rest. It is not to be supposed that, if they did not live in seclusion, they would cease to pray, though it is, of course, true that a life in the world would not allow them to give their time so unremittingly to prayer and devotion. The religion which they follow with such self-sacrificing zeal itself teaches, as the Cardinal's affidavit tells us, that "public prayer excels any other." It has not been suggested that private prayer is a fit subject for charitable endowment

unless there is something to distinguish it from that offered by the ordinary man. What it would be necessary to accept as a fact, in order to show "public benefit" in the sense in which that phrase is used of charity, is that (I again quote the Cardinal's words) :

" . . . the prayers and mortifications of the contemplative and practising religious are especially efficacious."

A Here we are outside the region of proof as it is understood in our mundane tribunals. This is ground on which the law does not presume to tread.

When I turn to the second contention, I find that (apart from the fact that, as has already been said, edification by example is too remote a public benefit to be considered) the same difficult arises. It is true that those who share the beliefs of these devout women, and some, it may be, of those who do not share

B them, are moved to admiration, if not to imitation, by the knowledge of their example. But the total effect on the community outside the convent of a life lived according to ideals which one faith, but by no means every faith, ranks among the highest is something which the law has no means of judging. It happens that in the present case the litigants who were before the court were at one in accepting the tenets of the Roman Catholic religion. If there

C were evidence before a court concerning religious acts which the creed of a particular church commended, or enjoined as duties, and if it were said on behalf of one party to a dispute that these acts resulted in the edification of many, and, on behalf of another, that they aroused in the hearts of no less a number of persons feelings injurious to the advancement of religion, it must surely be conceded that no court could properly attempt the task of deciding

D between the disputants. Indeed, it could hardly be desired by the devout followers of any creed that such a task should be essayed by a temporal court. I have only to add that, although I am unable to accept part of the reasoning which led the Court of Appeal in Ireland [in *O'Hanlon v. Logue* (8)] to the conclusion that a bequest for masses, whether they were to be said privately or in public, was a good charitable bequest, I do not desire to express, and, indeed, have not formed, any opinion as to the propriety of that decision on other grounds. It follows that I must reserve my opinion as to the correctness of the decision of LUXMOORE, J., in *Re Caus* (6). I concur in the recommendation of the Committee that this appeal should be dismissed.

F LORD NORMAND : My Lords, I agree with the opinions which have been delivered by my noble and learned friend on the Woolsack and by my noble and learned friend, LORD DU PARCQ. I have had the advantage of reading the opinion of my noble and learned friend, LORD REID, and I concur with that also.

G LORD MORTON OF HENRYTON : My Lords, I have also had the advantage of reading the opinions to which my noble and learned friend, LORD NORMAND, has referred. I agree with them and I have come to the conclusion that I cannot helpfully add anything to them.

LORD REID : My Lords, in this case a sum of money was given to be held by trustees :

H " . . . upon trust if the purposes of the Roman Catholic community situate and known as the Carmelite Priory, St. Charles Square, Notting Hill, in the county of London, are charitable to apply the income of the trust fund to all or any such purposes . . . but if the purposes of the said community are not charitable then upon trust . . ."

for other purposes. The question for decision is whether or not the purposes of that community are charitable in the legal sense of that word. It is admitted, and properly admitted, by the appellant, the prioress of the community, that the fact that it is a gift for religious purposes is not enough to make this gift

charitable in the legal sense. The prioress can only succeed by showing that the gift involves a benefit to the public. On the other hand, it is not disputed that, if benefit to the public can be held to be established, the appeal must succeed. Accordingly, the sole point in issue is whether or not there is any ground on which it can be held that the gift would involve public benefit.

The community referred to is a community of Discalced Carmelite nuns belonging to one of the orders of the Roman Catholic Church which are called contemplative orders. According to the affidavit of Cardinal Griffin :

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" They are so called because their members are strictly enclosed in their convents and engage in no exterior works but devote their lives to contemplation and penance, contemplation including not only assisting at mass and reciting the Divine Office and other vocal prayers but also reflection of the mind on God and the things of God which evokes from the will or heart acts of adoration, propitiation, love and intercession towards God and which in the case of contemplatives as a general rule passes sooner or later and to a less or greater degree into mystical prayer."

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That affidavit and the affidavit of the prioress set out at length the purposes of the order and the teaching of the Roman Catholic Church. As I understand it from these affidavits, the essential part of that teaching for the present purpose is that the daily prayers and mortification which these nuns offer for others advance religion and are an inestimable spiritual benefit to those both inside and outside the Church, and that the prayers and mortification of contemplatives are especially efficacious in view of the high degree of union with God which results from the following of their vocation. Counsel for the prioress submitted three grounds on each of which he argued that the prioress is entitled to succeed. If none of these three grounds is valid, the appeal must fail. His main argument was that a court is entitled to accept the belief of Roman Catholics that spiritual benefit to mankind flows from intercessory prayer as sufficient to establish the necessary element of public benefit. It was not suggested that the effect of prayer is capable of legal proof by evidence. No temporal court of law can determine the truth of any religious belief : it is not competent to investigate any such matter and it ought not to attempt to do so. How then does the law deal with a question like that now in issue ?

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The leading authority cited by counsel for the prioress was *O'Hanlon v. Logue* (8). In that case it was held, on a re-consideration of the older Irish authorities, that the celebration of mass in private was a charitable purpose. The question there decided is not the same as that which arises in the present case, but many of the reasons stated by the Irish judges are equally applicable to both questions. I shall examine them in some detail. By doing so I shall deal with the main argument for the prioress. WALKER, L.C., stated ([1906] 1 I.R. 259) :

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" There are some legal propositions germane to the case for which it would be mere pedantry to cite authority . . . (b) that included amongst charitable objects is one which, according to the ideas of the giver, is for the public benefit."

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It appears from the report of the argument in *O'Hanlon v. Logue* (8) that there had been cited from the opinion of FITZGIBBON, L.J. ([1898] 1 I.R. 446) in *Re Cranston* (14), this passage :

" . . . the benefit must be one which the founder believes to be of public advantage, and his belief must be at least rational, and not contrary either to the general law of the land, or to the principles of morality."

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WALKER, L.C., appears to have accepted this view and I think that his whole opinion is largely based on it. But counsel for the prioress could not maintain that it correctly states the law of England. I do not think that there has been any doubt, at least since the decision of *Re Hummeltenberg* (12), by RUSSELL, J.,

that the court cannot accept the opinion of the donor as sufficient to establish public benefit. As regards an opinion or belief other than a religious belief, I think that that is conclusively settled by the decision of this House in *National Anti-Vivisection Society v. Inland Revenue Comrs.* (2). The point could only now be maintained in the form that, when the opinion of the donor is based on a religious belief of the church of which the donor is a member, different considerations apply. That, I think, is the question to be determined in the present case.

A The opinion of PALLES, C.B., in *O'Hanlon v. Logue* (8) is based on three considerations. In the first place he deals with the validity of gifts for religious purposes prior to the Reformation. Such gifts were regarded as gifts to God and were frequently stated to be gifts to God and to a particular abbey or church. I think that his view was that such a gift was always held to be charitable without there being any need to inquire further whether there was any public benefit involved in it. It may well be that that is correct. It is the next step in his reasoning that I am unable to accept. He takes the view that after the Reformation the only reason why gifts such as gifts for masses to be celebrated in private ceased to be regarded as charitable was that the purposes of such gifts had been made illegal by statute and that [as he says ([1906] 1 I.R. 273)] :

D “When . . . in 1793, all laws prohibiting or discouraging the practice of the Roman Catholic religion were repealed, the illegality determined, and they resumed the character they enjoyed in pre-Reformation times, and once more became charitable (1) because of their piety ; (2) because they were devoted to the support and maintenance of the clergymen, the celebrants.”

E With the greatest respect to that great judge, I think that he has not given due weight to an essential difference between the position before the Reformation and the position now. Before the Reformation only one religion was recognised by the law and, in fact, the overwhelming majority of the people accepted it. It was natural that the law should accept the beliefs of that religion without question and act on them. But since diversity of religious beliefs arose and became lawful, the law has shown no preference in this matter to any church and other religious body. Where a belief is accepted by some and rejected by others, the law can neither accept nor reject. It must remain neutral. If the law before the Reformation accepted gifts for religious purposes as charitable simply because of their piety and without further consideration of the question of public benefit, I think that it did so on grounds which are no longer available. I think that PALLES, C.B., sums up this part of his opinion when he says (*ibid.*, 274) that the celebration of mass is

G “. . . an act from which the common law knew previous to the Reformation, and therefore knows now, that benefits spiritual and temporal flow to the general body of the faithful—benefits which, even were they spiritual only, would render the service charitable within 10 Car. 1, sess. 3, c. 1 [the Irish statute analogous to 43 Eliz., c. 4].”

H I have difficulty in seeing how this could be consistent with the law showing no preference to any particular religion. There may be a new religion with new beliefs which the common law never knew. To preserve equality between the old and the new it would be necessary to hold that the law must also know, in the sense of accepting as true, new beliefs which may directly contradict the old. Whatever other reasons there may be to support the prioress's case, this reason appears to me to be invalid. I am unable to agree with PALLES, C.B., when he says (*ibid.*, 270) :

“Even had the common law acknowledged more religions than one, it would have held pious any gift making provision for the worship of God,

irrespective of the particular acknowledged religion according to which the worship was to be offered, provided only such religion were recognised as lawful."

If this were so, one would expect to find some authority to support it after the law did acknowledge more religions than one. I have not found it. The second ground of judgment of the learned Chief Baron (*ibid.*, 274) appears to be based on the premiss:

"All will admit that the divine service of the Reformed Church was, by virtue of its spiritual efficacy, a charitable act, so long as it remained the established church . . ."

I can find no basis for drawing a distinction in the matter of charity between the Established Church and other churches. But apart from that it has been decided in England that it is not a charitable purpose to provide for Church of England services in a private chapel: see *Hoare v. Hoare* (15). The third ground of judgment of PALLES, C.B., is, perhaps, the most relevant to the present argument. It is to the effect that the only basis on which the law can hold, as it does hold, that public benefit flows from divine worship, is the acceptance as true of the beliefs of the worshippers. PALLES, C.B., puts a dilemma (*ibid.*, 276):

" . . . there must be one of two results: either (1) the law must cease to admit that *any* divine worship can have spiritual efficacy to produce a public benefit; or (2) it must admit the sufficiency of spiritual efficacy, but ascertain it according to the doctrines of the religion whose act of worship it is."

HOLMES, L.J., puts the matter thus (*ibid.*, 285):

"I am wholly at a loss to know now, if the court cannot determine whether the celebration of a private mass carries with it public benefits, by what means it can determine that a mass said in public confers such benefits."

Again, I must with great respect suggest that these learned judges have taken too narrow a view. There is another way of looking at the matter which avoids these difficulties.

The law of England has always showed favour to gifts for religious purposes. It does not now in this matter prefer one religion to another. It assumes that it is good for man to have and to practise a religion, but, where a particular belief is accepted by one religion and rejected by another, the law can neither accept nor reject it. The law must accept the position that it is right that different religions should each be supported, irrespective of whether or not all its beliefs are true. A religion can be regarded as beneficial without it being necessary to assume that all its beliefs are true, and a religious service can be regarded as beneficial to all those who attend it without it being necessary to determine the spiritual efficacy of that service or to accept any particular belief about it. Admittedly, public benefit in the present case can only be established if the court is entitled to accept and act on the beliefs of the Roman Catholic Church. This would, in my view, now be something new. In *Cocks v. Manners* (3) there was a gift to a community which belonged to a contemplative order of the Roman Catholic Church and in that case that gift was held not to be a charitable gift because it lacked the necessary element of public benefit. The only difference between that case and the present case is that in that case there was no evidence of the teaching of the Roman Catholic Church about the efficacy of intercessory prayer or of the special place which these orders occupy in that church; but I find it difficult to believe that these matters were wholly unknown not only to WICKENS, V.-C., who decided that case but also to the numerous judges of great eminence, both English and

Irish, who have referred to that decision with approval and without even suggesting that it may have been decided without all the relevant facts being before the court. I think that it is also noteworthy that, with one exception, the Irish courts have not, since the decision of *O'Hanlon v. Logue* (7), taken the view that *Cocks v. Manners* (3) should no longer be followed in Ireland. In *Charities Comrs. v. M'Cartan* (16) a gift to establish a monastery was held not to be charitable. O'CONNOR, M.R., said ([1917] 1 I.R. 396):

A " . . . monasteries of men and women are often, if not mostly, institutions the members of which devote their lives exclusively to acts of piety such as pious meditation, prayer and self-denial. Such institutions, however praiseworthy, are not charitable in the sense recognised by this court."

B In *Munster and Leinster Bank v. A.-G.* (9), to which I shall return in another connection, BLACK, J., recognised *Cocks v. Manners* (3) as good law. In *Re Keogh* (11) gifts for the purposes of Discalced Carmelite Orders were held not to be charitable. The one exception is *Maguire v. A.-G.* (10), where GAVAN DUFFY, J., held that a gift to found a convent for the perpetual adoration of the Blessed Sacrament was charitable. He said ([1943] I.R. 250):

C "To rescue the gift here from the post-Elizabethan morass and place it upon firm ground, I am driven back to the earlier position, before proscriptive legislation had for the time being blocked the steady flow of the common law."

D Having expressed the opinion (*ibid.*, 254) that *O'Hanlon v. Logue* (8) was decided on the "dual grounds that the gift was charitable at common law and that it imported the element of public benefit necessary to bring a gift within the Statute of Pious Uses," he said: "I rest my judgment upon the common law." Accordingly, this case is not an authority which helps the main argument of counsel for the prioress on public benefit. For the reasons which I have given, I do not think that this argument can succeed.

E Before passing to the second argument, I should notice *Re Caus* (6). In that case LUXMOORE, J., held, following *O'Hanlon v. Logue* (8), that a bequest for private masses was a good charitable gift. There are grounds on which it can be argued that such a gift is charitable which do not apply to the present case. I express no opinion whether this decision can be supported on these grounds. But, in my view, it cannot be supported on the ground that a court is entitled to accept the beliefs of Roman Catholics or the teaching of the Roman Catholic Church regarding the mass as sufficient to establish the necessary element of public benefit.

F The second argument of counsel for the prioress is founded on Cardinal Griffin's affidavit in which it is stated:

G "It is an undoubted fact that the practice of the religious life by the Carmelite nuns and other religious bodies is a source of great edification to other Catholics—and, indeed, in innumerable cases to non-Catholics—leading them to a higher estimation of spiritual things and to a greater striving after their own spiritual perfection and that the knowledge that there are men and women who are prepared to sacrifice all that the worldly in man holds dear in order to attain a greater love of God and union with Him inculcates in them a greater estimation of the value and importance of the things which are eternal than they would have if they had not these examples before them."

H This argument must be considered on the footing that it has already been decided that the necessary element of public benefit cannot be directly established under the first argument—otherwise the prioress would succeed without this argument. Counsel for the prioress relies on a passage in the judgment of WICKENS, V.-C. (L.R. 12 Eq. 585) in *Cocks v. Manners* (3):

“ It is said, in some of the cases, that religious purposes are charitable, but that can only be true as to religious services tending directly or indirectly towards the instruction or the edification of the public . . . ”

He says that it is proved by evidence that the public or, at least, a sufficient section of the public are edified. I doubt whether WICKENS, V.-C., meant to use the word edification in this sense. But, whether he did or not, there must be some limit to the kind of indirect instruction or edification which will constitute a public benefit. It is hard to imagine any form of religious activity by an organised religious body which does not have some effect of this kind, and, if the words were applied literally, the requirement of public benefit would virtually disappear. Counsel for the prioress admitted that it must be a question of degree whether or not in any case the public benefit is too remote. In this case I think it is too remote. Moreover, I do not think that, when a decision has stood for three-quarters of a century as *Cocks v. Manners* (3) has, it ought to be reversed on a question of degree of this kind. No broad principle is here involved. I agree with the view of BLACK, J. ([1940] I.R. 31) in *Munster and Leinster Bank v. A.-G.* (9) that

“ . . . unless a further and sweeping inroad is to be made on the rule against perpetuities, the line must be drawn somewhere. *Cocks v. Manners* (3) has drawn it.”

The third argument submitted by counsel for the prioress is of a different character. It was not submitted to the Court of Appeal. It is that the existence of this community enables some twenty women to practice religion in a way which would otherwise be impossible for them, and that, if the law recognises the practice of religion as beneficial, it must regard any gift to enable religion to be practised more fully as a gift for a beneficial purpose. On this argument the necessary element of public benefit is found in the fact that the twenty persons benefited are not drawn from any limited class, but from the whole body of Roman Catholic women who have a vocation for a contemplative life. I am prepared to assume that, if the law can regard the purposes of this community as beneficial, the necessary element of public benefit could be so found. But this argument, like the last, can only be reached after the prioress has failed on the first argument and it has, therefore, been decided that the law is disabled from recognising any public benefit resulting from the existence of the community. Counsel for the prioress, when asked, was unable to cite any authority to the effect that it can be a valid charitable purpose to assist persons to do something which cannot be shown to have any public utility. In the absence of authority, I can see no reason why this should be regarded as a valid charitable purpose, and, therefore, I think that this argument fails. Accordingly, I agree that the appeal must be dismissed.

Appeal dismissed. The trust fund to be applied in the first place in payment of the costs of the respondent trustees, and, in the second place, in payment of the costs of the other respondents. No other order as to costs.

Solicitors: *Witham & Co.* (for the convent); *Ellis, Bickersteth, Aglionby & Hazel* (for the Converts' Aid Society).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

INLAND REVENUE COMRS. v. WOLFSON.

[HOUSE OF LORDS (Lord Simonds, Lord du Parcq, Lord Normand, Lord Morton of Henryton and Lord Reid), February 22, 23, April 8, 1949.]

Income Tax—Settlement—“Power to revoke or otherwise determine settlement”—Power not found in terms of settlement—Settlement of dividends from shares in company controlled by settlor—Power of settlor to prevent declaration of dividend or to wind-up company—Finance Act, 1938 (c. 46), s. 38 (1) (a).

A

The Finance Act, 1938, s. 38 (1), provides: “If and so long as the terms of any settlement are such that—(a) any person has or may have power, whether immediately or in the future, and whether with or without the consent of any other person, to revoke or otherwise determine the settlement or any provision thereof and, in the event of the exercise of the power, the settlor . . . will or may cease to be liable to make any annual payments payable by virtue or in consequence of any provision of the settlement . . . any sums payable by the settlor . . . by virtue or in consequence of that provision of the settlement in any year of assessment shall be treated as the income of the settlor for that year and not as the income of any other person. . .”

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The capital of a private investment holding company consisted of 1,000 shares of £1 each of which the taxpayer held 700, his two brothers 100 each, and his father's trustees (of whom the taxpayer was one) the remaining 100. Each share carried a vote. To make provision for their sisters, the taxpayer and his brothers entered into a deed of covenant under which they each covenanted to pay to trustees for the benefit of the sisters such sum each year as, after the deduction of income tax, left a sum equal to the net amount of all dividends received by them during the previous twelve months on the ordinary shares of the company. The Crown contended that since the taxpayer, as the holder of seven-tenths of the shares of the company, was in a position to prevent any dividends being declared during the whole period for which his covenant was operative, and, furthermore, since by procuring the co-operation, or abstention from voting, of another shareholder holding a sufficient number of votes, he could secure the passing of a special resolution for winding-up the company, the taxpayer had (either by himself or with another person) power to revoke or otherwise determine the settlement or a provision thereof within s. 38 (1) (a).

HELD: the power referred to in s. 38 (1) (a) must be found in the terms of the settlement and not *aliunde*, and, as there was no such power conferred by the deed of covenant, the annual payments made thereunder should not be treated as income of the taxpayer.

MacAndrew v. Inland Revenue Comrs. (1943) (25 Tax Cas. 500) criticised by LORD NORMAND and distinguished by LORD MORTON OF HENRYTON.

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PER LORD NORMAND and LORD MORTON OF HENRYTON: The ability of the taxpayer to prevent the declaration of dividends during the relevant period or to secure the winding-up of the company did not constitute a power in him “to revoke or otherwise determine the settlement or any provision thereof.”

Decision of the Court of Appeal ([1948] 1 All E.R. 725) affirmed.

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[FOR THE FINANCE ACT, 1938, s. 38, see HALSBURY'S STATUTES, Vol. 31, p. 348.]

Cases referred to:

- (1) *MacAndrew v. Inland Revenue Comrs.*, (1943), 25 Tax Cas. 500; 2nd Digest Supp.
- (2) *Inland Revenue Comrs. v. Payne*, (1941), 23 Tax Cas. 610; 2nd Digest Supp.

(3) *Chamberlain v. Inland Revenue Comrs.*, [1943] 2 All E.R. 200 ; 25 Tax Cas. 317 ; 2nd Digest Supp.

APPEAL by the Crown from a decision of the Court of Appeal, reported [1948] 1 All E.R. 725, affirming an order of ATKINSON, J., dated June 6, 1947, and reported [1947] 2 All E.R. 150.

ATKINSON, J., reversed a decision of the Special Commissioners that certain payments made by the taxpayer under a deed of covenant must be treated as his income for the purpose of assessment to sur-tax. The Court of Appeal (TUCKER and SOMERVELL, L.JJ., COHEN, L.J., *dissentiente*) affirmed that decision. The House of Lords now dismissed the Crown's appeal from the order of the Court of Appeal. The facts appear in the opinion of LORD SIMONDS.

Sir Frank Soskice, K.C., S.-G., J. H. Stamp and R. P. Hills for the Crown (appellants).

Sir Roland Burrows, K.C., and Graham-Dixon for the taxpayer (respondent).

The House took time for consideration.

April 8. The following opinions were read.

LORD SIMONDS : My Lords, this appeal raises a question on s. 38 (1) of the Finance Act, 1938, on which there has been a difference of opinion in the Court of Appeal. The facts which are fully stated by the Commissioners for the Special Purposes of the Income Tax Acts are very simple. The respondent, Isaac Wolfson, was at all material times the holder of 700 ordinary shares of £1 each in a company called Leonard Gordon Estates, Ltd., which had been used by him and his brothers as a private investment holding company. The capital of the company was £1,000, and the remaining 300 shares were held as to 100 by his brother Charles Wolfson, as to 100 by his brother Samuel William Wolfson and as to the remaining 100 by the trustees (of whom the respondent was one) of a settlement known as Solomon Wolfson's settlement. Being minded to make provision for his sisters, on Mar. 26, 1940, the respondent entered into a deed of covenant of that date to which he and his brothers, who were therein called "the settlors," were parties of the one part, and one Henry Arthur Chetham, and the respondent, as trustees, were parties of the other part. By this deed, each settlor irrevocably covenanted with the trustees that he would, on Apr. 1 in each year, during the period of seven years from Apr. 1, 1940, or until his death (whichever period should be the shorter), pay to the trustees an annual sum calculated according to the provisions contained in cl. 2 thereof, such annual sum to be held by the trustees on the trusts and subject to the powers therein declared and contained. The method of calculation was as follows :

"Each annual sum hereinbefore covenanted to be paid by each settlor shall (subject to the proviso hereinafter in this clause contained) be such an annual sum as after deduction of tax at the standard rate for the time being in force leaves a sum equal in amount to the net amount in the aggregate of all dividends received by him during the previous twelve months expiring on the said Apr. 1 in each year upon the ordinary shares of Leonard Gordon Estates, Ltd., held by him as set out in sched. I hereto."

There followed a proviso dealing with the event of the settlor selling or otherwise disposing for value of his shares but not with the event of his disposing of them gratuitously, and a further clause provided for the re-investment of the proceeds of sale or disposal for value of such shares. The deed also contained trusts for the benefit of the settlors' sisters, who are therein described as the beneficiaries, or their children or next of kin.

Your Lordships will not be troubled with any details of figures in this case. It is sufficient to say that it is conceded for the purposes of this appeal that a net sum of £14,612 10s. 0d. was received by the trustees in discharge of the respondent's liability under the deed for the year ending Apr. 5, 1940. The

claim of the respondent was limited to the deduction from his income for income tax purposes of the gross sum representing this sum of £14,612 10s. 0d., and there is no question but that he is entitled to deduct such a sum unless the provisions of s. 38 (1) (a) of the Finance Act, 1938, are operative in regard to it. The Special Commissioners, conceiving that they were bound by the decision of MACNAGHTEN, J., in *MacAndrew v. Inland Revenue Comrs.* (1), held that the deduction was not permissible, but their decision was reversed by ATKINSON, J.,
 A whose judgment was upheld by the Court of Appeal (TUCKER and SOMERVELL, L.JJ., COHEN, L.J., *dissentiente*).

Section 38 of the Finance Act, 1938, is, so far as material, as follows :

“(1) If and so long as the terms of any settlement are such that—(a)
 any person has or may have power, whether immediately or in the future,
 B and whether with or without the consent of any other person, to revoke or otherwise determine the settlement or any provision thereof and, in the event of the exercise of the power, the settlor or the wife or husband of the settlor will or may cease to be liable to make any annual payments payable by virtue or in consequence of any provision of the settlement; ...
 C any sums payable by the settlor or the wife or husband of the settlor by virtue or in consequence of that provision of the settlement in any year of assessment shall be treated as the income of the settlor for that year and not as the income of any other person : Provided that, where any such power as is referred to in para. (a) of this subsection cannot be exercised within the period of six years from the time when the first of the annual payments so referred to becomes payable, and the like annual payments are payable
 D in each year throughout that period, the said para. (a) shall not apply so long as the said power cannot be exercised.”

It is contended on behalf of the Crown that the sums received by the respondent during the relevant year of assessment and accounted for to the trustees of the deed must be treated as his income under s. 38 (1) (a), because the terms of the deed were such that he (either by himself or with others or with the
 E consent of others) had power to revoke or otherwise determine the settlement or a provision thereof and thereby would or might cease to be liable to make the annual payment payable under the deed. It is common ground that the “settlement” consists of the deed of Mar. 26, 1940, alone. It is, therefore, the terms of that deed alone that have to be considered. In support of their contention it was said by learned counsel for the Crown that the settlor, as the
 F holder of seven-tenths of the shares of Leonard Gordon Estates, Ltd. (which I will call “the company”), was in a position to determine how much of the profits of the company should be distributed in any year by way of dividend. He might, if he thought fit, by the exercise of his majority vote prevent any dividend being declared during the whole period for which his covenant was operative. Thus, it was said, he could determine the settlement or a provision
 G thereof. It was further urged that, as the holder of seven-tenths of the shares, he could, by procuring the co-operation, or, indeed, the abstention, of another shareholder holding a sufficient number of votes, secure the passing of a special resolution for winding-up the company. This, too, it was said, was a power to determine the settlement or a provision thereof.

My Lords, the main part of the argument has revolved round the simple
 H words : “If and so long as the terms of any settlement are such that...” On the one hand, it is said that it is only in the terms of this settlement that one may look for the power which the sub-section describes—that the words bear the same meaning as the words : “If and so long as the terms of the settlement provide.” On the other hand, it is said that they have a meaning, which, to do justice to the argument of the learned SOLICITOR-GENERAL, I will state in his own words. This was his formula : “If the settlement is so framed that its immediate impact on the circumstances in relation to which

it was executed produces the result that some persons, whether settlors or others, get the power, whether by the exercise of some independent right they already possess or however else, to revoke and thus finally cancel or otherwise bring to an end the continued happening of something for which the settlement provides."

My Lords, between these alternatives I must unhesitatingly adopt the former. I am not greatly influenced by the absurd results which flow from an adoption of the latter, though it would appear to cover every covenant that ever was entered into, since in this view the covenantee has power, by releasing the covenantor from his liability, to put an end to the settlement. I am chiefly influenced by the consideration that, if it had been intended that regard should be had to powers not to be found in the settlement and exercisable by persons not parties to or named in the settlement, nothing could have been easier than to say so. I agree with both TUCKER and SOMERVELL, L.JJ., and ATKINSON, J., in thinking that the language of sub-ss. (3) and (4) provide a valuable contrast to that employed in sub-s. (1). It was urged that the construction that I favour leaves an easy loophole through which the evasive taxpayer may find escape. That may be so, but I will repeat what has been said before. It is not the function of a court of law to give to words a strained and unnatural meaning because only thus will a taxing section apply to a transaction which, had the legislature thought of it, would have been covered by appropriate words. It is the duty of the court to give to the words of this sub-section their reasonable meaning, and I must decline on any ground of policy to give to them a meaning which, with all respect to the dissentient Lord Justice, I regard as little short of extravagant. It cannot even be urged that, unless this meaning is given to the sub-section, it can have no operation. On the contrary, given its natural meaning it will bring within the area of taxation a number of cases in which by a familiar device tax had formerly been avoided.

As I have already noted, in this case the "settlement" consists of the deed of covenant alone. It is, therefore, unnecessary to consider the cases in which, the settlement being held to consist of a number of documents and transactions, it was found that the power to revoke or determine was among the terms of the settlement. The question whether the court may look outside the terms of the settlement did not arise. Of such cases *Inland Revenue Comrs. v. Payne* (2) is an example. I would expressly reserve the question how far such decisions can be regarded as correct after the decision of this House in *Chamberlain v. Inland Revenue Comrs.* (3). Nor do I think it necessary in this case to determine whether, if it could be regarded as a "term of the settlement" that the settlor had power to dictate whether any and what dividend should be declared, that would amount to a power to determine the settlement, nor yet whether, if it is such a term that the settlor can with the consent or co-operation of other shareholders wind-up the company, that would be such a power. These are questions which may have to be determined in other cases in which they are decisive. For the purposes of this appeal it is sufficient to say, affirming the judgment of the Court of Appeal, that the terms of the deed of Mar. 26, 1940, are not such that the respondent has power to revoke or otherwise determine the settlement or any provision thereof. I move, accordingly, that the appeal be dismissed with costs.

LORD DU PARCQ : My Lords, I concur in the report of the Appellate Committee and in the motion which my noble and learned friend has proposed from the Woolsack.

LORD NORMAND : My Lords, the relevant provisions of s. 38 of the Finance Act, 1938, are already before the House. So also are the material clauses of the deed of covenant. It is desirable to bring to notice at the outset that in this case the "settlement" and the deed of covenant are one, and that it is not found, or maintained by the appellants, that Leonard Gordon Estates,

Ltd., should be included in the "settlement" by virtue of the definition in s. 41 (4) (b).

The appellants' case depends on the contentions that in the inquiry whether "any person has or may have power . . . to revoke or otherwise determine the settlement or any provision thereof" it is permissible to look outside the terms of the settlement for the "power" and for the "person" who may exercise it, and to treat as a revocation or determination of the settlement or of a provision thereof the frustration of the obligation to make the annual payment under cl. 1 which would result from the liquidation of the company, the dividends of which are the measure of the sums to be paid. These contentions do not hinge on the settlor's control of the company with or without the aid of his brothers. COHEN, L.J., in his dissenting judgment, concisely states the principle of the appellants' case thus ([1948] 1 All E.R. 730) :

"Wherever the annual payment is to be measured by, and conditional on, the payment of dividends by a company, it necessarily follows that some person or persons have or may have power to determine that liability since the company can be put into liquidation by the requisite majority of shareholders passing a special resolution under s. 225 of the Companies Act, 1929."

The appellants relied on the opening words of s. 38 (1) : "If and so long as the terms of any settlement are such that", and contrasted them with the words "if the terms of [the settlement] provide", which are to be found in s. 21 (8) of the Finance Act, 1936. It is on this contrast that COHEN, L.J., founded his dissenting judgment, but with great respect I find the similarity of meaning between the two phrases more striking than the contrast of the words. There is, and here I agree with SOMERVELL, L.J., an ambiguity in the opening words of sub-s. (1), and standing by themselves they are not insusceptible of the meaning for which the appellants contend, but a power to "revoke or otherwise determine the settlement or any provision thereof" points rather to a power to be found within the settlement than to a power to be found in external circumstances, and the contrast with the opening words of sub-s. (3) of the same section is, to my mind, more relevant and cogent than the contrast with the words in a section of the earlier Finance Act. The opening words of sub-s. (3) are : "If and so long as the settlor has an interest . . ." and they are obviously selected because it was intended, not that the "interest" should be limited to one created or provided by the settlement, but that it should include an "interest" independent of the terms of the settlement. As TUCKER, L.J., pointed out ([1948] 1 All E.R. 727), if the appellants' case is right there was no necessity for the words "and so long as the terms of any settlement are such that." Indeed, the appellants' case would be much stronger if these words were absent. The SOLICITOR-GENERAL conceded that the meaning for which he was contending would be correctly expressed if sub-s. (1) ran somewhat as follows : "If and so long as any person is or may be able so to act . . . as to revoke" etc. I would not make too much of his assent to this paraphrase, nevertheless the reference to the terms of the settlement in this sub-section and the omission of such a reference in sub-s. (3) are significant. I, therefore, agree with the majority of the Court of Appeal that the power and the person who may exercise it must be found within the settlement. On the second contention put forward by the appellants, it is, I think, not appropriate to describe as a revocation or a determination of the settlement or of one of its provisions the effect which the liquidation of the company could have in making abortive the obligation to pay annual sums under cl. 2 of the settlement.

In general, the appellants' argument overstrains the language of the sub-section, though it may at no point be plainly inconsistent with it. More than once it was urged that, unless the argument was accepted, the sub-section would be nugatory or easily evaded. That the sub-section will be nugatory

I see no reason to think, and I have little doubt that it was framed to deal with, and has successfully dealt with, settlements of a certain type which had come to the notice of the Inland Revenue. That it may be easily evaded is possible. That is a consideration which is irrelevant to its proper interpretation, and there is the practical answer that it may be easily amended, but that that is for Parliament, not the courts. Of the cases cited, I think that *MacAndrew v. Inland Revenue Comrs.* (1) alone may be consistent with the conclusion to which I have come. The report of this case is not satisfactory, but I assume what was stated by counsel in this appeal, that, according to the Crown's case, the deed of July 11, 1940, alone constituted the settlement. On that assumption *MacAndrew's* case (1) was on all fours with the present case and must be regarded as wrongly decided. I would dismiss the appeal.

LORD MORTON OF HENRYTON : My Lords, I can express my views very briefly, as I am in agreement with the judgments of the majority in the Court of Appeal.

In my view, no settlement comes within s. 38 (1) (a) of the Finance Act, 1938, unless the power described in that sub-section is found in, and conferred by, the terms of the settlement. This seems to me to be the natural meaning of the words used. The SOLICITOR-GENERAL sought to rely on the difference in wording between the opening words : "If and so long as the terms of any settlement are such that" and the phrase "if the terms of the settlement provide" which is to be found in s. 21 (8) of the Finance Act, 1936. It would, indeed, be a trap for the taxpayer if the legislature intended the scope of taxation to be extended by some subtle difference in meaning between "the terms of the settlement are such that" and "the terms of the settlement provide," and, for my part, I think that the two phrases have the same meaning. The view which I have expressed as to the construction of s. 38 (1) (a) is fatal to the Crown's contentions in this case, for it is plain that the deed of covenant of Mar. 26, 1940, does not come within the sub-section, so construed, and the Crown concedes that the only document to be considered in the present case is the deed of covenant. This concession distinguishes the present case from *Inland Revenue Comrs. v. Payne* (2) and *MacAndrew v. Inland Revenue Comrs.* (1) and it is unnecessary to consider whether either of those cases was rightly decided. As to the other questions raised in argument, I agree with SOMERVELL, L.J., and ATKINSON, J., that, if the respondent were to use his majority shareholding to withhold the payment of a dividend by Leonard Gordon Estates, Ltd., in any year, he would not thereby "revoke or otherwise determine the settlement or any provision thereof." Every clause in the settlement would remain in full force, and the only result would be that the "annual sum" mentioned in cl. 2 would be *nil* in that year. I have not found it necessary to form a concluded view upon any other question. I would dismiss the appeal.

LORD REID : My Lords, I think that this appeal should be dismissed for the reasons which your Lordships have given. In particular, I would express my agreement with my noble and learned friend, LORD SIMONDS, that it is not the function of a court of law to give to words a strained and unnatural meaning because only thus will a taxing section apply to a transaction which, had the legislature thought of it, would have been covered by appropriate words.

Appeal dismissed with costs.

Solicitors : *Solicitor of Inland Revenue* (for the appellants) ; *Harris, Chetham & Co.* (for the respondent).

[Reported by C. ST.J. NICHOLSON, Esq., Barrister-at-Law.]

Re CRANSTOUN'S WILL TRUSTS. GIBBS *v.* THE HOME OF REST FOR HORSES AND OTHERS.

[CHANCERY DIVISION (Romer, J.), March 22, 1949.]

Legacy—Renunciation—Right to retract—Voluntary disclaimer owing to misunderstanding—Position not altered to anyone's detriment.

A By her will a testatrix, who died in 1929, gave her residuary estate to the Home of Rest for Horses. There was considerable difficulty in realising the estate and it was not known for some time whether there would be any surplus after the liabilities had been met. In 1935 the sole executor died intestate, leaving part of the estate unadministered, and in 1937 the Home, on being informed that it was entitled to a grant of letters of administration, renounced not only its right to take a grant but also all claims to the estate, not knowing that it could renounce the grant without renouncing the benefits given to it by the will, and that, if it took a grant, it would not be liable for the debts and liabilities of the testatrix beyond the assets of the estate. In January, 1948, administration of the estate being still incomplete, the secretary of the Home was given liberty to retract the renunciation of the grant, and letters of administration of the unadministered estate of the testatrix were granted to him as the nominee of the Home. The residuary estate now amounted to £4,000, and the question was whether, if there had been an effective renunciation by the Home of its right to the benefits under the will, it was entitled to retract that renunciation.

D HELD: assuming that the renunciation of 1937 was effective, it was a voluntary renunciation; no one had altered his position to his detriment in consequence of it; and, therefore, the Home was entitled to retract it.

Observations of SWINFEN EADY, J., in *Re Young* ([1913] 1 Ch. 272; 108 L.T. 292), *applied*.

E [AS TO DISCLAIMER, see HALSBURY, Hailsham Edn., Vol. 34, pp. 124-126, paras. 158-160; and FOR CASES, see DIGEST, Vol. 44, p. 403, Nos. 2347-2351.]

Cases referred to:

(1) *Re Young*, [1913] 1 Ch. 272; 108 L.T. 292; 44 Digest 403, 2349.

(2) *Doe d. Smyth v. Smyth*, (1826), 6 B. & C. 112; 9 Dow. & Ry. K.B. 136; 44 Digest 403, 2348.

F ADJOURNED SUMMONS to determine whether a beneficiary under the will of the testatrix had renounced its right to benefits under the will, and, if so, whether it was entitled to withdraw the renunciation.

By her will, dated Aug. 9, 1925, the testatrix, Pauline Emily Cranstoun, appointed Charles Edward Shirley Hardman and James Harry Edwards to be the executors and trustees thereof. After bequeathing pecuniary legacies to various named persons and charities, she devised, by cl. 5:

"... my freehold house and premises Hurst Hill House . . . unto my trustees in fee simple upon trust at their discretion to sell the same . . . and to pay the net proceeds of such sale unto the Home of Rest for Horses, Westcroft Stables, Cricklewood in the county of London and until the same . . . shall be sold to permit the said Home of Rest for Horses to have the use and occupation thereof."

By cl. 8 she gave her residuary estate to her trustees on the usual trusts for sale and conversion and directed them:

"... to pay my funeral and testamentary expenses and debts (including mortgage debts) and pecuniary legacies bequeathed by this my will or any codicil hereto and the estate duty legacy duty and every other duty payable in respect of my death in relation to the property

passing under this my will and to pay the residue of the said moneys to the said Home of Rest for Horses to whom I bequeath the same . . .”

The testatrix died on Aug. 13, 1929, and her will was duly proved on Jan. 10, 1930, in the Principal Probate Registry by Hardman (the second executor, Edwards, having died in 1929). The premises known as Hurst Hill House were subject to a mortgage of £1,700 in favour of the trustees of the will of the father of the testatrix, Lord Cranstoun. The secretary of the Home of Rest for Horses informed Hardman that it could not undertake to run Hurst Hill House as a separate home of rest. In January, 1931, the property was sold for £1,000 and the trustees of Lord Cranstoun's will concurred in the conveyance to release the property from the mortgage. They directed payment of the purchase money to Hardman, the testatrix being entitled to the mortgage moneys under her father's will. The net proceeds of the sale were applied in the discharge of certain liabilities of the estate. The principal asset of the estate was the sum of £3,400, with interest thereon at $3\frac{3}{4}$ per cent., secured by Scottish bonds and dispositions in security on certain property in Scotland, known as the Benholm Estate. This sum was vested in the trustees of Lord Cranstoun's will, the testatrix being the beneficial owner thereof by virtue of the will of Lord Cranstoun, a power of appointment of his widow and a deed poll executed by the testatrix on Mar. 28, 1908. Correspondence took place between Hardman and the secretary of the Home with regard to the assets and liabilities of the testatrix's estate and whether there was likely to be any surplus from the residuary estate. On Jan. 26, 1931, Hardman wrote to the Home saying that it was difficult to estimate the exact benefit which the Home would receive under the will owing to the difficulty of realising the Scottish estate, but it was expected that there might be a residue of about £2,000. At a meeting of the committee of the Home on Jan. 28, 1931, it was agreed to renounce all claim to the estate. This decision was communicated to Hardman by a letter of Jan. 29, 1931, but, on Feb. 12, 1931, the secretary wrote again to Hardman informing him that he had discussed the matter again with certain members of the committee, it appeared that they had not fully appreciated the position in regard to the Benholm Estate, and they asked Hardman to disregard the letter of Jan. 29, 1931. In 1932 the secretary of the Home died, and his successor, Captain W. T. C. Joyce, was appointed on June 27, 1932. Hardman died intestate on June 9, 1935, leaving part of the estate of the testatrix unadministered. On July 13, 1936, the solicitors acting for the administrator of Hardman's estate wrote to Captain Joyce informing him that the administration of the estate had not been completed and that the position was complicated by the fact that the Benholm Estate could not be sold and certain pecuniary legacies had not been paid. They said that it was necessary for someone to obtain a grant *de bonis non* and that the Home was the person first entitled to the grant, but that, if the Home were appointed administrator, it would be responsible for the winding-up of her affairs. On July 21, 1936, Captain Joyce wrote to the solicitors saying that in view of the resolution of Jan. 28, 1931, he had been instructed by the committee not to proceed with the matter. It appeared that Captain Joyce and the chairman were unaware of the letter of Feb. 12, 1931, and of certain subsequent correspondence and of resolutions passed at committee meetings of the Home later in 1931. Later, the solicitors wrote to Captain Joyce asking for the names of the trustees of the Home who would renounce the right of the Home to take a grant. They added that the estate was still in a state of confusion, but that, if the Scottish property could be realised, they considered that there would be sufficient funds to pay everyone. At a meeting of the committee of the Home on Oct. 14, 1936, it was unanimously agreed to renounce all claims to the estate. On Jan. 23, 1937, Captain Joyce signed a formal renunciation to that effect. It appeared that no officer of the Home or member of the committee was ever advised that it was

competent for the Home to renounce the grant of letters of administration without also renouncing the benefits given to it by the will, or that, if the Home took a grant, it would not be liable for the debts and liabilities of the testatrix beyond the assets of her estate. On Mar. 11, 1937, letters of administration with the will annexed of the testatrix's unadministered estate were granted to Eileen Russell, a legatee. She died in 1945, leaving part of the testatrix's estate still unadministered. On Jan. 15, 1945, the plaintiff, Hugh Edward Gibbs, became secretary of the Home. By an order made by Mr. Registrar Forbes on Jan. 22, 1948, the plaintiff was given liberty to retract the renunciation of Jan. 23, 1937. On Apr. 10, 1948, letters of administration with the will annexed of the unadministered estate of the testatrix were granted out of the Principal Probate Registry to the plaintiff as the secretary and duly appointed nominee of the Home. By reason of his successful administration of the estate and the sale of the Scottish property, the residue of the estate now amounted to a sum of £4,000. The question raised by the summons was whether the Home had renounced its right to the benefits under the will of the testatrix, and, if it had, whether it was entitled to retract that renunciation.

C *Hewins* for the administrator.

Wilfrid Hunt for the Home of Rest for Horses.

McMullen for the second defendant, representing persons entitled on an intestacy.

Danckwerts for the Attorney-General.

D **ROMER, J.** [after stating the facts]: The question which I have to determine is what, in the events which have happened, is the effect on the rights of the Home to the benefits given it under the will of the testatrix. It is clear that the chairman and the secretary of the Home thoroughly misunderstood the position. They were frightened of assuming the responsibilities of meeting the testatrix's liabilities, and they were under a wrong impression as to the mortgages on the two properties. They were in a state of considerable confusion as to what would happen if they accepted the inheritance. Counsel for the Home has argued that there never was an effective renunciation, but only informal indications as to its intention. His main argument, however, was that, assuming that there was a renunciation by the Home—inasmuch as it was purely voluntary and one in respect of which the Home received no consideration and on account of which no one had changed his position—then it was open to the Home at any time to retract the renunciation and to re-assert its position under the will. Inasmuch as, in my view of the matter, counsel for the Home is right on that point, I do not find it necessary to come to any concluded view whether or not the correspondence did or did not amount to an effective renunciation.

G I am willing to assume that there was a renunciation in 1931 and 1937 by the Home. What, then, is the position of a person who renounces a legacy and then thinks better of it on the hypothesis that no one has taken any steps to alter his position in consequence of that renunciation? In the absence of any authority I should have thought that it was open to anyone at any time to change his mind, when no one has acted to his hurt on the faith of the renunciation, and in the absence of authority that is the conclusion at which H I would have arrived myself, but I have been referred to *Re Young* (1), a decision of SWINFEN EADY, J., which deals with the point which I have to decide. Counsel for those entitled in the event of an intestacy says that the point was not actually decided in that case, and that the matter is still open for decision. It is probably strictly true that the learned judge's observations on this point were *obiter*, but I have the view of SWINFEN EADY, J., that, if a renunciation is not acted on, it may be withdrawn. The only other case to which I have been referred is *Doe d. Smyth v. Smyth* (2). From the scanty

material available on this principle of renunciation, it seems that it was introduced for the benefit of beneficiaries, so that a beneficiary should not be obliged to take what might be an onerous burden, but a natural corollary of the principle is that, if anyone acted on the faith of his renunciation and altered his position to his detriment in consequence thereof, the beneficiary would not be allowed to retract his renunciation. Where, as here, no one has altered his position, I cannot see why the claim to retract should not prevail.

Declaration accordingly. Costs of all parties as between solicitor and client to be paid out of the estate.

Solicitors: *Jaques & Co.*, agents for *Rowe, Watts & Wood*, Ilfracombe (for the plaintiff and the first defendant); *Crawley, Arnold & Co.* (for the second defendant); *Treasury Solicitor*.

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

Affirmed. H.L. [1950] 2 All E.R. 486.

CAMINER AND ANOTHER v. NORTHERN AND LONDON INVESTMENT TRUST, LTD.

[COURT OF APPEAL (Tucker, Asquith and Singleton, L.JJ.), March 3, 4, April 12, 1949.]

Negligence—Nuisance—Tree—Elm tree adjoining road—Fall on passing car—Fall due to disease—Liability of occupier of land.

The defendants were lessees of a block of flats which they occupied by their tenants. In the forecourt of the flats was a row of elm trees. On Apr. 7, 1947, the plaintiffs were driving past the flats when one of the trees fell on their car, wrecking it and injuring both the plaintiffs. The fall was proved to have been due to a disease of the roots, which was of long standing, but the disease had not taken a normal course and there was no indication from the condition of the tree above ground that it was affected by the disease. The tree, which was about 130 years old, carried a considerable crown and had not been trimmed or topped for many years. Evidence was given that elm trees should be inspected every five to seven years, and, if this tree had been topped, it was unlikely that it would have fallen when it did, but it did not appear to be dangerous to any of the witnesses who were called. On Mar. 1, 1947, the defendants had engaged a timber haulage contractor to top this and other trees for the purpose of tidying up the premises, but he had not reached the tree in question when the accident occurred.

Held: the plaintiffs had failed to prove that the defendants, as ordinary, careful laymen and not as experts, knew, or ought to have known, that the tree was dangerous, and, therefore, the defendants were not liable.

Decision of LORD GODDARD, C.J., ([1948] 2 All E.R. 1101), reversed.

[AS TO THE OCCUPIER'S DUTY TOWARDS THE PUBLIC IN RESPECT OF THE STATE OF PREMISES ADJOINING A PUBLIC PLACE, see HALSBURY, Hailsham Edn., Vol. 23, pp. 619-621, para. 870 and FOR CASES, see DIGEST Supp.]

Cases referred to:

- (1) *Brown v. Harrison*, (1947), 177 L.T. 281; 2nd Digest Supp.
- (2) *Cunliffe v. Bankes*, [1945] 1 All E.R. 459; 2nd Digest Supp.
- (3) *Noble v. Harrison*, [1926] 2 K.B. 332; 135 L.T. 325; 90 J.P. 188; Digest Supp.

APPEAL by the defendants from a decision of LORD GODDARD, C.J., dated Nov. 26, 1948, and reported [1948] 2 All E.R. 1101.

The first plaintiff and his wife, the second plaintiff, were injured by the fall of an elm tree standing on property occupied by the defendants, and claimed damages from the defendants for negligence, and, alternatively, nuisance. LORD GODDARD, C.J., held that it was the duty of all owners of property to manage it in accordance with the principles of good estate management, so that their property might not be in a condition likely to cause damage* to persons lawfully using highways in the immediate vicinity; as good estate management involved the inspection and trimming of trees from time to time, there was a duty on landowners to carry out those operations; and, therefore, the defendants were liable to the plaintiffs. The Court of Appeal now allowed the appeal. The facts appear in the judgments of TUCKER and SINGLETON, L.JJ.

Fox-Andrews, K.C., and Rees-Davies for the plaintiffs.

Marven Everett for the defendants.

Cur. adv. vult.

Apr. 12. The following judgments were read.

TUCKER, L.J. : This is an appeal from a judgment of LORD GODDARD, C.J., awarding damages to the plaintiffs for personal injuries suffered by them as a result of the fall of an elm tree which was growing in the fore-court of a block of flats, known as St. James's Close, at the corner of Prince Albert Road and Wells Rise in St. John's Wood, London, of which the defendants were lessees and in occupation by their tenants. The defendants became lessees in 1940, but in June, 1941, the premises were requisitioned by the Air Ministry who remained in occupation until April, 1946, when the premises were returned to the defendants. On Apr. 7, 1947, the elm tree fell on the plaintiffs as they were motoring along Prince Albert Road past this block of flats.

LORD GODDARD, C.J., found the following facts. The day was fine, there was nothing exceptional about the wind, but it was blowing in strong squally gusts from time to time. The tree was a large, well-grown elm, between 120 and 130 years old. After it fell it was found that three of its roots were badly affected by a disease known as elm butt rot. The other three roots showed signs of rot, but were not so badly affected. The disease was of long standing and must have been present in the roots long before the defendants took possession of the property. The roots had not been cut before the tree fell. There was no indication from the condition of the tree above ground that it was affected by this disease which had not taken a normal course. The fungus was working out sideways along the main roots and had not affected the trunk. There was nothing to indicate that the tree was in any way diseased. It carried a considerable crown—some 35 ft. in extent. It had not been trimmed or lopped for a great many years—indeed it was doubtful if it had ever been so treated. LORD GODDARD, C.J., found that the fall was due to a combination of circumstances, namely, the action of the wind on a tree bearing a large crown, the roots of which had rotted to a greater or less extent. He added ([1948] 2 All E.R. 1103) :

“Had it not been for the condition of the roots, it is probable that the wind was not heavy enough on the day in question to cause the tree to fall. On the other hand, had the tree not been bearing the amount of topshamper that it, in fact, was, and if it had been topped or pollarded, there is no reason to suppose that the tree would have fallen when it did, and it might have stood for a very considerable time.”

Save in one respect, *viz.*, the size of the crown, none of the above findings of fact was challenged before us. The finding with regard to the crown was, however, strongly criticised. It was said that it was based entirely on the evidence of a witness named Dunk on his being re-called. It was pointed out that the Lord Chief Justice had, apparently, rejected the evidence of this

witness on an important issue in the case, namely, whether or not the roots had been cut before the fall, and that Dunk, who was the garden superintendent of the St. Marylebone Borough Council, had never made any adverse report on this tree although it was part of his duty to inspect the trees in the neighbourhood for the purpose of causing the removal of branches overhanging the roadway lower than seven ft. from the ground, and he agreed that he would report any tree which he regarded as a potential danger. Furthermore, when first called he had been asked no question as to the size of the crown. No other witness who had seen the tree growing said that the crown was large or considerable, and the suggested extent of 35 ft. was only put in cross-examination to one witness, *viz.*, Mr. Prosser, who had a good view of the tree from his flat every day. He did not agree and said there was no evidence of the tree being top heavy. If the judgment had been based on the ground that the crown of the tree was of abnormal size so as to make it apparent to a layman that it was a potential danger, I should have been of opinion that the evidence was not sufficient to justify such a finding. A study of the judgment, however, satisfies me that it was not based on this finding. The Lord Chief Justice does not say it was abnormal, merely that it was large or considerable, which I take to mean no more than that it was the kind of crown which an elm tree of this age which had never been lopped might be expected to carry. The real ground of the decision is, I think, to be found in the following passage in the judgment. LORD GODDARD, C.J., says ([1948] 2 All E.R. 1103):

" . . . it is the duty of all owners of property to manage it in accordance with the principles of good estate management so that their property may not be in a condition likely to cause damage to persons lawfully using highways in the immediate vicinity, and, if good estate management involves the inspection and trimming of trees from time to time, there is a duty on landowners to carry out those operations. Mr. Le Sueur, who was called by the defendants, and who gave his evidence with a frankness which was most refreshing, said that elm trees should be inspected every five or seven years, and that if this tree had been lopped it is very unlikely that it would have fallen when it did. If, therefore, principles of good estate management require periodical inspection and cutting, it is not open to an occupier of property who maintains on his land trees which immediately adjoin or are very close to a highway to say: 'Well, I did not know that I ought to have done it'."

Later he said (*ibid.*, 1104), after referring to *Brown v. Harrison* (1):

"That, however, was a case where a dead tree fell, and it is true that in that case the judge found that it was apparent to the owner that the top boughs were dead and, therefore, likely to blow down. In this case the evidence satisfies me that it is a reasonable and proper precaution for the occupier of property on which there are elm trees bordering or near to the road to top or pollard them as an ordinary incident of good estate management. I may say that this was the opinion of SINGLETON, J., in *Cunliffe v. Bankes* (2). The learned judge in that case concluded his judgment by saying ([1945] 1 All E.R. 465): 'Those who have property of this kind have to realise there is a duty to the public.' He emphasised that the duty was there, though in that case he held that the owner had adequately performed the duty by periodical inspection. In this case, I think that the defendants did not realise their duty, and, though, with another object in view, namely, to get a tidy appearance, they had begun to do what good management required, unfortunately they had not done so in time."

There can be no doubt since the decision in *Noble v. Harrison* (3) that whether the claim is based on nuisance or negligence the plaintiff in such an

action as the present must establish either that the defendant knew of the danger or that he ought to have known of it. "Ought to have known" cannot mean more than "would have known if he had taken the precaution which a reasonable landowner would take." There are many things the doing of which may be in accordance with good estate management, but the failure to perform which I venture to think may not amount to negligence. I doubt, therefore, whether it assists the solution of the problem to test it in the terms of good estate management, unless this means no more than doing that which a reasonable landowner would know was necessary for the protection of the public. In the present case the defendants did not know of the existence of the danger, and the only question is whether they omitted to take some step which a reasonable landowner would take and which, if taken, would have prevented the continuance of the danger. An elm, though notoriously a shallow rooted tree, has not yet been placed in the category of things which a man keeps on his property at his peril, and, though it may be wise and in accordance with good estate management to lop elms every five or seven years, I do not think the evidence in the present case established that elms 120 or 130 years old (which is less than half of the normal life of an elm) normally becomes dangerous after seven years without lopping so that it can be said that on proof of failure to lop for seven years a *prima facie* case of negligence is established which can only be rebutted if the defendant can show that he omitted to lop as a result of advice received after expert examination. I am, accordingly, of opinion that, once the presence of disease is eliminated as an element of which the defendants were or should have been aware, the plaintiffs, in order to succeed, must show there was something in the appearance of this tree which should have indicated to the defendants the probability of danger. In this I think they failed. No witness who had seen the tree when growing said it looked dangerous. Two of these witnesses—Chipping and Dunk—were men who had had many years' experience of trees. The evidence of Chipping is, I think, of great importance. He is a timber and haulage contractor who has been engaged in timber felling since 1915. He was actually engaged in lopping the trees on this property when the accident occurred. He saw nothing dangerous in the appearance of this tree. There is no indication in the judgment under appeal that the Lord Chief Justice took an adverse view of this witness. This evidence of an expert, if reliable, would seem to absolve the defendants, who are not experts, from negligence in failing to appreciate the existence of danger, and, furthermore, would appear to lead to the conclusion that, if they had sought advice from this expert, they would have remained in ignorance. They cannot be required to call in an expert with the high qualifications of Mr. Le Sueur, but, even if he had been consulted, although it is highly probable he would have advised lopping, I do not think it is by any means certain he would have condemned the tree as dangerous.

The real cause of this unfortunate accident was the presence of elm butt rot, which disease had taken an unusual course with the result that there was nothing to indicate its presence to a layman or an expert. Once the defendants are absolved from responsibility in this respect, I do not think the evidence is sufficient to establish that their conduct in this matter fell short of the standard to be expected from a reasonable landowner of property adjoining a public highway. For these reasons, I would allow this appeal.

ASQUITH, L.J. : After much hesitation in what seems to be a difficult and delicately balanced case, I have come to the same conclusion as my Lord, for the reasons given by him, and I desire to add nothing.

SINGLETON, L.J. : The claim of the plaintiffs was laid in negligence, or, alternatively, in nuisance. An occupier of property owes a duty to his neighbours and to users of a highway alongside his premises. It is a duty to exercise that care which the circumstances demand—in other words, to act as

a reasonably careful man would act. PROFESSOR WINFIELD in his TEXT BOOK ON THE LAW OF TORT, 4th ed., p. 453, in dealing with the law of nuisance in relation to projections over the highway, states the position thus :

"If damage is done owing to the collapse of the projection on the highway or by some other mischief traceable to it, the occupier of the premises on which it stood is liable if he knew of the defect or ought, on investigation, to have known of it. At any rate that is the rule with respect to a thing that is naturally on the premises, e.g., a tree."

He cites *Noble v. Harrison* (3), in which it was pointed out that a tree was not in itself a dangerous thing and that to grow trees was one of the natural uses of the soil. Neither the defendant in that case nor his servants knew that the bough which fell was dangerous—indeed, the fracture was due to a latent defect not discoverable by any reasonably careful inspection. It was held that a claim based on negligence failed, as also did a claim based on nuisance.

A tree may become dangerous as was the case in *Brown v. Harrison* (1). In that case the tree, which hung over the road, was in a state of decay and that could be seen by anyone. SOMERVELL, L.J., in the Court of Appeal (177 L.T. 282) approved of the statement of the law by STABLE, J., who had stated :

"Having regard in each particular case to the circumstances of that particular case, if there is a danger which is apparent, not only to the expert, but to the ordinary layman, which the ordinary layman can see with his own eyes, if he chooses to use them, and he fails to do so, with the result that injury is inflicted, as in this case, upon somebody passing along the high road, the owner is in those circumstances responsible, because in the management of his property he has not acted as a normal reasonable landowner would act. That, as I understand it, is the extent of the duty'."

SOMERVELL, L.J., added : "The danger, therefore, must be apparent to the ordinary layman." There may, of course, be cases in which the circumstances are such that the ordinary layman ought to foresee danger or risk and to take the precaution of calling in expert advice.

In the case now under appeal the elm which fell was about 130 years old. The character of the neighbourhood had altered considerably during its lifetime. The tree was at a corner of the defendants' property and was twelve ft. from one road and six ft. from the other road. It showed no sign of disease outwardly, but it had, in fact, a disease of the roots (elm butt rot) of long standing, a disease which follows an injury or wound though there was no sign of any injury on the tree itself and the Lord Chief Justice accepted the evidence of Mr. Le Sueur that there was no indication that the roots had been cut at any time. Mr. Chipping, who was called in on Mar. 1, 1947, to advise the defendants as to tidying up the garden in which the tree stood, noticed nothing abnormal about the tree—"nothing that would denote that it was rotten in any way." He advised lopping this and other trees as part of the general tidying up process, and he would have left about 25 ft. of the tree standing which meant taking off about 15 ft. He said there was nothing whatever to make him suspicious about the tree and that "it had not a large crown—an ordinary one." Mr. Chipping is a man of experience in regard to trees. He knew that elms fall more easily than other trees, probably because of their shallow rooting. He said that he had occasionally been asked to deal with elms because of risk to adjoining property. Mr. Chipping began the lopping of the trees on the defendants' property the week before Easter, and all had been done except two when the accident happened on Easter Monday. This elm would have been dealt with on the Tuesday had it not fallen. Mr. Chipping was leaving it until the last, not anticipating any danger whatsoever. The property was managed by Messrs. Hillier, Parker, May & Rowden, surveyors and property

agents of great experience. Mr. Metcalf of that firm had been in charge. The building contractors who had been engaged almost continuously since the property was de-requisitioned were nearing the end of their work, and Mr. Metcalf came to the conclusion that the garden should be put in order—and that involved something being done to the trees, not from the point of view of safety but to let more light and sun into the garden. He was asked “As an

A ordinary layman, indeed, not as an ordinary layman, as managing agent, had you observed anything which called your attention to this tree?”, and he answered: “I had no reason to suppose that it required any special attention.”

Mr. Gabell, maintenance surveyor with the same firm, was called and gave the reason for the calling in of Mr. Chipping, which had nothing to do with safety. It may well be asked: “What more can be expected of those who

B are occupiers of property?” They had most experienced managing agents to look after the property; the agents called in Mr. Chipping who has been engaged in timber felling, etc., since 1915. The agents are accustomed to managing property; they saw no danger, nor did the man they called in—and one whose daily work is the felling of trees is probably as good a judge of the age of a tree and of the risks arising from falling trees as anyone.

C Mr. Atkins, a witness called on behalf of the plaintiffs, expressed the opinion that some of the roots of the tree had been severed at some time, but the Lord Chief Justice did not accept that view. The witness further said that an elm of this age “with a large crown” and in this position ought to have been lopped for reasons of safety. He added that elm trees, provided that they are not wounded, will go on for two, three, four hundred years, or, even up to five hundred years. He had not seen the tree, but went to the site on Jan. 2, 1948.

D Mr. Dunk, the garden superintendent of the St. Marylebone Borough Council, was another witness called on behalf of the plaintiffs. He also expressed the opinion that the roots of the tree had been cut many years previously. In cross-examination he was asked:

“Q.—In the course of your inspection and walking round, supposing
E you come across a tree which you regard as a potential danger to the public in any way, do you as a fact report it? A.—I do. Q.—Have you ever had any occasion to make any adverse report on this tree? A.—No.”

Mr. Dunk has held his position for 20 years. The tree was in his area and he saw it from time to time. During the period when the property was under

F requisition by the Air Ministry he had asked for some of the low branches overhanging the road to be cut back, but he had made no other suggestion.

The witness was recalled at a later stage and he said that the tree had a crown of about 35 ft. and “I should certainly say it was a large crown.” This was the nearest approach to evidence that the crown of the tree was unusual in any sense, and it must be taken in conjunction with the fact that the witness

G had not thought there was anything which called for a report. There was a considerable volume of evidence to the effect that there was nothing unusual about the tree. The defendants called as an expert witness Mr. Le Sueur, a consultant forester, who examined the remains of the tree and said he would not call it old for an elm but “more or less well into middle age.” He described the disease from which it suffered and which had taken an abnormal course,

H and he said he thought it was most unlikely that the disease would have been found even by boring. Mr. Le Sueur gave certain answers on which the plaintiffs’ counsel placed great reliance. He said that elms are untrustworthy and “you have more accidents with elms” and “they are more dangerous than any other species.” He was asked:

“Q.—In the case of an elm 130 years old, if it had a crown spreading, say, 35 ft. to 40 ft., standing close to the highway, it might well be advisable to have it inspected with a view to lopping? A.—I absolutely agree.”

The Lord Chief Justice asked :

"Q.—What did you agree to ? A.—That it should be inspected with a view to action being taken, or necessary action."

He gave his opinion on lopping and he was asked :

"Q.—It certainly ought to be inspected with a view to lopping before it is 100 years old ? A.—I quite agree. Q.—And if you inherit it . . . when it is 120 years old and it has not been lopped at all, common sense decrees that it should be inspected for that purpose ? A.—I could not argue against that."

He was asked by the Lord Chief Justice "Do you think you might have said if you went by : "Why on earth don't they have it lopped ?", and he answered : "Yes, I think so."

The Lord Chief Justice attached great importance to the evidence of Mr. Le Sueur, and it would seem that his judgment in favour of the plaintiffs is based very largely on some of the answers given by that gentleman. It is to be remembered that Mr. Le Sueur was an expert witness and was speaking as one having great knowledge of trees. In this respect he is not in the same category as the ordinary layman or as the reasonably careful occupier. Moreover, he was speaking after the event. He never saw the tree alive. The Lord Chief Justice formed the opinion that the defendants did not realise their duty. Yet they had Messrs. Hillier, Parker & Co. looking after the property for them, and one may think that property agents are not slow in calling in other expert advisers if they think it desirable to do so. Indeed, they did call in Mr. Chipping—not to advise on safety but as part of the tidying up scheme. Mr. Chipping saw no danger. If he had, he would not have left this tree until the last. If he had been consulted as to possible danger, it would not appear as though there would have been any change in his methods. In other words, that which happened was in no way due to any failure of the defendants to realise their duty. It was just sheer bad luck that this elm was caught by a gust of wind on Easter Monday. It would have been lopped (or topped) three days earlier except that it was Good Friday, and, in the ordinary course, it would have been dealt with on the Tuesday.

The evidence, taken as a whole, does not satisfy me that the defendants have failed in their duty or that they were negligent. It is not a case of the credibility of a witness or of witnesses. I find myself unable to agree with the conclusion at which the Lord Chief Justice arrived. If there had been evidence of apparent disease, or that the tree was unduly old, or that it had an unusually large top, the case would have been different. In the absence of any such evidence it seems to me that the Lord Chief Justice's judgment places an undue burden on the occupiers of property and goes far towards laying down the standard of the expert rather than that of the reasonably careful man who has elms in his garden or on his farm. I agree that the appeal should succeed.

Appeal allowed with costs here and below.

Solicitors : G. Howard & Co. (for the plaintiffs) ; Barlow, Lyde & Gilbert (for the defendants).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

KENNEWELL v. DYE.

[CHANCERY DIVISION (Roxburgh, J.), March 17, 18, 1949.]

Option—Option to purchase freehold—Notice of exercise of option—Notice to grantor's personal representative.

By a tenancy agreement, dated Apr. 6, 1923, it was provided: "The landlord . . . lets to the tenant and the tenant . . . accepts [the property] from Apr. 6, 1923, at the yearly rental of £15 payable half-yearly commencing with the first payment of rent six months from the date of the commencement of the tenancy which will be arranged between the [landlord] and the [tenant]." There followed certain provisions with regard to the payment of rates and taxes, liability for repairs, assignment or underletting, and re-entry for non-payment of rent, and the agreement continued: "The said landlord . . . agrees to allow the tenant . . . the enjoyment of the said premises without any interference whatsoever as long as the said [tenant] pays his rent and keeps to the covenants in the agreement as hereby contained." The agreement was then signed and witnessed, but it proceeded: "It is further hereby agreed and declared that the said [landlord] will sell to the said [tenant] this property for the sum of £350, subject to the said [tenant] giving to the said [landlord] three months notice of his intention of so doing." The agreement was then again signed by both parties and witnessed. On June 24, 1947, the landlord died, and on Nov. 24, 1947, the tenant purported to exercise the option to purchase by notice to the landlord's personal representative. The court found as a fact that the option clause formed part of the tenancy agreement and was, therefore, supported by consideration.

HELD: the burden of the option clause devolved on the personal representative and notice to him was sufficient compliance with the requirements thereof.

Harwood & Bincks v. Hilliard, (1677) (2 Mod. Rep. 268), *applied*.

Case referred to:

(1) *Harwood & Bincks v. Hilliard*, (1677), 2 Mod. Rep. 268; 3 Keb. 848; Freem. K.B. 247; 24 Digest 619, 6493.

ACTION for specific performance of an alleged contract for the sale of freehold land, or damages.

The action arose out of a memorandum of agreement by which the landlord granted a tenancy to the tenant, and, by way of an addendum, also an option to purchase the freehold, on notice being given to the landlord. The landlord having died, the tenant purported to exercise the option by notice to the landlord's legal personal representative. **ROXBURGH, J.**, held the notice to be good, and ordered specific performance. The facts are set out in the head-note.

Jopling for the plaintiff, the tenant.

Vaughan, K.C., and *N. F. M. Robinson* for the defendant, the legal personal representative of the landlord.

ROXBURGH, J. [having stated the facts, and having decided that the whole tenancy agreement, including the option clause, was executed at one and the same time, and that the option clause was, therefore, supported by consideration, continued:—] it is said that this was an option which, on its true construction, was incapable of exercise after the death of the grantor of the option. I think I may take the statement of the law on this subject from **WILLIAMS ON EXECUTORS**, 12th edn., p. 1126:

"The executors or administrators so completely represent their testator or intestate, with respect to the liabilities above mentioned, that every

bond, or covenant, or contract of the deceased (not being a contract personal to the deceased) includes them, though they are not named in the terms of it; for the executors or administrators of every person are implied in himself."

It does not, therefore, matter whether or not the words "executors or personal representatives" are expressly used, but, if they are used, *cadit quaestio*.

In my judgment, there are only two matters which would prevent the burden of this option from devolving on the personal representative of the grantor. One would be if, as a matter of construction of the document, I should hold that it was not intended so to devolve. I can find nothing in the document which would induce me so to hold. The other would be if the contract were personal to the deceased. I can see nothing in this case to make vicarious performance difficult on either side. The obligation on one side is to execute a conveyance, the obligation on the other side is to pay some money, and both of those transactions are readily capable of vicarious performance. Accordingly, I can see no ground for holding that the burden of this option did not devolve on the personal representative of the grantor.

It is said, however, that the notice has to be given to Mr. Dye, and that the giving of a notice to his personal representative is not the giving of a notice to him. In my judgment, that point is precluded by a very old case which counsel for the plaintiff cited to me, *Harwood & Bincks v. Hilliard* (1) (2 Mod. Rep. 268). In that case:

"By an agreement between the plaintiffs and the testator of the defendant, a parcel of lands was to be sold for £400; but if it did not arise to so much, then they covenanted with each other to repay proportionable to the abatement; and the defendant's testator covenanted for himself and his executors to pay his proportion to the plaintiffs, so as the plaintiffs gave him notice in writing of the said sale by the space of ten days; but doth not say that such notice was to be given to his executors or administrators. And now the plaintiffs averred, that they gave notice accordingly to the defendant who was executor; and the breach assigned was, that he hath not paid, etc. The defendant demands *oyer* of the indenture, wherein was a variance between the covenant (which was for notice to be given to the testator) and this declaration (by which notice is averred to be given to the executor); and for this reason he demurred . . . SIR FRANCIS NORTH, C.J., and ATKINS, J., upon the first opening this matter this term [which was the Michaelmas term in the 29th year of the reign of Charles II] inclined that the notice ought to be personal, and that the variance was material; but afterwards in Hilary term following, *mutata opinione*, the whole court agreed it to be otherwise, because the covenant runs in interest and charge, and so the executor is bound to pay; and therefore it is necessary that he should have notice."

In that case it was plain from the language of the covenant that the burden of it devolved on the executor of the testator. Therefore, that case is no authority on that aspect of my problem; but once I have decided on other grounds that the burden of the covenant does devolve on a personal representative, it appears to me that that authority shows plainly that in such a case the notice which the contract or covenant requires to be given to the deceased can be given, and should be given, to his personal representative. Accordingly, in my judgment, the plaintiff is entitled to specific performance of the contract.

Order for specific performance with costs.

Solicitors: *Routh, Stacey, Hancock & Willis*, agents for *Tallents & Co.*, Newark (for the plaintiff); *Morrish, Strode & Searle*, agents for *Hodgkinson & Beevor*, Newark (for the defendant).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

PYRAH v. DONCASTER CORPORATION.

[COURT OF APPEAL (Bucknill, Cohen and Denning, L.J.J.), March 1, 2, 17, 1949.]
Workmen's Compensation—"Accident"—*Tuberculosis*—*Hospital nurse subjected to repeated attacks of tuberculosis germs*—*Workmen's Compensation Act, 1925 (c. 84), s. 1 (1).*

In 1938 the applicant was employed as a nurse in the employers' isolation hospital for tuberculosis patients. In October, 1944, the applicant was found to be suffering from tuberculosis, and the evidence showed that between February, 1943, and April, 1944, she was subjected to constant attacks of tuberculosis germs. The evidence further disclosed particular incidents in which she had been brought into unusually close contact with tubercular patients. The question for decision was whether the applicant's infection with tuberculosis was an "injury by accident" entitling her to compensation under s. 1 (1) of the *Workmen's Compensation Act, 1925*, or whether it was a disease due to a process of work.

HELD (BUCKNILL, L.J., *dissentiente*): although it might not be possible to fix the exact dates on which the applicant inhaled tuberculosis germs, on each occasion on which that occurred there was an assault of bacilli which constituted an "accident", and, therefore, the applicant was entitled to compensation.

Principle in Brintons, Ltd. v. Turvey ([1905] A.C. 230; 92 L.T. 578); *Innes (or Grant) v. Kynoch* ([1919] A.C. 765; 121 L.T. 39); and *Burrell (Charles) & Sons, Ltd. v. Selvae* (1921) (126 L.T. 49), *applied*.

Roberts v. Dorothea Slate Quarries Co., Ltd. (No. 1) ([1948] 2 All E.R. 201), *distinguished*.

[AS TO "ACCIDENT" WITHIN THE ACT, see HALSBURY, Hailsham Edn., Vol. 34, pp. 816-822, paras. 1154-1159; and FOR CASES, see DIGEST, Vol. 34, pp. 267-275, Nos. 2272-2324.]

Cases referred to :

- (1) *Roberts v. Dorothea Slate Quarries Co., Ltd. (No. 1)*, (1947), 176 L.T. 541; 40 B.W.C.C. 24; *affd.*, [1948] 2 All E.R. 201; 2nd Digest Supp.
- (2) *Fitzsimons v. Ford Motor Co., Ltd. (Aero Engines)*, [1946] 1 All E.R. 429; 174 L.T. 233; 39 B.W.C.C. 26; 2nd Digest Supp.
- (3) *Brintons, Ltd. v. Turvey*, [1905] A.C. 230; 92 L.T. 578; 34 Digest 464, 3799.
- (4) *Burrell (Charles) & Sons, Ltd. v. Selvae*, (1921), 126 L.T. 49; 14 B.W.C.C. 158; *affg. S.C. sub nom. Selvae v. Burrell (Charles) & Sons, Ltd.*, [1921] 1 K.B. 355; 34 Digest 326, 2666.
- (5) *Fenton v. Thorley & Co., Ltd.*, [1903] A.C. 443; 89 L.T. 314; 34 Digest 266, 2264.
- (6) *Trim Joint District School Board of Management v. Kelly*, [1914] A.C. 667; 111 L.T. 305; 7 B.W.C.C. 274; 34 Digest 270, 2300.
- (7) *Fife Coal Co., Ltd. v. Young*, [1940] 2 All E.R. 85; [1940] A.C. 479; 162 L.T. 344; *sub nom.*, *Young v. Fife Coal Co.*, 33 B.W.C.C. 107; 2nd Digest Supp.
- (8) *Marshall v. East Holywell Coal Co.*, *Gorley v. Backworth Collieries*, (1905), 93 L.T. 360; 34 Digest 271, 2303.
- (9) *Walker v. Hockney Brothers*, (1909), 2 B.W.C.C. 20; 34 Digest 273, 2311.
- (10) *Innes (or Grant) v. Kynoch*, [1919] A.C. 765; 121 L.T. 39; 12 B.W.C.C. 78; 34 Digest 272, 2308.
- (11) *Hughes v. Lancaster Steam Coal Collieries, Ltd.*, [1947] 2 All E.R. 556; 177 L.T. 313; 2nd Digest Supp.
- (12) *Williams v. Guest, Keen & Nettlefolds*, [1926] 1 K.B. 497; 134 L.T. 459; 18 B.W.C.C. 535; 34 Digest 272, 2310.
- (13) *Roberts v. Penrhyn (Lord)*, *post*, p. 891.

APPEAL by the employers from an award made by His Honour JUDGE CAPORN, at Doncaster County Court, dated Sept. 10, 1947, whereby he awarded the applicant compensation in respect of total incapacity at 30s. a week from Nov. 1, 1944, by reason of an injury by accident occurring in the course of her employment. The learned judge had made his award before the opinion of the House of Lords was given in *Roberts v. Dorothea Slate Quarries Co., Ltd.* (1), and the Court of Appeal adjourned the present case pending the House of Lords decision. The court now, by a majority, distinguished the present case from *Roberts'* case (1) and dismissed the appeal. The facts appear in the judgment of BUCKNILL, L.J.

Beney, K.C., and *E. Ould* for the employers.

P. M. O'Connor for the applicant.

Cur. adv. vult.

Mar. 17. The following judgments were read.

BUCKNILL, L.J. : This is an appeal from an award dated Sept. 10, 1947, made by His Honour JUDGE CAPORN in favour of Lorna Pyrah, the applicant, in proceedings under the Workmen's Compensation Acts against the employers, the mayor, aldermen and burgesses of Doncaster. The award was in respect of total incapacity since Nov. 1, 1944. After the employers had lodged this appeal this court made an order standing the case out of the list to await the determination of the case of *Roberts v. Dorothea Slate Quarries Co., Ltd.* (1), which was pending in the House of Lords and in which judgment has now been given.

The material facts in the present case are as follows. The applicant was a nurse in the employment of the employers' isolation hospital at Doncaster. She started work there in 1938 when she was 25 years of age. The patients were suffering from tuberculosis. Up to 1941 the practice was for a nurse to wear a mask and a gown when attending a patient, but the applicant said that this practice was discontinued when the resident medical superintendent left. In the sanatorium sputum cans were provided for each patient, and they were emptied each morning into a pail by nurses. In January, 1943, the hospital authority introduced a routine X-ray for nurses every six months. The applicant was examined in February, 1943, and was free of tuberculosis. There is no history of tuberculosis on either side of her family. Her evidence was that during the war the ventilation was impaired by the black-out conditions, and owing to the shortage of staff she did not get away for the usual two hours absence from the ward. There were very many acute cases of tuberculosis in the hospital in 1943. In January, 1944, she was relief night sister and was on duty throughout the night. In the fever ward, where the applicant also nursed and where the patients had tuberculosis, there were no sputum cans. In May, 1944, the applicant began to feel tired, had pains in her joints, and had to go off duty. She returned to duty for three weeks in July, and after a further absence in August and September—due to other causes—she returned to work in the hospital on Sept. 25. On Oct. 27, 1944, the routine X-ray disclosed tuberculosis in her left lung. This was treated, but she has been unable to do her work as a nurse since Nov. 1, 1944. I need not refer to the medical evidence called before the judge, except to say that the deputy medical officer for health, in charge of the hospital since 1941, said that nurses were told to use masks and that he had no knowledge of their not being used after 1941, but he had on occasions seen nurses not wearing masks. The judge said that he found that the applicant became infected by tuberculosis bacilli as a result of constant and repeated doses between February, 1943 and April, 1944, and probably within a few months before April, 1944, and made an award in the applicant's favour.

It was conceded by counsel for the employers that if *Fitzsimons v. Ford*

Motor Co. (Aero Engines) (2) is an authority which this court ought to follow, this appeal must fail, but his argument was that *Fitzsimons'* case (2) cannot be so regarded because of the more recent decision of the House of Lords in *Roberts v. Dorothea Slate Quarries* (1). An important question, therefore, in this appeal is whether the decision in *Roberts'* case (1) is inconsistent with the present award. The legal position in this kind of case is summed up in the following passage in LORD PORTER'S speech in *Roberts'* case (1) ([1948] 2 All E.R. 205):

"In truth, two types of case have not always been sufficiently differentiated. In the one type there is found a single accident followed by a resultant injury, as in *Brintons, Ltd. v. Turvey* (3), or a series of specific and ascertainable accidents followed by an injury which may be the consequence of any or all of them, as in *Burrell (Charles) & Sons, Ltd. v. Selvaige* (4). In either case it is immaterial that the time at which the accident occurred cannot be located. In the other type, there is a continuous process going on substantially from day to day, though not necessarily from minute to minute or even from hour to hour, which gradually and over a period of years produces incapacity. In the first of these types, the resulting incapacity is held to be injury by accident. In the second it is not. In the case of silicosis it is, of course, possible to divide up the cause of the final collapse and say that each particle of silica striking upon and adhering to the lung is a separate accident, but, however analytically maintainable, the attribution of the resultant silicosis to an accidental cause is an unreal one. The distinction between accident and disease has been insisted on throughout the authorities and is, I think, well-founded . . . I do not know, however, that any explicit formula can be adopted with safety. There must, nevertheless, come a time when the indefinite number of so-called accidents and the length of time over which they occur take away the element of accident and substitute that of process. In my opinion, disability from silicosis is one of such instances. It cannot be said to be the result of injury by accident."

The problem is to decide in which category the present case falls. It seems to me that the solution to this problem must turn partly on the answer to the question: Is this an injury by accident within the meaning of that word as defined by various decisions which are binding on us? It must also turn partly on the solution of a more technical question, namely, (a) whether as a matter of law the disease of tuberculosis contracted in this case is indistinguishable in principle from the disease in *Fitzsimons'* case (2), and (b) whether *Fitzsimons'* case (2) is still a valid authority which this court ought to follow.

First, was this an injury by "accident" as defined by the authorities binding us? LORD MACNAGHTEN in *Fenton v. Thorley & Co., Ltd.* (5) said ([1903] A.C. 448):

"... the expression 'accident' is used in the popular and ordinary sense of the word as denoting an un-looked for mishap or an untoward event which is not expected or designed."

This definition was qualified by the speech of LORD HALDANE, L.C., in *Trim Joint District School Board of Management v. Kelly* (6) where he said ([1914] A.C. 676:

"I think that the context shows that in using the word 'designed' LORD MACNAGHTEN was referring to designed by the sufferer."

In *Kelly's* case (6) it was held that murder might be an accident, because it was unexpected by the workman although carefully designed by the murderer. This definition includes one essential feature, namely, that it is an event or series of events of such a nature as does or do not normally occur in the course of the employment of the applicant. Applying that test to the present case,

can it be said that it is to be expected that a nurse in a hospital where there are tuberculosis patients will herself develop tuberculosis? No such evidence has been given in this case, and it has not been suggested in argument. Provided proper appliances are used and proper safeguards taken, I think that such a suggestion would be untenable. However, no evidence was directed to this point, and the only inference one can draw from the use of masks by the nurses is that there is an obvious risk of infection if proper precautions are not taken. The arbitrator was presumably unable to infer from the evidence that the successful attack or attacks of the tuberculosis bacilli on the applicant's lung had been due to some particular incident, such as that to which she referred in her evidence, in January, 1944 (about three months before she began to feel pain and weariness). I think it would be impossible in the present case to attribute the onset of the disease to any particular incident and that the judge was right when he attributed it to the constant and repeated inhalations by the applicant of tuberculosis bacilli during the thirteen months between the first test and the time when she first began to feel ill.

The question then arises whether such inhalations can properly be said to constitute an accident. On the one hand it is argued that the case falls within the process category. That argument is, I think, best supported by quoting the passage in the speech of VISCOUNT CALDECOTE, L.C., in *Fife Coal Co., Ltd. v. Young* (7), which was relied on by LORD SIMONDS in *Roberts'* case (1). The passage in VISCOUNT CALDECOTE's speech is as follows ([1940] 2 All E.R. 88):

"The two cases, one of 'beat hand' and the other of 'beat knee,' which came before the Court of Appeal very shortly after the decision of your Lordships' House in *Brintons, Ltd. v. Turvey* (3)—namely, *Marshall v. East Holywell Coal Co., Gorley v. Backworth Collieries* (8)—followed a different line. They were each decided in favour of the employer on the grounds that the injury was the inevitable result of work long continued, and was not anything which could be described as having happened on a particular duty. *Walker v. Hockney Bros.* (9), the case of the man who gradually over a period of five years acquired paralysis by riding a carrier bicycle, was another decision in favour of the employer. There is no reason to doubt the correctness of the decisions in the three cases I have last mentioned. In all of them the facts were such as to make it impossible to identify any event which could, however loosely, be called an accident. In these cases, the workman failed, not because a disease is outside the purview of the Workmen's Compensation Act altogether, but because the burden of proof that there has been an accident was not discharged."

On the other hand it is argued that each inhalation of bacilli which, in fact, injured the lung of the applicant was an event which could be called an accident within the meaning given to that word in the decided cases. In *Innes v. Kynoch* (10) blood poisoning starting at an abrasion on the leg of the workman and caused by bacilli in artificial manure which was being handled by the workman was held to be an accident, and in *Selvage v. Burrell* (4) injury from a series of cuts made in the workman's hands which gradually became septic was also held to constitute an accident.

I think that ultimately it becomes very largely a question of fact whether it can be said in any particular case that individual events, however numerous they may be, which brought about the injury to the workman, may be said to be an accident. I cannot distinguish between injurious incursions into the body of living organisms, or chemical bodies such as particles of gas, or of mineral bodies such as minute fragments of silica dust. In each case they may do injury to the body, and the question in each case is whether the injury is done in such a way and over such a period of time as to describe it as a process, or whether it is done in such a way and over such a period of time as to describe it as an accident.

A A great deal was said in the course of the argument on the question whether the opinions of the House of Lords in *Roberts'* case (1) made the decision of the Court of Appeal in *Fitzsimons'* case (2) invalid. On this point it is necessary to consider carefully the facts in *Fitzsimons'* case (2). The applicant was employed by the respondents as a "rotary fettler," which required him to hold in his hand a machine which vibrated at the rate of 2,800 revolutions a minute. He held this machine in his left hand whilst with his right hand he pressed it against the material to be cut. After he had been working in this way for about a year the workman found his hand going dead, and the hand became useless after another six months. The medical evidence was that the workman's condition, known as Reynaud's disease, was caused by the vibrations of the machine, and that each vibration constituted a tiny blow to the workman's hand and arm which was transmitted to the nerves and injured them, and thereby interfered with the normal flow of blood to the hand. The application for compensation under the Workmen's Compensation Acts was dismissed by the arbitrator on the ground that to constitute an injury by accident within the Acts the workman must be "suddenly and decisively attacked at his work," and in effect that the gradual ruining of his blood vessels did not bring him within the Acts. This judgment was reversed in the Court of Appeal. SCOTT, L.J., in giving the judgment of the court in a reserved judgment said that the court thought it their duty to follow *Selvage v. Burrell* (4). Each vibration was an infinitesimal blow to the man's hand and arm, causing an infinitely small damage to their tissues. SCOTT, L.J., added this ([1946] 1 All E.R. 430):

D "Some men may have better powers of resistance to such attacks than others, but the mere fact that the breakdown does not occur until the cumulative effect of the tiny blows from the vibrations produces a certain degree of alteration in the nerves does not affect the character of the cause."

E Eighteen months after the decision of the Court of Appeal in *Fitzsimons'* case (2), *Hughes v. Lancaster Steam Coal Collieries, Ltd.* (11) came before the Court of Appeal (TUCKER, SOMERVELL and EVERSHED, L.JJ.). In that case the workman was employed in working a pneumatic drill. After he had been working it for some time, which is not specified in the report of the case, he noticed a lump in his groin which developed into a hernia and made an operation necessary, and he was away from work in consequence for a little over three months. The judge dismissed the man's claim for compensation on the ground that he had not proved that the use of the machine contributed to the onset of the hernia. In the Court of Appeal, TUCKER, L.J., in the course of his judgment allowing the appeal, said ([1947] 2 All E.R. 558):

G "Counsel for the employers has urged that . . . injury must be due to a series of accidents, each of which is specific and ascertainable. He has referred us to a number of authorities, some on one side of the line and some on the other, some cases dealing with the controversial question when and in what circumstances the contraction of some disease can be said to be due to an accident, and other cases where it has been held that a number of small accidents may cumulatively amount to an accident within the meaning of the statute."

H TUCKER, L.J., cited that part of the judgment of SCOTT, L.J., in *Fitzsimons'* case (2) which I have set out and said (*ibid.*, 559):

"I think that all those observations are applicable to the evidence in the present case . . ."

Hughes v. Lancaster Steam Coal Collieries (11) was decided in the Court of Appeal in July, 1947, six months after *Roberts v. Dorothea Slate Quarries Co., Ltd.* (1) had been decided in the Court of Appeal (SCOTT and MORTON, L.JJ., and myself). In *Roberts'* case the workman had been employed in the slate works of the same employers for some 20 years, and during that time was in frequent contact

with slate dust and silica particles. He then became totally incapacitated from injury to his lungs through gradual inhalation of particles of silica. These caused minute injuries to the air passages and cells of the lungs, and gradually produced the disease known as silicosis. SCOTT, L.J., when giving judgment dismissing the workman's appeal, said that the case was concluded by the decision in *Williams v. Guest, Keen & Nettlefolds* (12). He said (176 L.T. 542):

"It may be that, on an appeal, the House of Lords will reconsider *Williams v. Guest, Keen & Nettlefolds* (12), or possibly the decision of this court in *Fitzsimons v. Ford Motor Company* (2). This court there decided a question which has some apparent similarity to that in *Williams v. Guest, Keen & Nettlefolds* (12) but not sufficient for us to regard it as leaving the latter decision open to criticism by this court. That being so, I take that decision as binding on this court at present. It completely covers this case. . ."

I venture to describe that passage as a discreet invitation to the House of Lords to express their disapproval of the decision in the *Guest, Keen* case (12), which was also a case of silicosis. The House of Lords, however, in *Roberts' case* (1) expressed their approval of the *Guest, Keen* decision (12), but said nothing about *Fitzsimons' case* (2).

Counsel for the employers informed this court that when he argued *Roberts v. Dorothea Slate Quarries* (1) in the House of Lords he relied strongly on the decision of the Court of Appeal in *Fitzsimons' case* (2). The fact that their Lordships did not mention *Fitzsimons' case* (2) in their opinions leads me to the conclusion that they thought, not that *Fitzsimons' case* (2) was wrongly decided, but that it was a very difficult case which appeared to lie between the two categories of process or accident and that it was unnecessary for them to decide into which category it ought to fall. I, therefore, find it impossible to accede to the argument of counsel that the House of Lords decision in *Roberts' case* (1) impliedly overruled the decision in *Fitzsimons' case* (2). That being so, it seems to me that this court is free to hold that the constant inhalations of noxious bacilli into the applicant's lungs in this case was either an "accident" similar in principle to the blows from the electric machine in *Fitzsimons' case* (2), or the blows from the pneumatic drill in *Hughes' case* (11), or else a process similar to the injury done by the inhalations of silica dust as in *Guest, Keen's case* (12) and *Roberts' case* (1). I think that the answer is to be found in the comments by LORD CALDECOTE in *Fife's case* (7), which I have already set out. With genuine regret I must express my opinion that the disease of the applicant cannot properly be said to be the result of a series of ascertained or ascertainable accidents. I think it was the result of a gradual process of breathing air containing noxious bacilli, as in the silicosis case, and that there is no such evidence of accidental cuts or blows as would put the case in the category of accident. It is for the applicant to prove her case, and if the matter is left in doubt, then I think the inevitable result is that the applicant fails to establish her claim to compensation under the Workmen's Compensation Acts. I think, therefore, that this appeal should be allowed, but COHEN and DENNING, L.JJ., think that the appeal should be dismissed.

COHEN, L.J. [after stating the facts]: The learned county court judge did not refer to any of the particular instances which I have mentioned. We were informed that this was because his attention was directed to the decision of this court in *Fitzsimons v. Ford Motor Co., Ltd.* (2), and he considered that the principle of that case bound him to decide the present case in favour of the applicant. In that case a workman was employed for some nineteen months continuously as a rotary fettler which involved his gripping tightly in the left hand a machine with movable parts which revolved at 2,800 revolutions a minute. The resulting vibrations gradually damaged the tissues and nerves of his hand until he became incapacitated. The learned county court judge

dismissed his claim for compensation, holding that there had been no accident, but his decision was reversed by the Court of Appeal. SCOTT, L.J. said ([1946] 1 All E.R. 430) :

A “In our opinion he was wrong in so holding. Each vibration caused by the rapidly rotating instrument was, as it were, an infinitesimal blow to the man's hand and arm, transmitted to the nerves, causing an infinitely small damage to their tissues, and in the end cutting off the flow of blood needed to keep the hand in a healthy condition. Some men may have better powers of resistance to such attacks than others, but the mere fact that the breakdown does not occur until the cumulative effect of the tiny blows from the vibrations produces a certain degree of alteration in the nerves does not affect the character of the cause.”

B Counsel for the employers, while admitting that, if *Fitzsimons'* case (2) is still good law, it would be difficult for him to succeed in the present case, submitted that it had been in effect overruled in *Roberts'* case (1) and that the present case was indistinguishable in principle from *Roberts'* case (1). Counsel for the applicant pointed out that the House of Lords did not overrule *Fitzsimons'* case (2) despite an invitation by SCOTT, L.J., in the Court of Appeal (see 176 C L.T. 542) to do so, an invitation which the argument of counsel for the employer himself, when the case was before the House of Lords, necessarily endorsed. Counsel for the applicant submitted, therefore, that *Fitzsimons'* decision (2) still stood. He went on, however, to submit, and he really made this the main ground of his argument, that, whether *Fitzsimons'* (2) was good law or not, the present case was distinguishable on its facts from *Fitzsimons'* (2) and fell within D the principle of three decisions of the House of Lords, *Brintons, Ltd. v. Turvey* (3), *Innes (or Grant) v. Kynoch* (10) and *Burrell & Sons Ltd. v. Selvaige* (4). It will be convenient to consider this argument first.

E In *Brintons'* case (3) while the workman was employed sorting wool in a factory a bacillus (according to the medical evidence or theory) passed from the wool to the eye of the workman and infected him with anthrax of which he died. On the facts as found by the learned judge the germ did not enter through any abrasion or pimple, but alighted on the eye. The judge found in favour of the workman and the House of Lords (LORD ROBERTSON dissenting) affirmed his decision, holding that it was a case of injury by accident within the meaning of the Acts.

F In *Innes'* case (10) a workman employed in handling artificial manure, consisting mainly of bone dust, died from blood poisoning caused by his becoming infected through an abrasion on his leg by certain noxious bacilli which were present in large numbers in bone dust, but were also found in the air and in other substances, though in a much lesser degree. It did not appear when or how he received the abrasion and it was impossible to say with certainty when the infection occurred. The arbitrator found in favour of the workman and his decision was upheld in the House of Lords. LORD BIRKENHEAD, L.C., based his decision on the earlier decision in *Brintons'* case (3) saying ([1919] G A.C. 770, 772) :

H “In that case, therefore, the essentials of the composite phrase ‘injury by accident’ were satisfied. This decision may easily prove with the development of scientific discovery to be one of far-reaching importance. Had your Lordships been invited to reach this conclusion in the absence of authority, I should have given the most anxious attention to the many powerful arguments contained in the dissenting judgment of LORD ROBERTSON. But I am clearly of opinion that *Brintons'* case (3) does in fact govern the present case. The sequence of incident is a little difficult to describe in precise speech, because the courts have necessarily applied to infection by microscopically small organisms language which is more commonly

used of, and therefore suggests, larger and more material forces; thus the invasion of the bacillus is conceived of as a blow or physical assault. And an interval is assumed (perhaps rightly) before the assault, which is the accident, is followed by the infection or contraction of disease, which is the injury. When *Brintons'* case (3) was decided the area conceded by contemporary science to idiopathic disease was much larger than is the case today. It follows that the area of disease which is now traced to infection by bacillus has correspondingly grown. The result is that the decision in *Brintons* (3) is likely to increase in range. But no apprehension founded upon these scientific observations can affect our duty to follow the decision when once we are agreed upon its scope. . . It is no doubt the fact that in *Brintons'* case (3) a particular time was found as being that at which the contract occurred. But all that is material is that the infection should have been the result of contact at some one particular time and that this one particular time should have been during the course of the employment. . . That it should be some particular occurrence happening at some particular time is essential, otherwise it is not in the nature of an accident. What that particular time was is immaterial so long as it reasonably appears that it was in the course of the employment."

In *Burrell's* case (4) the applicant, who was employed in cleaning shell adaptors for copper plating, in the course of her work scratched and cut her hands very frequently. Some of the scratches and cuts suppurated and caused septic poisoning, so that in April, 1918, she had to give up work and was quite incapacitated. It appeared that it was impossible to identify any particular scratch as having caused the injury, but there was no doubt that the injury was the result of the septic condition produced by the scratches. The House of Lords decided that she had suffered an injury by accident for which she was entitled to compensation, although the times and places of the several scratches or causes could not be fixed and her condition could not be attributed to one particular injury. LORD BUCKMASTER said (126 L.T. 50):

"The only question therefore for consideration is whether when the disease is due not to one specific and definite accident, but to a series of accidents, each one of which is specific and ascertainable although its actual influence on the resulting illness cannot be precisely fixed, the workman is disentitled to the benefit of the statute. I cannot find any words in the statute which permit of such a construction. In the present case personal injury was suffered, it was suffered by accident, and the injury is no less accidental because it occurred on a series of occasions instead of on one. It follows that the claim to compensation was properly established."

In all these cases it will be observed that the accident was due to the infection of the bacilli. In *Burrell's* case (4) the infection took place through scratches themselves incurred in the course of the employment, but in *Brintons'* case (3) there was nothing to show that the applicant had suffered any injury prior to the infection of the anthrax germ, and in *Innes'* case (10) there was nothing to show whether the scratch from which the germ was thought to have entered was incurred at work or not. Moreover, both in *Innes'* case (10) and *Burrell's* case (4) the infection was due to a number of accidents, and it was impossible to attribute it to any particular one of them. Counsel for the applicant submitted that the principle of the cases I have cited necessarily involved that the applicant was entitled to succeed. Counsel for the employers pointed out that there was no reported case where a workman had succeeded when the invasion of the bacilli took place through the normal habit of breathing. That is true, but equally there is no authority that the workman cannot succeed in such a case. Moreover, in *Brintons'* case (3) the germ found its way into the system without any external injury. I can see no reason in principle why there should be any difference between an invasion through the nostril and invasion through a cut

incurred outside the course of the employment. It seems to me that the principle of the cases counsel for the applicant cited applies to the present case.

Counsel for the employers, however, submitted that we were debarred from so holding by the recent decision of the House of Lords in *Roberts' case* (1). He referred us in particular to the passage in the speech of LORD PORTER, which is as follows ([1948] 2 All E.R. 205, 206) :

- A "In truth, two types of case have not always been sufficiently differentiated. In the one type, there is found a single accident followed by a resultant injury, as in *Brintons, Ltd. v. Turvey* (3), or a series of specific and ascertainable accidents followed by an injury which may be the consequence of any or all of them, as in *Burrell (Charles) & Sons, Ltd. v. Selva* (4). In either case it is immaterial that the time at which the accident occurred cannot be located. In the other type, there is a continuous process going on substantially from day to day, though not necessarily from minute to minute or even from hour to hour, which gradually and over a period of years produces incapacity. In the first of these types, the resulting incapacity is held to be injury by accident. In the second it is not . . . I do not know, however, that any explicit formula can be adopted with safety. There must, nevertheless, come a time when the indefinite number of so-called accidents and the length of time over which they occur take away the element of accident and substitute that of process. In my opinion, disability from silicosis is one of such instances. It cannot be said to be the result of injury by accident."
- D In my opinion, the facts of this case as found place it in the first of the types specified by LORD PORTER, not the second. It seems to me that every time the applicant inhaled a tuberculosis germ, that was an assault of bacilli within the meaning of LORD BIRKENHEAD's speech in the *Innes* case (10), that that assault constituted an accident, and that these incidents did not occur over such a length of time or in such circumstances as to deprive them of the character of accident and substitute that of process. Counsel for the employers also
- E relied on a passage in LORD SIMONDS' speech in the same case where he said that he regarded *Burrell's* case (4) as the high-water mark and felt it impossible to say that the disease in *Roberts' case* (1) was due to a series of accidents each one of which was specific and ascertainable. I do not find myself embarrassed by LORD SIMONDS' words. It seems to me that, for the reasons I have given, every time the applicant inhaled a tuberculosis germ, an accident
- F occurred, and that, though it may not be possible to fix the exact dates on which these incidents occurred, yet, as it is quite plain that they all occurred in the course of her employment, and that the infection was due to one or more of them, she is entitled to succeed. For these reasons I think the appeal fails and I do not think it desirable on this appeal to go into the question of whether *Fitzsimons' case* (2) is good law as that point is more clearly raised in the second
- G case with which we have to deal, *Roberts v. Penrhyn* (13)*.

* ROBERTS v. PENRHYN (LORD).

[COURT OF APPEAL (Bucknill, Cohen and Denning, L.JJ.), March 2, 17, 1949.]

Workmen's Compensation—Accident—Continuous process—Diseased hip caused by working pneumatic drill—Process extending over twenty years—Workmen's Compensation Act, 1925 (c. 84), s. 1 (1).

- H APPEAL by the employer from an award dated Dec. 23, 1947, made by His Honour JUDGE EVANS, K.C., sitting at Bangor County Court, whereby he awarded compensation to the workman on the ground that he had suffered an "injury by accident" within the meaning of s. 1 (1) of the Workmen's Compensation Act, 1925.

The workman had been employed as a rock driller in the employer's quarries for over twenty years. This work involved the use of a drilling machine which constantly came forcibly into contact with the left side of the workman's hip. In 1943 or 1944 pain developed in the hip and shortly afterwards the workman became totally incapacitated by reason of an osteo-arthritic condition which was directly attributable

DENNING, L.J.: Many diseases cannot in their nature be due to accident, but some may be. These include the diseases produced or precipitated by trauma (that is, injury or shock), by exposure or exertion, by infection or contagion, or by contact with or invasion by foreign elements. If one of these diseases is due to an accident or series of accidents, it may form the subject of compensation under the Workmen's Compensation Acts, but if it is due to a process of work, and not to an accident or accidents, it will not form the subject of compensation unless it is one of the scheduled diseases. The present question is: Where is the line to be drawn between a disease which is due to an accident or accidents, and a disease which is due to a process of work. In my opinion, the solution to that question is to be found by remembering that an accident is something fortuitous, something which is unsought but happens by chance, something of which it can be predicated that, even if it is very likely to happen, and happen repeatedly, nevertheless it is still a chance that it does happen. Applying this test, if a disease can be attributed to one external factor only, whether that factor be trauma, exposure, exertion, or infection, or such like, then it is undoubtedly due to an accident, even though the precise occasion on which it occurred cannot be ascertained: see *Brintons v. Turvey* (3), *Innes v. Kynock* (10) and *Fife Coal Co. v. Young* (7); but if the disease is due to a number of external factors acting in combination, such as inhaling foreign particles over a long period, exposure to dust, or numerous cuts, then a distinction has to be drawn. On the one hand, the disease is due to a series of accidents if

to the vibration caused by the use of the drill. The question was whether this condition was an "injury by accident" within the meaning of s. 1 (1) of the Workmen's Compensation Act, 1925.

Beney, K.C., and *J. H. C. Goldie* for the employer.

Edgedale, K.C., and *Monier-Williams* for the workman.

Cur. adv. vult.

Mar. 17. The COURT OF APPEAL, in a considered judgment, held that the length of time over which the series of impacts occasioned by the vibration of the pneumatic drill occurred was such as to take away the element of accident and substitute that of process, so that the injury sustained by the workman was not an "injury by accident" within the meaning of s. 1 (1) of the Act of 1925 and the workman was not, therefore, entitled to compensation.

Per COHEN, L.J.: I should not hesitate to refuse to follow *Fitzsimons v. Ford Motor Co., Ltd. (Aero Engines)* (2), if I were satisfied that it could not be reconciled with the decision of the House of Lords in the *Dorothea* case (1). I have, however, to bear in mind that when the *Dorothea* case (1) was before this court, the court invited the House of Lords to reconsider *Fitzsimons* case (2), and, we were informed during the hearing of the present matter by counsel for the employer, when he was arguing for the workman in the *Dorothea* case (1) in the House of Lords, he relied strongly on the *Fitzsimons* case (2) and submitted that, if it were correctly decided, it necessarily followed that he was entitled to succeed in the *Dorothea* case (1). Despite this invitation both from this court and counsel, none of their Lordships mentioned the *Fitzsimons* case (2), and in these circumstances I hesitate to come to the conclusion that their Lordships have impliedly held that *Fitzsimons* case (2) was wrongly decided. Counsel relied on the fact that in the *Dorothea* case (1) their Lordships expressly approved the decision of this court in *Williams' case* (12)—a silicosis case—and, apparently, approved the decisions of this court in *Marshall v. East Holywell Coal Co.*; *Gorley v. Backworth Collieries* (8), the "beat hand" and "beat knee" cases. These cases are difficult to distinguish from the *Fitzsimons* case (2), but the distinction may be that in neither of the earlier cases was it possible to fix on any particular occurrence corresponding to the vibration in *Fitzsimons* case (2) which could be described as an accident. Moreover, it has to be borne in mind that in *Fife Coal Co. v. Young* (7), when the earlier cases first received the blessing of the House of Lords, the House of Lords distinguished them and decided in favour of the workman.

Appeal allowed with costs.

Solicitors: *Barlow, Lyde & Gilbert* (for the employer); *Shaen, Roscoe & Co.*, agents for *W. Elwyn E. Jones, Bangor* (for the workman).

C.N.B.

the external factors which produce it occur fortuitously as a matter of chance. That was the case in *Charles Burrell v. Selvage* (4) where, although the cuts were numerous and repeated, nevertheless each one occurred as a matter of chance. On the other hand, a disease is due, not to a series of accidents, but to a process of work if the external factors which produce it are a continuous and necessary concomitant over a long period of the work in which the man is engaged. That was the case in *Roberts v. Dorothea Slate Quarries Co., Ltd.* (1) where the inhaling of the silica dust was not fortuitous but a necessary incident of the work.

The decision of the House of Lords in *Roberts v. Dorothea Slate Quarries Co., Ltd.* (1) makes it necessary to re-consider the previous cases on the subject. It calls a halt to the recent tendency to treat diseases due to a process of work as if they were diseases due to accident. Its effect, in my opinion, is to restore the authority of *Marshall v. East Holywell Coal Co.* (8) and to render the *Fitzsimons* (2) and *Hughes* (11) cases no longer of authority. Applying this principle to the present case, the question, to my mind, is what is the proper interpretation of the judge's finding that the nurse became infected by tuberculosis bacilli as a result "of constant and repeated doses" between February, 1943 and April, 1944. If that means, as BUCKNILL, L.J., thinks, that it was the result of a gradual process of breathing air containing noxious bacilli, I would agree that it would not be due to a series of accidents, but I do not read the finding in that way. I read it as meaning that there was a repeated number of incidents such as those she described in evidence when she was brought by chance into close contact with a patient who had been coughing. She could not, of course, remember all the incidents and she specified only a few of them, but they were all accidental. On this view the case falls within the cases of which *Burrell v. Selvage* (4) is an example, and not within *Roberts v. Dorothea Slate Quarries Co., Ltd.* (1). I would, therefore, dismiss the appeal.

Appeal dismissed with costs.

Solicitors: *William Easton & Sons*, agents for *Pullan, Davies & Co.*, Leeds (for the employer); *Foss, Bilbrough, Plaskitt & Co.* (for the applicant).

[Reported by C. N. BEATTIE, Esq., Barrister-at-Law.]

KELLY v. STOCKPORT CORPORATION.

[COURT OF APPEAL (Tucker, Asquith and Singleton, L.JJ.), April 6, 1949.]

County Court — Jurisdiction — Negligence — Damages — Apportionment — Damages assessed at sum in excess of that which court had jurisdiction to award—Reduced to amount within limits of jurisdiction—County Courts Act, 1934 (c. 53), s. 40 (1)—Law Reform (Contributory Negligence) Act, 1945 (c. 28), s. 1 (1) (2).

The Law Reform (Contributory Negligence) Act, 1945, s. 1 states: " (1) Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage . . . (2) Where damages are recoverable by any person by virtue of the foregoing sub-section subject to such reduction as is therein mentioned, the court shall find and record the total damages which would have been recoverable if the claimant had not been at fault."

In an action brought in the county court by an infant plaintiff and his mother for personal injuries and out-of-pocket expenses respectively the plaintiffs claimed £200 damages, the maximum amount recoverable in the county court. The learned judge, applying the provisions of the Act of 1945, found that the infant plaintiff was one-third to blame, and, having assessed at £300 the damages which would have been recoverable if the infant plaintiff had not been at fault, awarded the plaintiffs two-thirds of that sum, *viz.*, the full amount claimed. A

HELD: the Act of 1945 did not empower the county court judge to assess an amount of damages either in excess of that claimed or beyond the limits of the county court's jurisdiction, and, therefore, the reduction should have been of the sum of £200.

[FOR THE LAW REFORM (CONTRIBUTORY NEGLIGENCE) ACT, 1945, s. 1 (1) (2), B see HALSBURY'S STATUTES, Vol. 38, p. 357.]

APPEAL by the defendants from a decision of His Honour JUDGE BATT in the Stockport County Court, dated Nov. 30, 1948, whereby he awarded £190 damages to an infant plaintiff, suing by his father as next friend, for personal injuries, and £10 to his mother, the second plaintiff, for loss of wages. The learned judge assessed the damage suffered by the plaintiffs at £300 (£100 more than that claimed) and, apportioning the blame as to one-third to the infant plaintiff and two-thirds to the defendants, awarded the plaintiffs a total sum of £200. The Court of Appeal now held that the judge had no jurisdiction to make such an award and allowed the appeal. C

L. S. Hart Jackson for the plaintiffs.

Gerrard, K.C., and *Mais* for the defendants. D

TUCKER, L.J.: This is an appeal from a decision of His Honour JUDGE BATT in the Stockport County Court whereby he awarded £190 to the infant plaintiff and £10 to his mother, also a plaintiff, for her out-of-pocket expenses. The claim was brought in respect of injuries suffered by the infant. It contained particulars of special damages amounting to £26 10s. 6d., a claim for £13 10s. 0d. for loss of wages by the mother, and it ended: "and the plaintiffs claim £200 damages." E

By s. 40 of the County Courts Act, 1934 (as amended by the Administration of Justice (Miscellaneous Provisions) Act, 1938, s. 16):

"(1) A county court shall have jurisdiction to hear and determine any action founded on contract or on tort where the debt, demand or damage claimed is not more than £200, whether on balance of account or otherwise." F

It is clear that £200 was the sum which the plaintiffs were seeking to recover, and it was the maximum sum which they could recover in the county court. The learned judge, having determined the issue on liability, found, applying the provisions of the Law Reform (Contributory Negligence) Act, 1945, that the infant plaintiff was one-third to blame and the defendants two-thirds. Notwithstanding that, he awarded the full amount claimed, £200, to the plaintiffs. He did that on the basis that he was satisfied that the amount of damages recoverable by the plaintiffs amounted to £300 and that, under the provisions of the Law Reform (Contributory Negligence) Act, 1945, he had power to apportion the blame as to one-third and two-thirds, and, accordingly, he awarded the plaintiffs two-thirds of the sum which he thought represented what they had suffered, which came to £200. G H

This was the total claimed by the plaintiffs in the action, and, thereupon, counsel for the defendants submitted to the judge that under the provisions of the Act of 1945 he had to apportion the sum of £200, the amount claimed, and not some other sum, namely, £300, which had never been claimed and

to award which he would have no jurisdiction. The learned judge rejected this submission.

The case is very plain. It turns entirely on the language of the Law Reform (Contributory Negligence) Act, 1945. Section 1 (1) reads as follows :

A "Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage."

B In the present action the damages recoverable were limited, by reason of the provisions dealing with the jurisdiction of the county court, to £200. It is, therefore, the £200 which has to be reduced. In other words, it is not the damage sustained, in fact, by the plaintiff, but the damages recoverable in respect thereof which must be taken into consideration in this connection.

Sub-section (2) provides :

C "Where damages are recoverable by any person by virtue of the foregoing sub-section subject to such reduction as is therein mentioned, the court shall find and record the total damages which would have been recoverable if the claimant had not been at fault."

D Under that sub-section, the sum which the court has to record, as being that which would have been recoverable if the plaintiff had not been at fault, must necessarily be a sum which it was within the jurisdiction of that court to have awarded if it had not found that the claimant had been to blame. If counsel for the plaintiffs is right, the result of this sub-section would be to require the county court judge to record, as the sum which would have been recoverable, a sum in excess of that which he had jurisdiction to award. In my opinion, £200 was the sum which had to be apportioned in this case, and the result is that the maximum sum recoverable by the plaintiffs is £133 6s. 8d.

E **ASQUITH, L.J.** : I agree. The operation of s. 1 (1) of the Law Reform (Contributory Negligence) Act, 1945, seems quite plain. It raises two questions :—(i) What is the claim in respect of the damage suffered ? and, (ii) What are the damages recoverable in respect of that claim ? The claim was for £200 and the damages recoverable in respect of that claim cannot exceed £200 for two reasons :—(i) because a party cannot recover more damages F than he claims in any civil court ; and (ii) because he cannot recover more than £200 in the county court owing to the limits of its jurisdiction. £200 is the "damages recoverable," and it is this sum which, by sub-s. (1), has to be reduced in the event of contributory negligence being established. It, therefore, seems to me that the appeal must be allowed.

G **SINGLETON, L.J.** : I agree. Despite the argument of counsel for the plaintiffs I feel it was not within the contemplation of the legislature that, in a case of this nature, if, perchance, the plaintiff was found four-fifths to blame, the county court judge should have jurisdiction up to £1,000 damages in order that the plaintiff could recover £200. The defendants have established their principle.

Appeal allowed. No order as to costs.

H Solicitors : *Green & Moulst*, Stockport (for the plaintiffs) ; *Gardiner & Co.*, agents for *A. W. Mawer & Co.*, Manchester (for the defendants).

[*Reported by C. St.J. NICHOLSON, Esq., Barrister-at-Law.*]

COMMISSIONERS OF CUSTOMS AND EXCISE v. INGRAM.

[COURT OF APPEAL (Evershed, L.J. and Wynn-Parry, J.), March 17, April 5, 1949.]

Purchase Tax—Information to be supplied by “person concerned with the purchase . . . of goods”—Information as to sales—“Purchase”—Form of order—Lapse of time since period under consideration—Finance Act, 1946 (c. 64), s. 20 (3).

The Finance Act, 1946, s. 20, provides : “ (3) Every person concerned with the purchase or importation of goods or with the application to goods of any process of manufacture or with dealings with imported goods shall furnish to the commissioners within such time and in such form as they may require information relating to the goods or to the purchase or importation thereof or to the application of any process of manufacture thereto or to dealings therewith as they may specify . . . ”

The defendant carried on businesses from October, 1946, until June, 1947, in the course of which he purchased “chargeable goods” within the statutes relating to purchase tax. In July, 1948, he received a written demand from the Commissioners of Customs and Excise expressed to be pursuant to s. 20 (3) to produce for inspection the books, accounts and other documents relating to the goods purchased. The defendant informed the Customs and Excise officers that his books and accounts had been stolen on Dec. 13, 1947, and this was not challenged in cross-examination. In October, 1948, the commissioners, pursuant to s. 20, served a formal notice on the defendant (i) to produce for inspection his books, accounts and other documents, and (ii) to furnish the commissioners with certain information relating both to the purchases by the defendant and also to his sales. In November, 1948, the summons in the present proceedings was issued by the commissioners under the Crown Proceedings Act, 1947, s. 14, for an order that, *inter alia* : “The defendant do . . . furnish to [the commissioners] pursuant to s. 20 of the said Act the following information . . . : (a) the names and addresses of the persons from whom goods were purchased by him . . . the quantities, descriptions and values of the goods so bought from each supplier, and the date of each purchase ; (b) the names and addresses of the persons to whom goods were sold by him . . . the quantities, descriptions and values of the goods so sold to each purchaser, and the date of each sale.” After the matter had come before the master and had been adjourned, the defendant gave certain information with regard to his purchases, but none as regards his sales. The summons was restored, and the master ordered that “the defendant do . . . give information to [the commissioners] regarding the goods, of what they consist, and of the persons from whom they were bought and to whom sold.” The judge in chambers dismissed an appeal from that order. On appeal to the Court of Appeal in so far as the order related to sales made by the defendant,

HELD : (i) by the combined effect of s. 67 (3) of the Act of 1946 and s. 41 (1) of the Finance (No. 2) Act, 1940, the word “purchase” in s. 20 (3) of the Act of 1946 meant any contract which is a contract of sale within the meaning of the Sale of Goods Act, 1893 ; the liability of the defendant was as a person concerned with such contracts for the sale of goods whether as buyer or seller ; and the information which might be required of him under s. 20 (3) related to such contracts made by him whether as buyer or seller, and the order of the master should be affirmed.

Customs and Excise Comrs. v. Ingram ([1948] 1 All E.R. 927), considered.

HELD, further, that, while the order should be as precise as possible, on the construction of s. 20 (3) there was no jurisdiction in the court to

specify the form in which the information must be given, but the court was not deprived of all discretion in regard to the order and should not impose on the defendant obligations which were beyond his power to discharge.

[FOR THE FINANCE ACT, 1946, s. 20, see HALSBURY'S STATUTES, Vol. 39, pp. 748, 749.]

A Case referred to :

(1) *Comrs. of Customs and Excise v. Ingram*, [1948] 1 All E.R. 927.

APPEAL by the defendant taxpayer from an order of FINNEMORE, J., in chambers, dated Jan. 14, 1949, affirming an order of the master whereby the defendant was ordered to supply to the Commissioners of Customs and Excise under s. 20 (3) of the Finance Act, 1946, information regarding goods dealt with by the defendant in the course of his businesses, of what they consisted, of whom they were bought, and to whom sold. The Court of Appeal dismissed the appeal, but varied the order to the effect that the defendant should furnish the information "to the best of his knowledge and belief or which it is within his control to procure." The facts appear in the judgment of the court, and are summarised in the headnote.

C * *Marshall, K.C., Platts Mills and Michael Lee* for the defendant.

H. L. Parker and M. Littman for the Commissioners of Customs and Excise.

Cur. adv. vult.

Apr. 5. **EVERSHED, L.J.**, read the following judgment of the court.

D This appeal raises, for the first time (as we understand), a question of the scope of s. 20 (3) of the Finance Act, 1946, relating to purchase tax - namely, whether a "person concerned with the purchase . . . of goods" (as the defendant admittedly is for the purpose of this appeal) can be required to furnish information relating to the sale by him to others of the goods which he purchased.

The material facts may be briefly stated. Mr. Marcus Ingram, the defendant to the proceedings and the appellant in this court, carried on certain businesses from October, 1946, to June, 1947 (according to his own evidence) in the course of which he purchased "chargeable goods" within the meaning of the statutes relating to purchase tax. In July, 1948, he received from the Commissioners of Customs and Excise a written demand, expressed to be pursuant to s. 20 of the Act of 1946 to "produce for inspection" to an officer of the commissioners the books, accounts and other documents relating to the goods purchased by or from him in the course of the above mentioned businesses. According to the defendant's evidence it so happened that "on or about the night of Saturday, Dec. 13, 1947," a burglar entered on certain premises occupied by another business with which the defendant was then connected and possessed himself of some confectionery, a radio set and a leather suitcase into which all the books of accounts and other records of the businesses in question happened to have been packed. The defendant says that he immediately informed the police of this calamity, but that none of the stolen property was ever recovered. He also says that when he was visited by two officers representing the commissioners in July, 1948, he informed them likewise of the theft. No evidence in reply has been filed on the part of the commissioners nor has the defendant's evidence been challenged in cross-examination. For the purposes of the present appeal, therefore, it must be taken that all the relevant books of accounts and other records disappeared in December, 1947. The commissioners, nevertheless, in October, 1948, served on the defendant a formal notice pursuant to s. 20 of the Act of 1946, requiring him (1) to produce for inspection his books, accounts and other documents relating to the said businesses, and (2) to furnish to the commissioners' agent certain information relating both to the purchases by the defendant and also to his sales. It is unnecessary to refer further to the form of this notice since

its language was reproduced in the summons issued by the commissioners in November, 1948, pursuant to s. 14 of the Crown Proceedings Act, 1947, from the order made on which summons the present appeal is brought. Paragraph 1 of the summons related to books and other documents and is immaterial for present purposes. Paragraph 2 is in the following terms :

“ The defendant do within four days hereof furnish to an officer of the plaintiffs at City Gate House, Finsbury Square, E.C.2, in the county of London, pursuant to s. 20 of the said Act the following information in so far as it is not included in the books and accounts referred to above :
(a) the names and addresses of the persons from whom goods were purchased by him trading as the Castle Paper Co., and trading as Ingram's Associated Distributors, the quantities descriptions and values of the goods so bought from each supplier, and the date of each purchase ;
(b) the names and addresses of the persons to whom goods were sold by him trading as the Castle Paper Co., and trading as Ingram's Associated Distributors, the quantities description and values of the goods so sold to each purchaser, and the date of each sale.”

On the summons first coming before the learned master it was adjourned, and the defendant by his solicitors then wrote to the commissioners giving—without prejudice to what the defendant's rights and duties might be—certain information in regard to the purchases made by the defendant but containing no information in regard to his sales. The summons was then restored and on Dec. 22, 1948, the master ordered that :

“ . . . the defendant do within 21 days after service of the order give information to the plaintiffs regarding the goods : of what they consist and of the persons from whom they were bought and to whom sold.”

An appeal by the defendant from this order was dismissed by the judge in chambers who, however, gave leave to the defendant to appeal to this court. Counsel for the defendant raised no point before us in regard to the order made save in so far as it related to sales made by the defendant. His main contention was that upon the true interpretation of s. 20 (3) of the Finance Act, 1946, there was no jurisdiction to make any order in regard to such sales. Counsel further contended that, having regard to the facts already narrated, and, particularly, to the length of time which has elapsed since the unfortunate occurrence of Saturday, Dec. 13, 1947 (told to the commissioners in July of last year), it would, in any event, be inequitable now to order the defendant to furnish information in regard to his sales.

It will be convenient to deal first with this latter contention, for it is, in our view, without substance. The chronology of the present case provides, in our judgment, no ground for saying that the commissioners have been dilatory or have unreasonably delayed the issue of proceedings under the Act of 1947. If, in truth, the defendant, because of the lapse of time, cannot now recall the facts in regard to the relevant sales, that is a matter proper to be taken into account on any step taken by the commissioners to enforce any order made on this application, but it does not disentitle the commissioners to the order if it is within the court's jurisdiction and otherwise proper to make it.

We return to the main question raised on the appeal. The language of s. 20 (3) of the Act of 1946 is, so far as material, as follows :

“ Every person concerned with the purchase or importation of goods or with the application to goods of any process of manufacture or with dealings with imported goods shall furnish to the commissioners within such time and in such form as they may require information relating to the goods or to the purchase or importation thereof or to the application of any process of manufacture thereto or to dealings therewith as they may specify . . . ”

It is clear from the form of the words used in the sub-section that four categories of persons are comprehended by its terms, namely, those concerned with (i) the purchase of goods, (ii) the importation of goods, (iii) the application to goods of any process of manufacture, and (iv) dealings with imported goods. Counsel for the defendant argued that the kind of information which the commissioners may require is likewise divided into categories, each category being appropriate, exclusively, to one of the four classes of "persons" which we have enumerated, plus the further category—that is, information relating to the goods—which must (according to the argument) in the context mean and mean only information relating to the character of the goods as physical things as distinct from information relating to transactions with the goods. From counsel's analysis of the language of the sub-section it follows that information relating to "dealings therewith" must be confined to dealings with imported goods and that the only words which can be applicable to the defendant are "information relating . . . to the purchase thereof," which (according to counsel's argument) must on the natural acceptance of the language refer only to purchases by the defendant and exclude his sales. Counsel for the commissioners has desired to keep open the question whether the analysis of counsel for the defendant is sound, and whether, accordingly, the words "information relating to the goods" and "information relating to dealings therewith" can have the restricted significance which the defendant attributes to them. The main argument for the commissioners has been that, even if the analysis of the sub-section put forward on behalf of the defendant be assumed in his favour, nevertheless the phrase "information relating to the purchase thereof" means and includes, in its context and having regard to certain other sections of the Act of 1946 and of the Finance Act (No. 2), 1940 (which first imposed purchase tax), not only purchases by the defendant but purchases from him—that is, sales by him of the goods which he purchased.

It must, we think, be conceded that the drafting of the sub-section is not on any view entirely felicitous, and (assuming the defendant's analysis) it seems to us that a first and natural reading of its terms would confine "purchase" to the purchase by the "person concerned," but s. 67 (3) of the Act of 1946 requires that the relevant part of that Act should be read with pt. V of the Finance (No. 2) Act, 1940 (which related to purchase tax) and makes applicable to s. 20 (3) of the 1946 Act the relevant definitions contained in s. 41 (1) of the Act of 1940, and by the last named section "purchase" is defined to mean—be it observed that the word is "mean" and not "include"—any contract which is a contract of sale within the meaning of the Sale of Goods Act, 1893. The remainder of the definition is immaterial. Having regard to this definition, which, as we have stated, must be read into s. 20 (3) of the Act of 1946 by virtue of s. 67 (3) of the same Act, it is necessary for the purpose of construing the former sub-section to write in, for the word "purchase," the formula contained in s. 41 (1) of the Act of 1940. In the result it is, in our opinion, impossible to restrict the scope of the information which the defendant is required to furnish as his counsel contends. For the liability of his client is as a person concerned (*inter alia*) with contracts for the sale of goods (within the meaning of the Sale of Goods Act, 1893) whether as buyer or seller, and the information which he may be required to furnish relates to such contracts made by him, again whether as buyer or seller.

If this view is right, then counsel for the commissioners succeeds on his main point and it is unnecessary to express any concluded opinion on the ambit of the other phrases—"information relating to the goods" or "information relating to dealings therewith." We must not, however, be taken, as at present advised, to be suggesting that the commissioners might not well be entitled to succeed also under either or both these phrases. A division of the kinds of information required into categories corresponding with the four

classes of "persons concerned" is, having regard to the language used, *prima facie* attractive. Nevertheless, there remains as a kind of fifth wheel "information relating to the goods," and as a matter of ordinary English it is not easy to see why this phrase should not mean and include information not only as to the character of the goods but also as to what has happened to them. And, again, as a matter of ordinary English, it is not easy to see what meaning can fairly be given to the words "thereof" "thereto" or "therewith" save "of the goods" "to the goods" and "with the goods," nor to formulate and justify the glosses which would, as we think, necessarily have to be read into the sub-section if the defendant's construction is to be adopted. In the circumstances, however, it is unnecessary to express a concluded opinion on these matters.

In our judgment, the conclusion at which we have arrived is supported by a consideration of the characteristics of the purchase tax itself and also by the reasoning of this court in an earlier case of the same name as the present—*Comrs. of Customs and Excise v. Ingram* (1). In that case the question was as to the extent of the obligation of the defendant, Ingram (not the same person as the present defendant), in regard to documents under the concluding words of s. 20 (3) of the Act of 1946 :

" . . . and shall, upon demand made by any officer or other person authorised in that behalf by the commissioners, produce any books or accounts or other documents of whatever nature relating thereto for inspection by that officer or person at such time and place as that officer or person may require."

On that question, this court held that the word "accounts" embraced (*inter alia*) sales invoices or copy sales invoices as well as documents relating to purchases made by the "person concerned."

In considering questions such as those raised in the present and in the preceding case, it is not to be forgotten that, having regard to the nature and incidence of purchase tax, certain traders have imposed on them the duty of adding the tax to their selling prices and of thereby collecting the tax and accounting for it as trustees or agents for the commissioners. The statutory provisions designed to render effective, in such circumstances, the collection of the tax, must, to adopt the phrase of LORD GODDARD, C.J. ([1948] 1 All E.R. 929), not be given so narrow a meaning as "to stultify" the orders made. It is true that the main point argued in the present case was not directly raised in the earlier case. Nevertheless, the general consideration to which LORD GODDARD alluded is no less pertinent to the present appeal than it was to the case then before the court. Information relating to sales by "persons concerned in the purchase of goods" is as relevant to the proper administration and collection of the tax as are sales invoices and other documentary evidence of their sales. And it would be, indeed, anomalous if such persons were bound to produce the accounts in their possession relating to such sales, but were not bound (where no document existed) to give any information in regard thereto. In our judgment, therefore, the conclusion at which we have arrived is supported by the earlier decision and by the reasoning which underlies that decision.

In the result, it follows that the present appeal cannot succeed, but there remains the form of the order which it is proper to make. On this two points arise. In the first place, it is observed (and, again, the language used by the draftsman seems to us unhappily vague) that there is no indication of the form in which the required information is to be given or may be ordered to be given—whether orally, in writing, on oath, or otherwise. Secondly, it was argued on the part of the commissioners that, once the commissioners have proved the facts bringing the case within the ambit of the sub-section, the

A court has no discretion in the matter and is bound to make the order asked
 in the general form indicated by the sub-section and cannot in any way restrict
 or qualify the obligation imposed on the defendant—for example, in the light
 of such facts as must be taken to have been proved or conceded in the present
 case by ordering the defendant to furnish information “to the best of his
 knowledge and belief.” Having regard to the penal consequences of failure
 to comply with any order made, it is, on general principles, both necessary
 and proper that the terms of the order should be as precise as possible and
 should leave no room for doubting what are the exact obligations imposed
 thereby, but, having regard to the language of the sub-section, we think that
 there is no jurisdiction in the court to specify the form in which the information
 must be given. Thus, it is not, in our judgment, competent for the court to
 order that the information should be furnished on oath or in any particular
 form. All the court can do is to order the defendant to furnish the information,
 and he is entitled to do so in any form he chooses. In practice it may well
 be that the matter is academic. For if, after an order has been made, the
 commissioners should be dissatisfied with what the defendant may do by way
 of compliance with the order and should make out a *prima facie* case for
 committal or attachment, the defendant would, by his sworn answer, in effect
 put on oath all that he may have said by way of furnishing information together
 with his inability to do more. On the other hand, we cannot think that the
 court is deprived of all discretion in regard to the order which it makes. In
 the present case the commissioners have not asked for an order on para. 1 of
 the summons, but, had they done so, we cannot think that the court would
 not, on the state of the evidence before it, have been entitled to refuse to make
 an order with which on the evidence it would plainly have been impossible
 for the defendant to comply. So, also, it must, in our judgment, be competent
 for the court to make such an order for the furnishing of information (that is,
 an order subject to such limitations and qualifications) as in all the circum-
 stances it seems just and proper to make. In other words, the court on such
 an application as the present can and should make such an order as, on the
 one hand, will make reasonably clear to the defendant what he is called on
 to do, and, on the other, will not impose on the defendant obligations which
 are beyond his power to discharge.

*Appeal dismissed with costs. Order that the defendant do within 21 days of the
 service of the order furnish the information set out in the summons to the best of
 his knowledge and belief or which it is within his control to procure.*

Solicitors: *Stanley Moore & Partners* (for the defendant); *Solicitor for
 Customs and Excise.*

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

Re OWEN (deceased). OWEN v. INLAND REVENUE COMRS.

[CHANCERY DIVISION (Romer, J.), March 31, 1949.]

*Estate Duty—Gift inter vivos—Date when made—Cheques drawn more than
 three years, but presented less than three years, before death.*

On Mar. 12, 1941, the donor directed his solicitors to sell certain
 securities and out of the net proceeds to pay £1,000 into the donor's
 current banking account, £2,000 into the donor's deposit account, one
 half of the remainder to his sister M., and a share of the residue each to his
 niece K. and his nephew T. On Mar. 29, 1941, the sales were made, and
 the proceeds, amounting to some £17,000, were paid into the solicitors'
 account. The solicitors drew a cheque for the whole amount in favour

of the donor and paid it into a special account at the donor's bank on May 21, 1941, and the donor signed cheques drawn on the special account by the bank manager to effect the intended arrangement. On May 22 the solicitors' cheque was cleared. On June 4 M. presented her cheque for payment. On June 5 K. presented hers, and on July 2 T. presented his. On June 1, 1944, the donor died, and the question arose whether the gifts were liable to estate duty as having been made within three years of the donor's death and so aggregable with the donor's free estate for the purposes of the ascertainment of the rate of duty chargeable.

HELD: the instructions to the solicitors did not create a trust of the proceeds of the sales, nor did the signing of the donees' cheques by the donor amount to an equitable assignment of those moneys; until the cheques were cleared and the money was credited to the donees' accounts no gift had been made; and, therefore, the gifts were made within three years of the donor's death.

[AS TO LIABILITY OF GIFTS INTER VIVOS TO ESTATE DUTY, see HALSBURY, Hailsham Edn., Vol. 13, pp. 237-240, paras. 227-229; and FOR CASES, see DIGEST, Vol. 21, pp. 10-14, Nos. 45-67.]

Cases referred to:

- (1) *Brandt's (William) Sons & Co. v. Dunlop Rubber Co.*, [1905] A.C. 454; 93 L.T. 495; 8 Digest 445, 205.
- (2) *Bromley v. Brunton*, (1868), L.R. 6 Eq. 275; 18 L.T. 628; 25 Digest 533, 227.
- (3) *Tate v. Leithead*, (1854), Kay 658; 2 Eq. Rep. 1105; 23 L.T.O.S. 252; 25 Digest 533, 226.
- (4) *Re Swinburne*, [1926] Ch. 38; 134 L.T. 121; Digest Supp.
- (5) *Re Beaumont*, [1902] 1 Ch. 889; 86 L.T. 410; 25 Digest 542, 292.
- (6) *Hewitt v. Kaye*, (1868), L.R. 6 Eq. 198; 32 J.P. 776; 25 Digest 547, 327.

ADJOURNED SUMMONS to determine whether three gifts were made more than three years before the death of the donor. No question arose regarding a gift to another donee which the donor made out of the same fund as those under consideration, because the money was received by this donee more than three years before the donor's death. ROMER, J., held that the gifts were not made more than three years before the death. The facts are set out in the headnote.

Blaise for the plaintiffs, the trustees of the donor's will.

J. H. Stamp for the Crown.

ROMER, J. [having stated the facts]: Counsel for the trustees puts his case in two ways. He contends that these gifts were effective and perfected gifts prior to June 1, 1941. He says, first, that, at some date prior to June 1, 1941, there was established a trust affecting the sum of £17,000 which came into the hands of the testator's solicitors, that the effect of the instructions which the testator gave to his solicitors was to create a trust under which, directly the proceeds of sale came from the brokers to the solicitors, the latter were to hold them as trustees on trust, apart from the £3,000 which was to go into the testator's own accounts, to divide the proceeds among the sister, the nephew, and the nieces in the manner indicated to the solicitors by the testator. If that is so, it means that directly the £17,000 was received by the solicitors they were trustees and subject to all the obligations of trustees in relation to that money, and, consequently, anybody who took the money with notice of the trust would equally be affected by such obligations, including the testator himself. Counsel does not shrink from that view of the matter. He says that, if the testator had died at any time after the proceeds of sale had been received from the brokers by the solicitors, the solicitors would have

held those proceeds as trustees, not for the testator's estate, but for the beneficiaries who were in equity entitled to those proceeds by virtue of the trust already executed. It was not only an arrangement, counsel says, under which equitable interests were created in favour of the beneficiaries, to the exclusion of the testator himself except for the £3,000, but one which as from that moment of time the testator was unable to revoke or interfere with in any way.

A Counsel says there was certainty as to the subject-matter of the trust, certainty as to the trustees, certainty as to the objects, and, therefore, all the elements necessary for constituting a trust were brought into being. It follows from that, therefore, that when the testator signed these cheques and sent them off, he did so, not as a donor of this property, but in pursuance of his obligations as a trustee and to implement the trust which he had brought into being.

B I am quite unable on the facts to accept that view of the matter. It appears to me that this was the ordinary case of a man instructing his solicitors to get in touch with some brokers for the purpose of realising investments and putting the proceeds at the disposal of the solicitors in order that ultimately he might put them to the use which he had in mind. As counsel for the Crown pointed out, if, in fact, the intention was to create the solicitors trustees of these proceeds, then they committed a breach of trust for which they could have been subsequently rendered liable at the instance of the beneficiaries when they paid over these moneys to the testator's own account. It is unfortunate that the beneficiaries have been disappointed because the Inland Revenue is now enabled to make this claim, but that is an inevitable result of what happened.

C D Alternatively, counsel for the trustees said that, if there was not a trust, the general arrangement as disclosed by the evidence established a valid assignment of the money which was paid by the solicitors into the testator's account on which the cheques were subsequently drawn. So far as I can make it out—the evidence is somewhat obscure—the testator had at his bank a current account and a deposit account. When the solicitors received from the brokers the cheque for £17,000 odd they thought that it would be a good idea for the testator to implement his generosity by his personal act, namely, by signing the cheques himself and drawing on his own account cheques in favour of the relatives whom he desired to benefit. So the solicitors took to the testator's bank manager a cheque drawn on their account which was paid into an especially opened new account. It was on that account that the testator then drew the two cheques in favour of himself, one to be paid into his current account and the other into his deposit account. The other four cheques were in favour of the beneficiaries. Counsel for the trustees, while admitting that the mere payment of a cheque cannot, having regard to the authorities, be treated as a gift of the sum mentioned in the cheque, says that the whole arrangement, if looked at and analysed properly and carefully, constituted an equitable assignment. He relied on a passage in the speech of LORD MACNAGHTEN in *Brandt's (William) Sons & Co. v. Dunlop Rubber Co.* (1) where LORD MACNAGHTEN said ([1905] A.C. 462), dealing with this class of equitable assignment :

"All that is necessary is that the debtor should be given to understand that the debt has been made over by the creditor to some third person."

H With reference to that passage in LORD MACNAGHTEN's speech counsel says that the testator gave the bank manager to understand that a debt, namely, £17,000, less the £3,000, which he paid over to himself, had been made over by him to his relations when he signed the cheques which the manager had drawn for his signature. Counsel says that from that moment there was in existence a complete valid equitable assignment amounting to an effective transfer in the various proportions, a transfer recognisable and enforceable in equity, of the sum of money which had been paid into the special account.

Counsel had not any very direct authority to support his proposition, but he did refer me to one or two cases. First, he referred me to the decision of STUART, V.-C., in *Bromley v. Brunton* (2). The headnote is :

"A cheque was given by A. to B., and presented without delay. The bankers had sufficient assets of A., but refused payment because they doubted the signature. The next day A. died, the cheque not having been paid : *Held*, a complete gift, *inter vivos*, of the amount of the cheque."

A

The Vice-Chancellor said (L.R. 6 Eq. 277) :

"In order to make a gift of this description valid it is necessary, according to the settled doctrine of the court, that it should be complete—that everything should be done on the part of the donor. The gift in this case being made in the form of a cheque drawn on the bankers of the donor, if there had been no funds in the hands of the bankers then of course there would have been an incompleteness in the gift on the part of the donor. It is clear, however, that when the cheque was presented on the second occasion the bankers had sufficient funds in their hands to pay it. The reason why they did not pay it was one proceeding from their minds—they doubted the authenticity of the donor's signature, and the result is that the funds which the donor had dedicated to the purpose of this gift, through no act of the donor, and through no default of the donee, came into the hands of the executors of the donor. I conceive that, under these circumstances, no further act was necessary on the part of the donor to make the gift complete. The failure, so far as the gift has failed through non-payment to this time, occurred through the default of third parties, whose duty it was to pay it."

B

C

D

Then comes the passage on which counsel for the trustees particularly relied :

"The effect of the cheque was to appropriate so much of the donor's money, and my opinion is that the funds, the subject of the gift, are in the hands of the executors just as much liable to the payment of the cheque as they were in the hands of the bankers. It was said that *Tate v. Leithead* (3) is an authority in favour of the executors refusing to pay this cheque ; but in that case the cheque was never presented to the bankers, while here the cheque was presented on two occasions, and the failure in the receipt of the money by the donee is not attributable to her but to the conduct of the bankers. I am of opinion that the gift was as complete as the donor and the donee could make it, and, consequently, that the cheque must be paid out of the funds in the hands of the executors, with interest, as claimed."

E

F

Bromley v. Brunton (2) was overruled by the Court of Appeal in *Re Swinburne* (4), but counsel says that the principle that in certain circumstances money paid to the credit of a banking account may be appropriated in such a way as to constitute an equitable assignment (which was the proposition visualised by STUART, V.-C.), is a sound principle, and nothing that happened in *Re Swinburne* (4) disturbed it.

G

Re Beaumont (5), which came before BUCKLEY, J., was a case of *donatio mortis causa*, and I was only referred to it because of some observations which BUCKLEY, J., made on *Bromley v. Brunton* (2). He said ([1902] 1 Ch. 895) :

H

"*Bromley v. Brunton* (2) at first puzzled me. There the deceased gave her cheque to Bromley, who at once presented it. The assets of the customer were sufficient to pay it, but the signature was shaky, and the banker refused to pay until the signature was confirmed. The drawer died, and the cheque was not paid. STUART, V.-C., held that there was a complete gift *inter vivos* of the amount of the cheque. He must have so decided either because the cheque was constructively paid, the bankers

having substantially said that they would pay, so that the payment constructively related back to the date of presentation; or because the bankers had in effect said: 'The account is in credit, and we will hold enough of the balance to satisfy the cheque subject to the signature being shewn to be genuine,' and therefore, that there was a good equitable assignment. The Vice-Chancellor says: 'The effect of the cheque was to appropriate so much of the donor's money, and my opinion is that the funds, the subject of the gift, are in the hands of the executors just as much liable to the payment of the cheque as they were in the hands of the bankers.' I cannot suppose that he meant that the cheque by itself operated as an equitable assignment of money at the bank. Probably he meant that the effect of the cheque coupled with the bankers' action on it was to appropriate enough of the money at the bank to meet the cheque—that the bankers, so to speak, constructively honoured the cheque."

Counsel says that is the kind of conception on which he relies in the present case, and that BUCKLEY, J., apparently, referred to such a position without any disapprobation.

C *Re Swinburne* (4) is a decision of the Court of Appeal. The headnote of that case is:

"A. drew a cheque for £700 in favour of B. and gave it to B., who presented it forthwith. A. had current and deposit accounts at the bank, but her money on current account was not sufficient to meet the cheque without resort to the money on deposit. It had been the practice of the bank to allow A. to overdraw her current account so long as the overdraft was covered by her money on deposit. The bank refused payment of the cheque, not because of the state of A.'s current account, but because they doubted A.'s signature on the cheque. A. died before anything further was done. *Held*, that in the circumstances there had not been any appropriation or dedication of the money in the bank, or any constructive payment of the cheque; and that there had been an incomplete gift *inter vivos* of the amount of the cheque, which gift would not be perfected by the assistance of equity."

Mr. *Raeburn*, for the appellant, argued, among other things ([1926] Ch. 39):

F "The handing over of the cheque to the appellant showed an intention on the part of the donor to dedicate or appropriate this money."

SIR ERNEST POLLOCK, M.R., said ([1926] Ch. 41):

G "Now a cheque is clearly not an assignment of money in the hands of a banker. A cheque, as explained by LORD ROMILLY, M.R., in *Hewitt v. Kaye* (6), is nothing more than an order to obtain a certain sum of money, and it makes no difference whether the money is with the bankers or elsewhere. It is an order to deliver the money; and if the order is not acted upon in the lifetime of the person who gives it, it is worth nothing. Let me assume, therefore, that there was money in the current account ready to meet this cheque as and when it was accepted for payment by the banker, but it is clear law that the fact that this cheque was outstanding did not indicate that there had been any assignment of the money on current account to meet the cheque. It is merely a mandate or authority in the hands of the holder of the cheque to go to the bank and get the money from it."

Then he makes some observations on *Bromley v. Brunton* (2) and continues (*ibid.*, 42):

"It is fair to point out that SIR JOHN STUART, V.-C., who decided that case, decided it on the basis that the donor had dedicated to the purpose of the gift the sum which was indicated by the cheque, and he says he conceives that under these circumstances no further act was necessary on the part of the donor to make the gift complete. Now if the Vice-Chancellor was able to find those facts—namely, that there had been an actual dedication of property, that no further act was necessary on the part of the donor to make the gift complete, and that there had been a transfer of the property—then I think that that case falls into line with the other cases, and his judgment can be supported. Whether I should have been able to construe the facts as amounting to what the Vice-Chancellor finds them to be is quite another question; but unless the basis of the case is that there had been an actual transfer of property and no further act necessary on the part of the donor to make the gift complete, it appears to me that *Bromley v. Brunton* (2) stands apart from, and is in contradiction with, the authority of the other cases to which I have referred, and can no longer be considered as law. Now in this case all that was received by Mrs. Gifford was a cheque. No indication had been given by the bank, by the certification of the cheque or otherwise, that they held a sum of money exclusively to answer the cheque; and under those circumstances it appears to me that the cheque remains a mere order to receive the money as and when it can be paid."

Bromley v. Brunton (2) was treated rather more harshly by the other members of the court, WARRINGTON, L.J., and SARGANT, L.J. WARRINGTON, L.J., said (*ibid.*, 44):

"With all respect to the judgment of STUART, V.-C., I share the doubt expressed by BUCKLEY, J., in *Re Beaumont* (5) as to whether it really can be supported. I think the vice of the judgment, if I may so express it, is found in the expression 'the effect of the cheque was to appropriate so much of the donor's money, and my opinion is that the funds, the subject of the gift, are in the hands of the executors just as much liable to the payment of the cheque as they were in the hands of the bankers.' With all respect to STUART, V.-C., the drawing of the cheque does not, in my opinion, appropriate money in the hands of the bankers to the payment of that cheque. It authorises and requires the bankers to pay it, but it is no appropriation of the money itself . . . I feel very great difficulty about introducing any such theory as that of constructive payment, and on the whole, if it were actually necessary to decide it, as at present advised, I should not follow *Bromley v. Brunton* (2). I should even go further, and say that *Bromley v. Brunton* (2) must be treated as overruled."

Finally, SARGANT, L.J., said (*ibid.*, 47):

"The mere instruction by means of a cheque to a banker to pay the money to the drawee of the cheque is not a gift. It is merely a revocable authority to the agent to make the payment; and the piece of paper containing that revocable authority is not a piece of property when it is given to the drawee by the drawer. It is merely the handing to the drawee of the means of entitling the drawee to obtain from the agent acting in pursuance of the authority the sum in question. In my judgment, even if this had been claimed as a *donatio mortis causa*, the claim must have failed; *a fortiori* it must fail when the claim is made as on a gift *inter vivos*. I think I should add this, because I myself argued the case of *Re Beaumont* (5) before BUCKLEY, J. I am quite sure that BUCKLEY, J., then only a judge of first instance, although finding a possible way of reconciling *Bromley v. Brunton* (2) with the decision he was about

to give, really thoroughly disapproved of the case. I also disapprove of the case, and I think that from this time forward it cannot be relied on."

- A It is said by counsel for the trustees that there was here an actual dedication of property, namely, the amount standing to the testator's credit on his special account in favour of the relations whom he desired to benefit, and that what happened constituted an assignment in equity of that balance, complete at a point of time not later than when the testator signed those cheques. The occasions have been innumerable on which incomplete gifts have been sought to be interpreted in some such way as to achieve the validity which otherwise they would lack. Looking at the facts, I can only describe this as another such attempt. The one thing which appears to me to be plain beyond all doubt is that the testator's intention was to benefit his relations
- B in a specific and particular manner, namely, by causing some investments to be sold and having the proceeds transferred to a banking account, and then drawing cheques on that account in the ordinary way in favour of the donees, so that by using those cheques in the way that cheques are used the participants would get the benefit which the testator intended to confer on them. But it was through the medium of cheques alone that the testator
- C intended to pass the benefit and to pass the property. It seems to me that I have to blind myself to the facts of the whole arrangement as disclosed by the evidence before me if I am to hold that when the testator was closeted with the bank manager an effective assignment of this money was brought about. It seems to me that it is impossible to find what POLLOCK, M.R., in *Re Swinburne* (4) said that the Vice-Chancellor was able to find in *Bromley*
- D *v. Brunton* (2), namely, that there had been a complete dedication of property, that no further act was necessary on the part of the donor to make the gift complete, and that there had been a transfer of the property. I am well satisfied that that is not the proper interpretation of the facts here. The proper interpretation of the facts is that until the donees had received their cheques and paid them into their own banking accounts, and the cheques were
- E cleared and the money came into the donees' banking accounts, no property was transferred at all, nor was any effectual gift achieved. With regard to the observations that SIR ERNEST POLLOCK, M.R., made ([1926] Ch. 42) in *Re Swinburne* (4), namely :

- F "No indication had been given by the bank, by the certification of the cheque or otherwise, that they held a sum of money exclusively to answer the cheque . . ."

- G it must be observed that what he had in mind was an indication to the donee and not to the drawer of the cheque. It is plain that no indication had been given in that sense by the bank to the donees of the cheques in this case. I am satisfied that the three gifts referred to in the summons were made within three years of the testator's death on June 1, 1944, because they were made on the occasion on which each of the cheques was cleared into the donee's own account.

Declaration accordingly. Costs as between party and party out of the estate.

Solicitors: *Hatchett Jones & Co.*, agents for *S. R. Dew, Jones & Prothero*, Valley, Holyhead (for the trustees); *Solicitor of Inland Revenue*.

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

EVERITT v. EVERITT.

[COURT OF APPEAL (Lord Merriman, P., Bucknill and Cohen, L.JJ.), March 30, 31, 1949.]

Desertion—Offer by deserting husband to resume cohabitation—Wife's refusal—Reasonable belief in husband's adultery.

Desertion—Parties living under same roof—Need to prove de facto separation—Interruption of period of desertion—Husband returning to matrimonial home—Parties living in three-roomed flat. A

A husband and wife were married on Apr. 28, 1943, and lived together until Sept. 6, 1943, when the husband left the wife and went to live in the house of a woman with whom he had had sexual relations before his marriage, a fact which was known to the wife. About August, 1945, the husband expressed his wish to resume cohabitation, stating that the woman had now married and was going abroad, and adding that, although he had lived in the woman's house, he had not committed adultery with her. The wife refused to have him back, but he managed to instal himself in the three-roomed flat in which she was living with her child. After four months the wife left the flat and later petitioned for a divorce on the ground of the husband's desertion. B C

HELD: (i) where a wife who had been deserted refused to resume cohabitation in the amply justified belief that the husband had committed adultery, and, later, petitioned for divorce on the ground of the husband's desertion, the fact that the judge hearing the petition was not satisfied that the adultery was proved did not bring the period of desertion pleaded in the petition retroactively to an end. D

Glenister v. Glenister ([1945] 1 All E.R. 513; [1945] P. 30; 172 L.T. 250), *applied*.

(ii) where a husband who had deserted his wife offered to resume cohabitation, but had been guilty of adultery which was uncondoned, the wife's refusal to resume cohabitation did not put an end to his desertion and turn her into the deserter. E

Lodge v. Lodge (1890) (15 P.D. 159; 63 L.T. 467), *overruled*.

Thomas v. Thomas ([1924] P. 194; 130 L.T. 716), *applied*.

(iii) the principle that the necessary element of separation could not subsist when a husband and wife were living under the same roof unless they had ceased to share one household and had set up two households applied not only to the inception of the alleged desertion but also to the interruption of a period of desertion, and, therefore, as the husband and wife were living for four months in a three-roomed flat, it would be difficult to hold that desertion continued during that period, even if the husband had, in the first instance, forced his way in, and on the facts the wife had failed to satisfy the court that during those four months they had lived absolutely separate and apart. F G

Hopes v. Hopes ([1948] 2 All E.R. 920; [1949] P. 227), *applied*.

[AS TO DESERTION, see HALSBURY, Hailsham Edn., Vol. 10, pp. 654-658, paras. 964-967, and 1948 Supplement; and FOR CASES, see DIGEST, Vol. 27, pp. 313-315, Nos. 2913-2928, and Supplements.] H

Cases referred to:

- (1) *Basing v. Basing*, (1864), 3 Sw. & Tr. 516; 10 L.T. 756; 27 Digest 315, 2928.
- (2) *Glenister v. Glenister*, [1945] 1 All E.R. 513; [1945] P. 30; 172 L.T. 250; 2nd Digest Supp.
- (3) *Ousey v. Ousey & Atkinson*, (1874), L.R. 3 P. & D. 223; 30 L.T. 911; *subsequent proceedings*, (1875), 1 P. & D. 56; 27 Digest 322, 3004.

- (4) *Synge v. Synge*, [1901] P. 317 ; 85 L.T. 83 ; *affirmg.* [1900] P. 180 ; 83 L.T. 224 ; 64 J.P. 454 ; 27 Digest 375, 3631.
- (5) *Wood v. Wood*, [1947] 2 All E.R. 95 ; [1947] P. 103 ; 111 J.P. 428 ; 2nd Digest Supp.
- (6) *Lodge v. Lodge*, (1890), 15 P.D. 159 ; 63 L.T. 467 ; 27 Digest 315, 2924.
- (7) *Volp v. Volp*, (1940), unreported.
- (8) *Thomas v. Thomas*, [1924] P. 194 ; 130 L.T. 716 ; 27 Digest 315, 2925.
- (9) *Thomas v. Thomas*, [1946] 1 All E.R. 170 ; 110 J.P. 203 ; 2nd Digest Supp.
- (10) *Fitzgerald v. Fitzgerald*, (1869), L.R. 1 P. & D. 694 ; 19 L.T. 575 ; *subsequent proceedings*, (1874), L.R. 3 P. & D. 136 ; 27 Digest 307, 2845.
- (11) *Jordan v. Jordan*, [1939] 2 All E.R. 29 ; [1939] P. 239 ; 160 L.T. 368 ; Digest Supp.
- (12) *Pardy v. Pardy*, [1939] 3 All E.R. 779 ; [1939] P. 288 ; 161 L.T. 210 ; Digest Supp.
- (13) *Edwards v. Edwards*, [1948] 1 All E.R. 157 ; [1948] P. 268 ; 112 J.P. 109.
- (14) *Hopes v. Hopes*, [1948] 2 All E.R. 920 ; [1949] P. 227 ; 113 J.P. 10.
- (15) *Smith v. Smith*, [1939] 4 All E.R. 533 ; [1940] P. 49 ; 162 L.T. 333 ; Digest Supp.
- (16) *Angel v. Angel*, [1946] 2 All E.R. 635 ; 176 L.T. 90 ; 111 J.P. 14 ; 2nd Digest Supp.

APPEAL by the wife from an order of MR. COMMISSIONER BLANCO WHITE, K.C., dated July 14, 1948, dismissing her petition for divorce on the ground of the husband's desertion.

The learned commissioner held that, by refusing to resume cohabitation, the wife had terminated the desertion. The Court of Appeal now held that, as the wife believed, with ample justification, that the husband had committed adultery, her refusal to resume cohabitation did not terminate the desertion, but they dismissed the appeal on other grounds. The facts appear in the judgment of LORD MERRIMAN, P.

Trevor Reeve for the wife.

Miss C. Colwill for the husband.

LORD MERRIMAN, P. : This is a wife's appeal from a decision of MR. COMMISSIONER BLANCO WHITE, K.C., sitting as a special commissioner in divorce, whereby, on July 14, 1948, he dismissed her petition for divorce on the ground of her husband's desertion. The case raises two important and distinct questions. The first is whether in the circumstances the wife, who had undoubtedly been deserted before the statutory triennium, was entitled to refuse to resume cohabitation, as she unquestionably did, without either, at the least, bringing the husband's desertion to an end, or even, at the worst, becoming herself the deserter. The second question is whether, assuming that the wife was entitled to refuse to resume cohabitation in the fullest sense of the word, there was such a degree of cohabitation during the triennium as to prevent the previous state of desertion from continuing to subsist during the whole of the statutory period. The learned commissioner decided the case against the wife on the ground that by refusing to resume cohabitation she terminated the husband's desertion. As to the second question the learned commissioner, apparently, accepted the wife's evidence (at any rate, in one material particular, to which I shall allude more particularly later) as against the husband's, but did not actually decide the point.

The parties were married on Apr. 28, 1943. The marriage was, in one sense, a marriage of necessity. We do not know whether the parties would in any case have got married, but it is plain that they were married when they were because a child, of which the husband was admittedly the father, had already been conceived. They lived together until Sept. 6, 1943. During those months, according to the evidence of the wife, the husband had been spending unconscionable periods of his time with a woman with whom admittedly he had had

sexual relations before he had married his wife. It was said that he was constantly lunching with her, and that, barely staying long enough to change his clothes in the evening, he went to spend his evenings with this woman. Finally, on Sept. 6, 1943, before the expected child was born, he left his wife, and by Oct. 20 he had gone to live in the house of this woman with whom, as I say, he had already had sexual intercourse before marriage, a fact which, it is important to note, was well known to the wife. This act of his in deserting his wife and within a few weeks going to live in that particular house clearly falls within the description of conduct on his part calculated to make the wife believe that he had resumed and intended to continue an association with his old love which, by reason of his intervening marriage, had now become an adulterous association. Plainly, there was abundant evidence on which the learned commissioner could hold that on Sept. 6 the husband deserted the wife. On Feb. 1, 1944, the wife obtained an order from one of the metropolitan magistrates on the ground of desertion. It is true that that order was never enforced, but it is also true that the husband made no payments under it. In these circumstances it seems to me impossible to contend that the inception of a period of desertion in September, 1943, was not fully proved.

After the lapse of nearly two years, *i.e.*, at the end of July or early in August, 1945, the husband intimated his wish to resume cohabitation. He accompanied this intimation with a statement that the woman at whose house he had been living had married a Belgian some little time before and had gone with her husband to Belgium. He added, presumably in response to some expostulation on the part of the wife, that he never had, in fact, committed adultery with this woman, though he had lived under her roof, because from the time he went there she was taken up with the Belgian whom she married. The wife says that she refused to have him back. Nevertheless, by some means which have not been made plain to us, the husband contrived to instal himself in the wife's flat. The flat consisted of three rooms, a bedroom, a sitting-room, and a small kitchenette with a stove in the passage outside. The wife said—and here there was an acute conflict of evidence between the two spouses—that during the period that she remained in this flat (which was a period of almost exactly four months, as she left the flat on Nov. 29, 1945), she not merely did not consent to his coming in and installing himself but she never consented to his remaining there; that they slept in separate rooms, she and the child retiring to a couch in the sitting-room and the husband occupying her bedroom; that there was no sexual intercourse between them; and that she performed no wifely duties of any sort for him. The husband, on the other hand, swore that they were living together as husband and wife in the full sense of the word, including sexual relations, and that she was performing all the ordinary wifely duties such as looking after his rations, preparing his meals, and all the rest of it.

On Nov. 29 the wife left. In connection with this part of the case, I shall have to return later to the examination of the circumstances in which she left and I will say no more about it for the moment. In view of the possibility that other proceedings may supervene later, I do not propose to express any opinion or to find any fact, for I think we have no material for finding facts about what happened after Nov. 29 beyond saying this which is common ground. The wife went to another flat, which she had obtained, and after about a fortnight the husband joined her there. I hope I have used a sufficiently colourless expression. Again, after yet another fortnight, she departed, leaving him in that particular flat. There, so far as this matrimonial history is concerned, I propose to stop and to examine now the issues raised by the learned commissioner's judgment.

The learned commissioner is recorded as summarising the matter in these words :

“ The question is whether, in these circumstances, the husband, by offering

A to return to his wife and to resume matrimonial life with her—and, indeed, doing all he could physically to resume life with her—has terminated his desertion. Counsel for the wife argued that there was no obligation on her to accept an offer to return, because that would mean an obligation to condone adultery and, therefore, his offer, however sincere and however often repeated, did not terminate the desertion. He relies on several cases, in particular on *Basing v. Basing* (1). I think that I must have regard to the fact that at the time the husband came back in the middle of 1945 his association with Mrs. Reeves was, to the knowledge of the wife, completely over. Mrs. Reeves had married another man and she was going to leave the country—indeed, shortly after that, to the knowledge of the wife, Mrs. Reeve did leave the country with her new husband. The circumstances were totally changed from the circumstances at the time the husband deserted the wife. Though the wife may have believed that there had been adultery, she knew that the circumstances were changed, and not only was there no misconduct taking place but the circumstances had changed in which that misconduct did take place. That the husband desired to return to his wife I personally have no doubt and, though the wife had the right if she could prove adultery to get a divorce on the ground of adultery, I do think, and I hold, that the husband, by coming back to his wife in the changed circumstances, terminated the state of desertion in which he was, and, therefore, I dismiss the petition.”

D I will only add, before I comment on this crucial passage in the judgment, that the learned commissioner, seeing the difficulties that were likely to arise, had made more than one plain suggestion to induce the wife to amend her petition by charging adultery, but it was not felt possible to accede to that intimation.

E That brings me to a consideration of the last paragraph, in which the learned commissioner gives his reason for dismissing the petition. We have had considerable discussion during the argument about the meaning of this passage. I am bound to say that I am still in doubt what the learned commissioner actually was holding. There are three possibilities. I will deal with each one in turn. If he meant that the husband’s explanation to the wife when he returned in 1945, including, as it did, an express denial of having committed adultery at all, ought to have dispelled the wife’s belief that he had committed adultery, hitherto a belief the learned commissioner found amply justified by the husband’s conduct, that decision would be correct in law, but the difficulty I have is that it seems to me to be in conflict with an earlier finding in the judgment where the learned commissioner, after referring to the husband’s statement that during his sojourn in Mrs. Reeves’ household he had been merely a lodger, says :

G “Adultery with Mrs. Reeves is not alleged in this case. If it were alleged, having regard to the presence of the Belgian whom she subsequently married, I should find on the evidence before me that I was not satisfied as to the adultery. Having regard, however, to the previous intimate association between the husband and Mrs. Reeves, I think that the wife was amply justified in concluding that adultery between them had taken place.”

H I must say that on the facts I should have some difficulty in coming to this suggested conclusion. I would point out, incidentally, that it means re-writing a crucial sentence in the last paragraph of the judgment, for it means in effect that in the passage “not only was there no misconduct taking place but the circumstances had changed in which that misconduct did take place” one would have to substitute for those last words the words “in which that misconduct was justly supposed to have taken place,” which is certainly not what he is reported as saying. I say, without expressing any concluded opinion,

that I should be the more doubtful about accepting that view of the passage unless I was very sure that the learned commissioner had so found the facts, because the wife's belief was, to some extent, at any rate, fortified by statements which she was allowed to say Mrs. Reeves had made to her. I am not at all dissenting from the learned commissioner's decision that the evidence was admissible. I think it was rendered admissible by the form of a question in the cross-examination of the wife. At any rate, the evidence was given. I am not going to refer to the passage; it is not necessary. Moreover, there was some evidence given by the wife's mother which corroborated the wife's suspicion that the husband had been resuming his association with Mrs. Reeves even before he left the wife. For the moment I prefer to say no more about this view of the matter than that I am doubtful whether on the facts I should be prepared to support that finding, if that is the correct interpretation of it.

The second possible meaning is that the wife's petition must be dismissed because of the learned commissioner's finding that he was not, at the moment of giving judgment, satisfied that the husband had committed adultery, though up to that moment the wife was amply justified in concluding that adultery between them had taken place. That is the alternative view of the passage which I have already quoted. If that is what he meant, that conclusion, in my opinion, would be in plain conflict with the decision of the Divisional Court of the Divorce Division in *Glenister v. Glenister* (2) and, in particular, with the reasoning on which that decision is based ([1945] 1 All E.R. 518).

I am in the embarrassing position in this case of being obliged to refer to a number of my own judgments. I only hope that I am able to deal with it with becoming humility. *Glenister v. Glenister* (2) is a case which, until it has been overruled—and, as far as I know, it has not yet been criticised by higher authority—establishes this proposition. I am reported as saying ([1945] 1 All E.R. 518):

"Take a hypothetical case, in which, short of actual and direct proof of adultery, the wife so conducts herself to the knowledge of the husband as to warrant the inference that adultery has been committed, though (I am supposing) that is ultimately held not to be the fact."

I then posed the dilemma that the husband, if he continues to cohabit with his wife, risks being held to have condoned the adultery if it is ultimately established, and, if he leaves his wife because of this belief induced by her own conduct, he is liable to be held to be a deserter, and I went on to say (*ibid.*):

"It seems to me to put the husband in an almost impossible position, if that is the law. But the question is whether it is the law. I do not think it is. If the wife has so conducted herself as to lead any reasonable person to believe, until she gives some explanation, that she has committed adultery, the husband, becoming aware of the facts and honestly drawing that inference and leaving his wife on that ground ought not to be held to have left her without reasonable cause."

I founded that judgment in part on a decision of SIR JAMES HANNEN (Judge Ordinary) in *Ousey v. Ousey and Atkinson* (3). It is not necessary to examine that case, or to go through the analysis of it on which I based my judgment in *Glenister v. Glenister* (2), but I would like to call attention to the fact that, as long ago as 1900, SIR FRANCIS JEUNE, P., in deciding *Synge v. Synge* (4), referred ([1900] P. 197) to *Ousey v. Ousey* (2) in these words:

"The primary question to be decided is, Had the husband reasonable ground for desertion? If belief is to be taken into consideration, why should not his honest belief that his wife refused him marital rights without cause justify his conduct, even though the wife honestly believed that she had good grounds for such refusal?"

Then he adds words which are of general application:

"The solution of the problem presented by such conflict of belief is, I think, to be found in holding that where the fact can be determined, the fact must prevail, and that erroneous beliefs on either side are immaterial."

A On this hypothesis the facts, at the earliest, were ascertained at the moment when the learned judge gave judgment. In *Wood v. Wood* (5) I called attention ([1947] 2 All E.R. 97) to this sort of position—a confession by the wife of adultery with every circumstantial detail fully justifying the husband's belief in the fact that she had committed adultery and, so long as that belief subsisted, entitling him to withdraw from, or to refuse to resume, cohabitation, but there might come a moment when, in spite of her confession, or, indeed, because of her oath that her confession had been false, and supported with equally circumstantial detail, a judge might hold that, not only was the charge of adultery not proved, but the wife had not, in fact, committed adultery. B From that moment the fact has been ascertained and there is no longer any room for the belief, but that does not act retrospectively or retroactively. So long as the belief is reasonably and properly held, the husband's conduct and their respective rights in relation to cross charges of desertion are regulated by the existence of the belief, though there may come a moment beyond which C that is no longer possible. If, therefore, the learned commissioner was holding that his saying that he was not satisfied that adultery had been proved, though the wife up to then had been amply justified in believing that it existed, had brought the period of desertion pleaded in the petition retroactively to an end, he was, in my opinion, wrong.

D There remains the third alternative. If the passage in question means that there had, indeed, been an actual adulterous association, but that its cessation, because of the marriage and departure for Belgium of the woman in question, did not justify the wife's refusal to resume cohabitation, the decision, in my opinion, was also wrong. I think that there is a good deal to be said for the argument that that is what the learned commissioner really meant. The short passage in the penultimate paragraph seems to me to suggest this interpretation. E I will read the passage once more. The learned commissioner said :

"I think that I must have regard to the fact that at the time the husband came back in the middle of 1945 his association with Mrs. Reeves was, to the knowledge of the wife, completely over. Mrs. Reeves had married another man and she was going to leave the country—indeed, shortly after that, to the knowledge of the wife, Mrs. Reeves did leave the country with her new husband." F

Then he adds the phrase in the next paragraph which I have already read :

"...not only was there no misconduct taking place but the circumstances had changed in which that misconduct did take place."

G I know of no authority in support of the proposition involved in this interpretation of a doubtful passage in the judgment except *Lodge v. Lodge* (6). Counsel for the wife, who has argued this case most admirably, says he did not actually cite, or does not recollect actually citing, *Lodge v. Lodge* (6) to the learned commissioner, but he tells us that he was, so to speak, steering his argument away from *Lodge v. Lodge* (6) and towards *Basing v. Basing* (1), H to which I shall shortly have to refer, and, I have no doubt, in the process clearly indicating the proposition which he was combating. It may be—because, unfortunately, it is the fact that *Lodge v. Lodge* (6) is still cited in the text-books on this subject—that the learned commissioner looked at the note in *RAYDEN ON DIVORCE* in which it is embodied. However that may be, the statement of the proposition in the paragraph that I have just read almost exactly expresses the point of the decision in *Lodge v. Lodge* (6). I said a moment ago that it was unfortunate that this case still appears in the legal text-

books, even in the very latest edition of *RAYDEN ON DIVORCE* (5th ed., p. 116). It is unfortunate because on Oct. 14, 1940, in *Volp v. Volp* (7), a Divisional Court composed of *HODSON, J.*, and myself expressed in no measured terms that *Lodge v. Lodge* (6) was no longer to be regarded as the law. Unfortunately, it did not occur to anyone that it was worth while reporting that decision. We have been provided for the purposes of this case with a transcript of the material part of my judgment and to avoid repetition, and because I find that I wish to say exactly what I said in *Volp v. Volp* (7), I propose to read and adopt one or two passages from that transcript. I began by saying :

"The argument for the husband has been founded on *Lodge v. Lodge* (6). This is a case which has not found favour with text-writers. It is a case of the decision in which there has, for many years, been very adverse criticism in the well-known text-book, *RAYDEN ON DIVORCE*, but, as we are constantly having this case cited to us in support of an argument like the present in these appeals from justices, I think the time has come to say something dogmatic about the case."

I then went on to analyse the decision of *BUTT, J.* After referring to the fact that the original parting had been by arrangement, that the wife had then pressed the husband to rejoin her, and had been met by a refusal, I said :

"It is quite plain from the judgment of *BUTT, J.*, that he considered that that amounted to desertion on the part of the husband. In fact, he says in his judgment (15 P.D. 160) : 'Desertion undoubtedly commenced in August, 1886, when the husband on one excuse or another refused to accompany his wife to Bournemouth ; but the question is whether that desertion has been continued for two years and upwards.'"

I ought to say, to make the point clear, that in *Lodge v. Lodge* (6) the wife was petitioning for divorce on the ground of adultery coupled with the desertion, as the law then stood, for two years and upwards at any time, whether or not immediately preceding the presentation of the petition. I then went on [in *Volp v. Volp* (7)] :

"It appears that in the course of the two years, namely in February, 1887, the wife acquired for the first time knowledge of the fact, which was not disputed at the trial, that her husband had been living in adultery with another woman for at least six years. It appears, if it had ever ceased, at any rate to have continued down to what the learned judge describes as 'the autumn of last year', i.e., the autumn of 1889."

From that it followed that the adultery had been going on through more than the period of two years which was, in fact, relied on. Then my judgment continues :

"After setting out those facts, *BUTT, J.*, is reported as having said (15 P.D. 160) : 'That being so, she was within her right to decline to resume cohabitation with the respondent...'—a phrase about which I should venture to suggest there could be no possible doubt at all. He goes on (*ibid.*, 161) : '... but there remains the question, can she insist on a separation from her husband and at the same time use the separation which she insists on as a desertion by her husband ?' Well, of course not. If she has insisted on a separation to the extent of obtaining a decree, obviously she cannot thereafter insist that any separation after that is desertion on the part of the husband. But that is not apparently what the learned judge means, because there had been no decree in that case. He was referring to the fact that she was trying to get a divorce for desertion based on her remaining absent because of her husband's adultery. He said (*ibid.*) : 'I think not. More than one offer was made by the husband to return to cohabitation ; but the wife's reply to those offers was to direct

her solicitors to inform her husband that she had made up her mind not to live with him. In the witness-box she stated that to have been, and to be, her determination.' It must be borne in mind that the learned judge had already found that she was within her right in declining to resume cohabitation. If so, she was under no obligation to accept these offers of her husband. The true answer was not in question whether the offers were
A genuine or not genuine, but in whether she had the absolute right to refuse them. But the learned judge goes on (*ibid.*): 'If it appeared that the husband's offer to return to cohabitation was not *bona fide*, it would not bar the wife's remedy. But the *onus* of showing that lies with the petitioner, and I am of opinion that it has not been shown in this case.' Accordingly, he pronounced a decree of judicial separation on the ground of adultery.
B If, as seems to me to be indisputable, the wife had ample grounds for refusing any offer made by her husband, it seems to me that the question of the genuineness of the offer does not arise at all. If by refusing an offer made in those circumstances she is precluded from saying that a state of desertion continues, it seems to me that is tantamount to saying that she makes herself a deserter by such refusal, but that quite unquestionably is not the law."
C

I then proceeded to analyse the proposition that any such conception of the law is in direct conflict with the well-known judgment of WARRINGTON, L.J. ([1924] P. 201) in *Thomas v. Thomas* (8). I do not propose to read the passage in that judgment or to comment on it at length, for, if I did so, I should merely be repeating what I said ([1946] 1 All E.R. 174) in a later case also named
D *Thomas v. Thomas* (9). I have read and re-read that passage for the purpose of this judgment and I am prepared to stand by it. The point was that, for what I hoped was the last time, the well-known passage from the judgment of SIR J. P. WILDE (Judge Ordinary) in *Fitzgerald v. Fitzgerald* (10) had been cited and pressed on the Divisional Court. SIR J. P. WILDE (Judge Ordinary) said (1 P. & D. 698):
E

"... if the state of cohabitation has already ceased to exist, whether by the adverse act of husband or wife, or even by the mutual consent of both, 'desertion,' in my judgment, becomes from that moment impossible to either, at least until their common life and home have been resumed."

As I stated ([1946] 1 All E.R. 173), I had already, in *Jordan v. Jordan* (11)
F set out ([1939] 2 All E.R. 35) a number of cases in which that *dictum* had been criticised almost to vanishing point, and had pointed out that even in *Fitzgerald v. Fitzgerald* (10) itself the subsequent history shows that SIR JAMES HANNEN (Judge Ordinary) decided exactly the opposite when two or three years later the same parties came before him and he pronounced a decree on the ground, among other things, of desertion, although it was plain beyond the slightest
G doubt that there had been no resumption of cohabitation, there had been no restitution suit, and there had been nothing more on the part of the wife than a formal demand that her husband should resume married life. Moreover, in *Pardy v. Pardy* (12) the Court of Appeal had decided that, in the case of a consensual separation, when once the separation deed was got out of the way because there had been a repudiation by one spouse accepted by the other, it was quite
H competent for the aggrieved spouse to establish a state of desertion without any previous resumption of cohabitation, but in *Thomas v. Thomas* (9) we were being pressed to say that that was all very well as regards a consensual separation—that you could, so to speak, start from the neutral and establish the positive—but you could not start from the negative and go straight to the positive without an intervening state of rest by a resumption of cohabitation. To show the fallacy of that, the point of my judgment was that it was in flat contradiction of the real meaning of what WARRINGTON, L.J., said ([1924] P. 201) in the

earlier *Thomas v. Thomas* (8). Without reading the passage, for it would be tedious to do so, I can paraphrase the proposition in this way. The only possible conclusion from the judgment of WARRINGTON, L.J., in *Thomas v. Thomas* (8) is that the unjustified refusal by the spouse who has been deserted to resume cohabitation not merely terminates the desertion but also reverses the process; it "turns the tables," or "puts the boot on the other leg," or whatever metaphor one chooses to adopt; and it is immaterial whether the case is one of mere desertion which is terminable by a simple offer on the part of the deserter to return or is a case of constructive desertion terminable, with more difficulty no doubt, but terminable by appropriate repentance and appropriate assurance of amendment of such a kind, according to the individual circumstances, as the aggrieved spouse is not justified in refusing. To that, of course, must be added the qualification that at the end of his judgment WARRINGTON, L.J., said ([1924] P. 201):

"In each case the question must be determined on its own merits. . ."

In another decision in the Divisional Court—*Edwards v. Edwards* (13)—my judgment concluded with this ([1948] 1 All E.R. 160):

"There may be some conduct so gross that no woman could be expected ever to resume cohabitation with him. The point is that every case must be dealt with on its merits, and if the husband's merits are so slight that he has very little hope of ever being taken back, that is one of the consequences of his own conduct, and it ought not to affect the result of the case."

It follows, therefore, in my opinion, that if, e.g., it is the husband who is offering to resume cohabitation but he has been guilty of adultery which is uncondoned (as in *Lodge v. Lodge* (6)) or of cruelty of so atrocious a character that the wife could not possibly be expected to subject herself to a risk of recurrence, then, as WARRINGTON, L.J., said ([1924] P. 201) in *Thomas v. Thomas* (8):

"... the actual separation must continue to have the quality of desertion by the husband; otherwise I see no alternative except to regard the wife as deserting him, which would be impossible."

That is precisely what was done in *Lodge v. Lodge* (6) which conflicts with the decision in *Basing v. Basing* (1) to which the learned commissioner was referred. It is true that it only conflicts with a part of the judgment which, strictly speaking, is *obiter*, but I will read the passage because, in my opinion, every word of it is right. It is again a judgment of SIR J. P. WILDE (Judge Ordinary). He said (3 Sw. & Tr. 517):

"The only question in the case was, whether this letter, if it amounted to an offer to renew cohabitation with his wife, could be any bar to her right to divorce on the above ground. I am of opinion that it was not. The petitioner was not bound to condone her husband's adultery, and take him back. The necessary period of desertion was complete before the letter was written. Supposing that it were in any case necessary under the statute to show that the desertion continued up to the filing of this petition, such necessity could not apply to a case in which the husband had in the meantime created a bar to his wife's return by the commission of adultery."

In *Lodge v. Lodge* (6) the letter interrupted the two years. Nowadays, of course, we have to deal with a triennium which immediately precedes the presentation of the petition, which is exactly the case supposed in the last sentence from the judgment of SIR J. P. WILDE (Judge Ordinary) which I have just read. Whichever it is, the point is that it is impossible to uphold the decision in *Lodge v. Lodge* (6) without turning the wife, who refuses to return to an adulterous husband, into a deserter by the very fact of her refusal, and I now venture to

repeat in the Court of Appeal the words with which I concluded my judgment in *Volp v. Volp* (7) nearly nine years ago :

“ In my opinion, the time has come to say plainly that *Lodge v. Lodge* (6) cannot be cited as a case of authority.”

A The result so far is that I am very doubtful whether I should find it possible to uphold the learned commissioner's judgment on the ground on which it was based, but that brings me to the further and better particulars of the answer dealt with under what I call the second heading. I propose only to deal with the period, four months in duration, of the alleged cohabitation at 193 South Lambeth Road. I have already alluded to the subsequent fortnights and I propose to say no more about them. In regard to this period of four months at 193 South Lambeth Road, I am not concerned with the question whether B desertion was condoned—a question which may raise some difficulties (which, in my opinion, it is unnecessary to pursue) arising out of the wife's assertion that she had nowhere else to go. The fundamental point about this part of the case is that it was decided by this court in *Hopes v. Hopes* (14) that the necessary element of separation cannot subsist when a husband and wife are living under the same roof unless they have ceased to share one household and have set up C two households there. In my opinion, it is impossible to limit that decision merely to the inception of the alleged desertion. The same principle must apply to the interruption of a period of desertion. In that case the Court of Appeal rejected the allegation of desertion on facts which were not so strongly in favour of the petitioner as those which the wife here attempted to prove. Be it remembered that what, in effect, she was saying was that the husband D forced his way into the house and that they only remained together, in the sense in which she said they were together, because he insisted on staying there against her will and she had nowhere else to go. That, putting it, I think, at its highest, was the wife's case—a much stronger case than that which was actually dealt with in *Hopes v. Hopes* (14). Agreeing, as I most heartily do, apart altogether from the fact that, whether I agree with it or not, this court is bound by it, I E think the simplest and shortest way to apply the decision in *Hopes v. Hopes* (14) to this case is to look at it the other way round and to see what every member of the court regarded as, so to speak, the high-water mark, or the top limit, of the class of case in which, though living under the same roof, the parties could be regarded as in a state of separation. Every member of the court approved a judgment, which again happened to be one of my own, in *Smith v. Smith* (15). F That was a test case and the King's Proctor had been brought in to argue it. I am not going to refer to it. It is sufficiently summarised in a couple of sentences in another decision of the Divisional Court, *Angel v. Angel* (16), which also found approval in *Hopes v. Hopes* (14). In *Angel v. Angel* (16) I said ([1946] 2 All E.R. 637) :

G “ In a word, *Smith v. Smith* (15) was a case in which, there being, so to speak, three tiers of the structure in which the spouses lived (a basement, a ground floor and a first floor) the husband had withdrawn from the wife's society and had made his home, so long as she was alive, with his mother, who lived in the basement, and he only went to the ground floor on which the wife thereafter lived, because he could only get to his bedroom on the first floor by going that way. The mother died, and the husband thereafter H continued to make his home in the basement, everything else continuing as before.”

I think I need only add to that description of *Smith v. Smith* (15) one other word, viz., that there was the additional circumstance that, on his way through, he left from time to time sums of money, arbitrarily selected by himself, for his wife, on her table, without ever speaking to her or giving her any opportunity of speaking to him.

In this case, taking the wife's evidence at its highest and assuming that it has been accepted by the learned commissioner, not only as regards the one thing about which he expresses his belief (*viz.*, that there was no sexual intercourse), but in its entirety, I doubt whether it would be possible, even if one thought that the husband had forced his way in, in the first instance, to hold that for the whole period of four months a state of separation still subsisted. I must admit that I doubt very much whether, applying the test laid down in *Hopes v. Hopes* (14), it would be possible to hold that there was, not only the creation, but also the subsistence, of two households in those three rooms. But it is not necessary, I think, to express a concluded opinion on that for this reason. It was said that, when the wife left on Nov. 29, 1945, there was found a note. I gather that there had been, if not discovery, at any rate mutual inspection of documents, for counsel for the wife, fully appreciating the gravity of this note in relation to this part of the case, took the bull by the horns and put it to the wife in examination-in-chief, and she denied that she had written it. She made that denial no less than three times altogether, once in response to what was obviously a serious question by the learned commissioner himself. She was cross-examined about this denial, she was made to write down certain words which appeared in the note, and her writing was made an exhibit. Unfortunately, that exhibit has not been forthcoming, but we have two letters which are, admittedly, in her handwriting. The resemblance between the writing in those two letters and the pencil writing on the note was so striking that we invited further consideration of the wife's position. Eventually counsel for the wife was instructed to say that the wife no longer denied that she wrote that note. In other words, she committed rank perjury and counsel for the wife quite rightly, for reasons which I will make plain in very few words, admitted that, if she wrote that note, it was impossible to continue the argument that during these crucial four months there had been no cohabitation, and that whether it was or was not accompanied by sexual intercourse was immaterial. The note is as follows :

" Dear Ted, Forgive me for going like this but I can't stand it any longer. Please look after Freddie I told them that he will be at the nursery tomorrow. I will get your rations in tomorrow dinner time as I shall go to work in the morning. Nobody need know. Also please don't go running to my people as it will make it worse all round. In time I shall properly [*qu.*, probably] come to my senses. Until then please look after Freddie. Will see you in work tomorrow. Flo. Have left some matches on shelf. Hope you have a box. Olive [the neighbour upstairs in the flat above] has got Freddie ; she thinks I have gone to get some fish. I shall be going away this weekend."

I wish to make it clear that I am deciding nothing whatever about the merits of this parting on Nov. 29, 1945, and still less anything about the subsequent parting a month later. What I am deciding is that this note, now admitted to be in the wife's handwriting, is utterly inconsistent with her story that she and the husband were living together for four months as it were by *force majeure* so far as she was concerned. The result, therefore, is that, though I should feel great difficulty in upholding the dismissal of this petition on the ground on which the learned commissioner based his judgment, I think that it must inevitably be dismissed on the ground that it is impossible for the wife to establish on the known facts, known as they are now, that a state of desertion subsisted during the statutory triennium. For these reasons, in my opinion, this appeal must be dismissed.

BUCKNILL, L.J. : I agree. I do not feel altogether easy about the case because I think that the learned commissioner came to the correct decision for a wrong reason. In the first place, one of the most important issues in the

case was whether the wife had written this letter (which she now no longer denies she did write) and counsel for the husband, in the brief argument that she put forward before the learned judge, specifically asked him to deal with its authenticity. Counsel said: "My Lord, in this case I submit that there is here no case of desertion," to which the commissioner replied: "What you say is that the husband offered to return and the three years period was broken?" and counsel for the husband said: "Yes." Then she said: "I would ask your Lordship to find that the note which was written, and which the husband found, is in the wife's handwriting." The learned commissioner did not deal with the disputed letter at all, although in his judgment he did deal with the correspondence. He says:

A
B "There is for instance a letter the postmark of which is June 25, 1946, in which she writes to her husband 'Ted received your letters safely'."

He did not decide the question who wrote the disputed letter, although he had a test made at the time and asked the wife to write out words to compare them with the disputed writing. I think the reason why he did not deal with this issue about the letter was that he thought the issue was immaterial for the reason that the husband had made an offer to come back and that, in itself, terminated the desertion. Immediately after the passage that I have read, in which he dealt with the letter of June, 1946, he says:

C
D "The question is whether in those circumstances the husband, by offering to return to his wife and to resume matrimonial life with her—and, indeed, doing all he could physically to resume life with her—has terminated his desertion."

I will not read the passage at the end of the judgment again, as my Lord has read it, but it seems to me to be consistent with the commissioner's view that the husband's offer to return terminated the desertion. I think the learned commissioner was wrong and that he must have based his decision on the judgment of BUTT, J., in *Lodge v. Lodge* (6). I agree, if I may respectfully say so, with the learned President's criticism of that decision, and I agree also with the judgment of the Divisional Court in *Volp v. Volp* (7).

E The passage in *RAYDEN ON DIVORCE*, 5th ed., p. 115, para. 128, on this point says:

F "Thus, a wife is always justified in refusing to return to her husband, so long as he continues an adulterous connection; and may insist upon his fulfilment of reasonable requirements as a condition of return to cohabitation."

Among the notes to that paragraph is the following:

G "The decision in *Lodge v. Lodge* (6) would be in accordance with the modern view, if there had been evidence in that case that the husband had ceased his adulterous connection."

I think that anyone, reading the words of that paragraph and the note (and I see that this statement of the law was also in *RAYDEN ON DIVORCE*, 2nd ed., p. 95, published in 1926) and the decision in *Lodge v. Lodge* (6), would infer that, if the husband announced that he had ended his adultery, he was entitled to ask to be taken back, and that, if the wife refused to take him back, he then terminated his desertion. I am puzzled to know why BUTT, J., came to that conclusion in *Lodge v. Lodge* (6). The decision seems to be inconsistent with the decision in *Basing v. Basing* (1), and also to be contrary to any natural idea of justice, because it means that a husband may go away and live in adultery with another person for years and, when that other died, he might say to his wife: "Take me back," and, if the wife refused, she would then be in the wrong. That seems to me to be a quite unreasonable proposition.

H

I think that the learned commissioner was misled by the decision in *Lodge v. Lodge* (6), and had not the advantage of seeing the judgment in *Volp v. Volp* (7) because that case had not been reported and the remarks in *RAYDEN ON DIVORCE* do not suggest that *Lodge v. Lodge* (6) was wrongly decided. It is unsatisfactory, to my mind, to have to support a judgment which has been based on a wrong reason. One cannot forget that the husband admitted sexual intercourse with Mrs. Reeves before his marriage, and, as regards their relations after his marriage, the learned commissioner in his judgment says :

"I think the wife was amply justified in concluding that adultery between her husband and Mrs. Reeves had taken place."

He is there referring to the period of time after their marriage, between 1943, when the husband left his wife, and 1945, when he returned. So far as I can see, reading the evidence, the husband never did anything to remove that belief except to tell his wife that in 1944 Mrs. Reeves had become engaged to a Belgian and that Mrs. Reeves and her husband, the Belgian, went to Belgium sometime in 1945—the year the husband wanted to come back to his wife—or early in 1946. It looks as if, when Mrs. Reeves decided to marry the Belgian, the husband decided to go back to his wife.

As regards the second point, the husband in his evidence admitted that his wife's attitude, during the four months when they were in the same flat, was that as soon as the opportunity presented itself she would leave. Most unfortunately, however, the wife has lied on a crucial matter, the letter. I would not decide that a husband, having deserted his wife and having lived in circumstances which reasonably led her to think that he was committing adultery while in desertion, could terminate the desertion by forcing himself back into the wife's flat and insisting on living there against her will. This was a little flat, it had only one bedroom, one sitting room and a kitchenette, and she was living there with her child and was the tenant of the flat. When, however, one finds a husband and wife living together in such a small flat for four months, it is almost impossible—I will not say absolutely impossible—to hold that desertion continued during those four months. I think it is for the wife to satisfy the court that during those four months they lived absolutely separate and apart so far as that was physically possible. The terms of the disputed letter, which she denied writing, are quite inconsistent with her story that she lived as far apart from her husband as she possibly could. When one finds her lying on that issue, I think she clearly fails to establish that during those four months the state of desertion continued. I, therefore, think the wife has failed to establish desertion for the necessary three years and the appeal should be dismissed.

COHEN, L.J. : I agree.

Appeal dismissed with costs.

Solicitors : *J. C. Hodgson*, Services Divorce Department (for the wife); *Musson & Co.* (for the husband).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

GALLAGHER v. SHILCOCK.

[KING'S BENCH DIVISION (Finnemore, J.), March 17, 25, 1949.]

Sale of Goods—Unpaid seller—Re-sale—Buyer's right to recover deposit—Sale of Goods Act, 1893 (c. 71), s. 48 (3).

A By s. 48 (3) of the Sale of Goods Act, 1893: "Where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to re-sell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may re-sell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract."

B The plaintiff agreed to purchase a boat from the defendant and paid £200 as deposit and part payment. He was subsequently informed that he must pay the balance of the purchase money by a certain date or the boat would be re-sold. After a reasonable time had elapsed in which to make the payment, the plaintiff offered the money to the defendant, but the boat had already been sold for more than the original contract price. In a claim by the plaintiff for, *inter alia*, the return of the deposit:

C HELD: the defendant, by exercising his right of re-sale under s. 48 (3) of the Sale of Goods Act, 1893, did not rescind the contract or resume the property in the goods, but merely exercised his statutory remedy of re-sale to obtain the contract price; consequently, he did not re-sell as a full and untrammelled owner; and, therefore, the £200 paid by the plaintiff as deposit and part payment must be brought into account, and, as there had been no loss on the re-sale, the plaintiff was entitled to recover that sum.

D *Observations of FRY, L.J., in Howe v. Smith (1884) (27 Ch.D. 104; 50 L.T. 578) applied.*

E [AS TO RE-SALE BY SELLER, see HALSBURY, Hailsham Edn., Vol. 29, pp. 185-188, paras. 249-252; and FOR CASES, see DIGEST, Vol. 39, pp. 639-642, Nos. 2352-2377.]

Cases referred to:

- (1) *Howe v. Smith*, (1884), 27 Ch.D. 89; 50 L.T. 573; 48 J.P. 773; 40 Digest 226, 1959.
- F (2) *Mayson v. Clouet*, [1924] A.C. 980; 131 L.T. 645; 40 Digest 242, 2123.
- (3) *Martindale v. Smith*, (1841), 1 Q.B. 389; 1 Gal. & Dav. 1; 39 Digest 608, 2053.
- (4) *Ockenden v. Henly*, (1858), E.B. & E. 485; 31 L.T.O.S. 179; 40 Digest 261, 2268.

G ACTION for specific performance of a contract for the sale of goods, damages for breach of the contract, and for the return of a deposit of £200 paid.

H On May 17, 1947, the plaintiff agreed to buy a boat from the defendant for £665 and he paid £200 as a deposit. The sale was "subject to survey" at the plaintiff's expense. The report being satisfactory, the plaintiff finally accepted the boat on May 31 and the defendant agreed to postpone payment of the purchase price pending registration of the boat to enable the plaintiff to raise a mortgage on it and pay the balance due. The boat was never registered, and, on July 16, the defendant's solicitors wrote to the plaintiff saying that, unless the balance of the purchase price was paid by July 31, the boat would be re-sold and the deposit would be forfeited. On Aug. 22 the plaintiff saw the defendant and offered him the balance, but the defendant told him that the boat had been sold on Aug. 7 for £700. The defence to the plaintiff's claim for the return of the deposit was that the contract was not performed by the plaintiff because he did not find the purchase price at the right date, and, there-

fore, he was not entitled to the return of the deposit. FINNEMORE, J., held that the deposit was recoverable.

Armstrong Cowan for the plaintiff.

Geoffrey Howard for the defendant.

Cur. adv. vult.

Mar. 25. FINNEMORE, J., read a judgment in which he stated the facts, found (following *Howe v. Smith* (1) and *Maison v. Clouet* (2)) that the payment by the plaintiff of the £200 was a deposit, or "a security for the completion of the purchase": per BOWEN, L.J., in *Howe v. Smith*, 27 Ch.D. 98; that the agreement of May 31 was not a new contract conditional on the registration of the boat; that more than a reasonable time had elapsed by Aug. 22 for the plaintiff to have tendered the balance of the purchase price; and, accordingly, that the defendant was entitled to re-sell the boat. He further held that the property in the boat had passed to the plaintiff on May 31 and that, therefore, he was not entitled to specific performance of the contract or to the damages claimed, and, on the claim for the return of the deposit, he continued: The point left is one of some considerable difficulty, and I am not sure that it has ever yet been decided in terms. It is whether or not in the circumstances of this case the deposit is forfeited. It depends on the construction of the relevant sections of the Sale of Goods Act, 1893. As I have said, it is common ground that the property passed and the boat became the boat of the plaintiff on May 31. Had it caught fire and been burnt the next day the loss would have been the plaintiff's. Had it for some reason increased in value, the increase would have been to the plaintiff's benefit. He was entitled at any moment after that date to say to the seller: "Give me my boat," but the seller was entitled to say: "First give me the balance of money due," because payment and delivery are concurrent conditions unless the parties have otherwise agreed.

Mere failure to pay on the appointed day does not rescind such a contract as this unless the parties have otherwise agreed, and time is not of the essence of the contract unless it is expressly made so. This is dealt with in BENJAMIN ON SALE OF PERSONAL PROPERTY, 7th ed., p. 864, where the editor thus comments on s. 49 (1) of the Sale of Goods Act:

"Whenever the property has passed and the goods have reached the actual possession of the buyer, the seller's sole remedy is by personal action. He stands in the position of any other creditor to whom the buyer may owe a debt: all special remedies in his favour *qua* seller are gone. By the law of England, in this respect agreeing with the civil law, mere delay by the buyer in paying the price will not justify the rescission of the contract by the seller, unless the right to rescind be expressly reserved."

The leading case on the subject is *Martindale v. Smith* (3) in which LORD DENMAN, C.J., said (1 Q.B. 395):

"Having taken time to consider of our judgment, owing to the doubt excited by a most ingenious argument, whether the vendor had not a right to treat the sale as at an end and re-invest the property in himself by reason of the vendee's failure to pay the price at the appointed time, we are clearly of opinion that he had no such right, and that the action is well brought against him. For the sale of a specific chattel on credit, though that credit may be limited to a definite period, transfers the property in the goods to the vendee, giving the vendor a right of action for the price, and a lien upon the goods, if they remain in his possession, till that price be paid. But that default of payment does not rescind the contract... In a sale of chattels, time is not of the essence of the contract, unless it is made so by express agreement..."

After May 31 the seller had two courses open to him. Under s. 49 (1) he could have sued for the price. That subsection provides:

"Where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods."

It seems to me beyond argument that, if the seller in this case had taken that course, he could not possibly have sued for the full contract price—£665 and at the same time have kept the £200 without giving credit for it. If he takes proceedings under s. 49 (1) and so invokes the principle which it enshrines, he is not rescinding the contract. He is taking steps to get the contract price paid to him. Clearly, therefore, if the £200 was in part payment of the purchase price as well as being a deposit, and here, beyond any possibility of doubt it was, he must bring that into account and give credit for it.

- B** He also has another remedy if the goods have not reached the purchaser. He may retain the goods and so exercise the unpaid seller's lien and in certain circumstances re-sell. He chose in this case to re-sell. I think it would be a curious thing that, if he decided to sue the purchaser for the contract price, he should be limited to that price, but, if he kept the goods and then sold them, he would be entitled not only to get the full contract price but also to keep in his pocket any deposit which had been paid beforehand. I think this must depend ultimately on whether, if the unpaid seller sells against the original purchaser, the contract has been rescinded and the goods have been re-vested in him or whether the view is that he is pursuing the remedy under the Act given to him in order to become no longer an unpaid seller but a paid seller. The special rights of an unpaid seller are contained in s. 39 of the Sale of Goods Act. Sub-section (1) enacts that

"... notwithstanding that the property . . . may have passed to the buyer, the unpaid seller . . . has . . . (a) a lien on the goods or right to retain them . . . (c) a right of re-sale as limited by this Act."

- E** It is important to remember that the only right to re-sell which the unpaid seller has is the one which is given to him by the Sale of Goods Act, 1893, s. 48, which provides :

- "(1) Subject to the provisions of this section, a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien or retention or stoppage in transitu . . . (3) Where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to re-sell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may re-sell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract. (4) Where the seller expressly reserves the right of re-sale in case the buyer should make default, and on the buyer making default, re-sells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim the seller may have for damages."

- G** It is plain that the Act draws a distinction between the person who sells under sub-s. (3) and the person who sells because in the contract he has expressly reserved a right to re-sell. Sub-section (4) provides in terms that in the second case the contract is rescinded. There are no such words in sub-s. (3), and the only inference to be drawn is that under sub-s. (3) the contract is not rescinded. Had it been otherwise nothing would have been simpler than to put into the Act : "Where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to re-sell, and the buyer does not within a reasonable time pay or tender the price, the contract of sale is thereby rescinded." The Act does not say that. It says that the unpaid seller may re-sell the goods, and, if that sale does not reimburse him, he may still recover damages for any loss which he has suffered. It is really in essence a way in which the seller makes sure of getting his contract price.

The general principle of English law is that mere lateness or unpunctuality in making payment for goods does not rescind the contract of sale. It would be a curious thing if, nevertheless, the exercise of the remedy of the seller because of delay should rescind the contract. When the unpaid seller sells the goods, does he sell them as a person who, by rescission of the contract, has had full title to the goods re-vested in him, or does he sell them in a capacity analogous to that of pledgee or in some limited capacity? So far as I know, this matter has not been in terms decided. In HALSBURY'S LAWS OF ENGLAND (1st ed.), vol. 25, p. 264, it is put like this:

"Whether the unpaid seller under the foregoing provisions re-sells the goods in the capacity of an owner, so as to be entitled to any profit which may be realised by the re-sale, or whether he re-sells the goods in a capacity analogous to that of a pledgee... is doubtful."

In the Hailsham (2nd) edition, vol. 29, p. 186, the following words have been added to that paragraph "but *semble*, the former is the correct view." As I have indicated I have come to the other view. I do not think the unpaid seller sells an absolute owner. The property has already passed, and the lateness of payment does not rescind the contract.

There has been discussion at times whether the Sale of Goods Act, 1893, made new law or whether it only declared the existing common law. In the main the Act codified and clarified the common law and it may be helpful to look at the position before the Act. There were many cases on this problem before the Act and I am fortified in the view I have taken by some remarks of LORD BLACKBURN in BLACKBURN ON CONTRACT OF SALE, 3rd ed., p. 495, where he is dealing with the lien which the seller has and the rights which follow from it.

"Assuming, therefore, what seems pretty well established, that the seller's rights exceed a lien, and are greater than can be attributed to the assent of the buyer, under the contract of sale, the question arises, how much greater than a lien are they? It is clear that in no case do they amount to a complete resumption of the right of property, or in other words, to rescind the contract of sale, but perhaps come nearer to the rights of a pawnee with a power of sale, than to any other common law rights."

The power of re-sale which is given to the seller who has exercised his lien or right of retention is, I think, properly described in that way. There is no rescission of the contract. There is, therefore, no complete resumption of the right of property on the part of the seller and when he re-sells he does not sell as the full, complete and untrammelled owner. If that view be right it follows that the defendant must bring into account the £200 he has already received. The £200 was paid under the contract, and the contract has not been repudiated by the purchaser although he has failed to make his payment by the due date. Nothing which has happened has rescinded the contract. What has happened is that the seller has enforced his remedy to obtain the contract price by the right of re-sale given to him under the Act of 1893.

In those circumstances, the deposit must be brought into account and all the seller is entitled to receive is a total of £665, which is the agreed contract price, subject to the right given to him expressly by the Act to claim any damages he may, in fact, have suffered by the purchaser's breach of contract. That conclusion is also fortified by some observations of FRY, L.J., in *Howe v. Smith* (1). In that case in addition to the £500 which was paid as deposit and in part payment of purchase money the contract provided that the purchase must be completed on a certain day and there was also a clause that, if the purchaser should fail to comply with the agreement, the vendor should be at liberty to re-sell and to recover any deficiency in price as liquidated damages. In other words, that contract gave an express right of re-sale to the seller quite apart

from what the legal position might be about deposit. Towards the end of his judgment FRY, L.J., says (27 Ch.D. 104) :

“ Yet another point has been raised and demands decision. The eighth clause of the agreement gives, as I have already stated, a power to the vendor to re-sell if the purchaser fail in his performance, and declares that the deficiency on such second sale shall be made good by the defaulting purchaser and be recoverable as liquidated damages. In the present case, the defendant, the vendor, declined to perform the contract on the ground of delay on the part of the plaintiff, the plaintiff brought this action, and about six months subsequently the vendor re-sold the property at the original price ; and it is contended by the plaintiff that the defendant thereby lost all right of retaining the deposit. If the vendor had chosen to re-sell under this power and to sue the purchaser for the deficiency, he would, in my opinion, and in accordance with the case of *Ockenden v. Henley* (4), have been obliged to bring the deposit into account ; but that is not the course which he has pursued . . . in my opinion there has been such default as justifies the vendor in treating the contract as rescinded ; it affords the vendor an alternative remedy, so that he may either affirm the contract and sell under this clause or rescind the contract and sell under his absolute title. If he act under the clause, he must bring the deposit into account in his claim for the deficiency : if he sell as owner, he may retain the deposit, but loses his claim for the deficiency under the clause in question.”

The case dealt with a sale of land and with the special contract there made, but I think that the position arising by virtue of s. 48 (3) of the Sale of Goods Act is comparable in that the seller who re-sells and so ensures the contract price and any damages he may have suffered is affirming and not rescinding the contract, and, accordingly, must bring the deposit into account. The result is that the plaintiff is entitled to recover the sum of £200 paid by him as deposit.

Judgment for plaintiff with costs.

Solicitors : *J. A. Ramsey & Co.* (for the plaintiff) ; *Gordon Gardiner, Carpenter & Co.*, agents for *Cousins & Burbidge*, Southsea (for the defendant).

[*Reported by F. A. AMIES, ESQ., Barrister-at-Law.*]

F

NORTON v. WHITE.

[COURT OF APPEAL (Tucker and Singleton, L.JJ.), April 4, 5, 1949.]

Rent Restriction—Standard rent—Dwelling-house owner-occupied from 1930 until 1936—Let before 1930 at 14s. per week and after 1936 at 35s. per week—Owner's occupation not registered—Whether house controlled immediately before the Act of 1938—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), s. 1 (2).

The Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12, provides : “ (2) This Act shall apply to a house or a part of a house let as a separate dwelling, where either the annual amount of the standard rent or the rateable value does not exceed [certain amounts] and every such house or part of a house shall be deemed to be a dwelling-house to which this Act applies.” By the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 1 (2) : “. . . the principal Acts shall not apply to any dwelling-house unless it is a dwelling-house to which they applied immediately before the passing of this Act [*i.e.*, before July 18, 1933] . . . and it is also a dwelling-house of which either the annual amount of the

recoverable rent on the appointed day or the rateable value on the appointed day did not exceed" certain amounts. The Act of 1933 also provides in s. 16 (1): "' Dwelling-house ' has the same meaning as in the principal Acts, that is to say, a house let as a separate dwelling or a part of a house being a part so let."

Until 1930 a dwelling-house was let at 14s. per week, and thereafter until 1936 the house was occupied by the owner, but he did not register the house under s. 4 (1) of the Rent and Mortgage Interest (Restrictions) Act, 1938, as having become free from control by virtue of s. 2 (1) of the Rent and Mortgage Interest (Restrictions) Act, 1923. On Nov. 30, 1936, the house was let to the present tenant at 35s. per week, and in August, 1939, the present landlord became the landlord. On Oct. 25, 1948, the tenant applied to the county court to determine the standard rent, and it was decided by the registrar, whose order was affirmed by the county court judge, that the standard rent was 14s. per week. On appeal, it was argued by the tenant that, as the landlord had failed to register the "decontrol" under s. 4 (1) of the Act of 1938, the Acts were, by s. 4 (2) of that Act, deemed to apply to the house and, therefore, the standard rent was 14s. per week, and not 35s. which it was agreed would be the amount if the house was brought under control by the Rent and Mortgage Interest Restrictions Act, 1939.

HELD: in both s. 12 (2) of the Act of 1920 and s. 16 (1) of the Act of 1933, a dwelling-house to which the Acts apply is defined as "a house . . . let as a separate dwelling"; on July 17, 1933, the house in the present case was not let, but was occupied by the owner; and, therefore, it was not one to which the Acts applied on July 17, 1933, and so was "decontrolled" by s. 1 (2) of the Act of 1933 and the standard rent was 35s. per week.

Dicta of CLAUSON and GODDARD, L.JJ., in *R. & P. Properties v. Baldwin* ([1938] 4 All E.R. 848, 849; [1939] 1 K.B. 468, 469; 160 L.T. 447, 448), applied.

[AS TO DECONTROL BY LANDLORD OBTAINING POSSESSION, see HALSBURY, *Hailsham Edn.*, Vol. 20, pp. 319-321, paras. 379, 380; and FOR CASES, see DIGEST, Vol. 31, pp. 585, 586, Nos. 7349-7359.]

Cases referred to:

- (1) *Schaffer v. Ross*, [1939] 4 All E.R. 363; [1940] 1 K.B. 418; 162 L.T. 37; 2nd Digest Supp.
- (2) *Brooks v. Brimecome*, [1937] 2 All E.R. 637; [1937] 2 K.B. 675; 157 L.T. 417; Digest Supp.
- (3) *Woodfield v. Bond* (No. 1), (1921), 127 L.T. 204; 31 Digest 557, 7045.
- (4) *R. & P. Properties, Ltd. v. Baldwin*, [1938] 4 All E.R. 845; [1939] 1 K.B. 461; 160 L.T. 445; Digest Supp.

APPEAL by the landlord from an order of HIS HONOUR JUDGE DONE, at Edmonton County Court, dated Nov. 23, 1948, affirming an order of the registrar that the standard rent of a dwelling-house was 14s. per week. The Court of Appeal allowed the appeal, holding that the standard rent was 35s. a week, which was the amount which had been paid by the tenant since 1936. The decision turned on the question whether the house was controlled immediately before the passing of the Act of 1938, which depended on whether it was controlled immediately before the passing of the Act of 1933. The facts appear in the judgment of TUCKER, L.J., and are summarised in the headnote.

Scott Henderson, K.C., and *L. S. Fletcher* for the landlord.

J. F. Donaldson for the tenant.

TUCKER, L.J.: Before 1930 the premises in question here were let at 14s. per week. From 1930 till 1936 they were owner-occupied. On Nov. 30, 1936,

by an agreement of that date, the house was let to the present tenant for three years at £91 per annum, *i.e.*, at 35s. per week, by the present landlord's predecessor in title. In August, 1939, the present landlord became the landlord of the property. From November, 1936, until these proceedings, the tenant has duly paid the rent of 35s. per week. On Oct. 25, 1948, the tenant applied to the registrar to fix the standard rent, claiming that the standard rent was 14s.

- A per week, the figure at which the premises were first let after August, 1914, and not the 35s. per week he had been paying for 12 years. Until 1931, the rateable value of the house was £19, and since April, 1931, it has been £25. No question of rateable value arises in these proceedings. It is conceded that, so far as rateable value is concerned, the premises are within the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938, and, if they are controlled by that Act, the standard rent is 14s. per week, as fixed by the learned judge.
- B On the other hand, if they are not within the Act of 1938, but if they were only caught by the Rent and Mortgage Interest Restrictions Act, 1939, the standard rent is 35s. per week, the sum agreed on Nov. 30, 1936.

- C In my view, the point on which this decision depends is whether the principal Acts applied to this dwelling-house on July 17, 1933. It is necessary to refer to the relevant sections in the Acts. It is conceded that up till 1930 the house was within the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. It came within s. 12 (2) of that Act, which provides :

- D "This Act shall apply to a house or a part of a house let as a separate dwelling, where either the annual amount of the standard rent or the rateable value does not exceed [certain amounts] and every such house or part of a house shall be deemed to be a dwelling-house to which this Act applies."

The Act of 1923, by s. 2 (1) provides :

- E "Where the landlord of a dwelling-house to which the principal Act applies is in possession of the whole of the dwelling-house at the passing of this Act, or comes into possession of the whole of the dwelling-house at any time after the passing of this Act, then from and after the passing of this Act, or from and after the date when the landlord subsequently comes into possession, as the case may be, the principal Act shall cease to apply to the dwelling-house."

- F In the present case, the landlord did come into possession after the passing of this Act, namely, in 1930, and, accordingly, as from that date, the principal Act ceased to apply to the dwelling-house. The Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 1 (2), provides :

- G "As from Sept. 29, 1933, the principal Acts shall apply to any dwelling-house unless it is a dwelling-house to which they applied immediately before the passing of this Act or then formed part of such a dwelling-house, and it is also a dwelling-house of which either the annual amount of the recoverable rent on the appointed day or the rateable value on the appointed day did not exceed "

- H certain specified amounts. As I have already said, it is common ground that this house is within that second limb. The question is whether it was a house to which the principal Acts applied immediately before the passing of this Act, that is to say, was it a dwelling-house to which the principal Acts applied on July 17, 1933 ? In one sense, it clearly was not, because it had been taken out of the principal Acts by s. 2 (1) of the Act of 1923, but it is said that it would have been outside the purview of the principal Act in any event, apart altogether from the provision of the Act of 1923, and that it is not necessary for the landlord to rely on the Act of 1923 at all. The Act of 1933 contains a definition of "dwelling-house" in s. 16 (1) :

" ' Dwelling-house ' has the same meaning as in the principal Acts, that is to say, a house let as a separate dwelling or a part of a house being a part so let."

In s. 2 (1) of the Act of 1938 there is this provision :

" Subject to the provisions of this Act relating to registration, the principal Acts as from Sept. 29, 1938, shall not apply to any dwelling-house unless it is a dwelling-house to which they applied immediately before the passing of this Act . . . "

and is within certain rateable values. So, subject to the provision relating to registration, a dwelling-house is outside the Act if it is a dwelling-house to which the Acts did not apply immediately before the passing of this Act.

It is, therefore, necessary to see whether or not this was a dwelling-house to which the principal Acts applied immediately before the passing of the Act of 1938, and, in order to do so, we are thrown back to s. 1 (2) of the Act of 1933. The premises in question were not let on July 17, 1933, but they were let in 1936. It is said on behalf of the landlord that, having regard to the Act of 1933 and the position of these premises on July 17, 1933, the principal Acts did not apply to them on that day, irrespective altogether of the provisions of the Act of 1923.

I now pass to the provisions with regard to registration in the Act of 1938, because the whole of s. 2 of that Act is subject to the provisions dealing with registration. Those provisions are to be found in s. 4 (1) :

" If the landlord of any dwelling-house let as a separate dwelling immediately before the passing of this Act, being a dwelling-house of which the rateable value on the appointed day did not exceed the respective amount mentioned in s. 2 of this Act, claims that by virtue of the provisions of s. 2 of the Act of 1923 the principal Acts had ceased to apply to the dwelling-house before the passing of this Act, he shall within three months after the passing of this Act make to the council of the county borough or county district in which the dwelling-house is situated application in the prescribed form for the registration of the dwelling-house."

Thus, where a landlord is claiming to be excluded by the Act of 1923, in order to preserve his exclusion he must register. Sub-section (2) of the same section provides :

" If, in any proceedings with respect to any dwelling-house which is, or immediately before the passing of this Act formed part of, a dwelling-house to which sub-s. (1) of this section applies, it appears that but for the provisions of the said s. 2 of the Act of 1923 the principal Acts would have applied to the dwelling-house and that no application has been made by or on behalf of the landlord under that subsection within the time therein mentioned, the dwelling-house shall, subject as hereinafter provided, be deemed to be a dwelling-house to which the principal Acts apply."

In an admirable argument counsel for the tenant urged that these premises were removed from the control of the Acts by the Act of 1923, and that the landlord could not escape from that. When, therefore, he claims that he is outside the scope of the Acts after the coming into force of the Act of 1938, if he shows as part of his case—as he must do—that the house has been taken out of the control of the Acts by the Act of 1923, then, if he has not registered, the exclusion from control is not preserved. Furthermore, counsel says, apart from the provisions of the Act of 1923, on July 17, 1933, this dwelling-house would have been a dwelling-house to which the principal Acts applied, notwithstanding the fact that it was not at that date let as a separate dwelling, because it was a house within the limits of rateable value prescribed by the Acts and had at one time been let. The argument on behalf of the landlord is that, by reason of the definition of " dwelling-house," whether you

take the definition in the Act of 1933 or that in the Act of 1920, in order that a house shall become a dwelling-house to which the Acts apply it must be a house which at the material date was let as a separate dwelling, and on July 17, 1933, this, house was not let as a separate dwelling. Therefore the landlord says that, apart altogether from the provisions of the Act of 1923, the principal Acts did not apply and would not have applied in any event. He says: "I am not claiming under s. 4 of the Act of 1938, that, by virtue of the provisions of s. 2 of the Act of 1923, the principal Acts have ceased to apply to this dwelling-house. I am saying that, apart altogether from the Act of 1923, this house was not within the principal Acts at the material date."

The learned county court judge said that, in his view, the application of s. 4 to the house was "quite clear." It was decontrolled by the Act of 1923, and, but for that Act, the principal Acts would have applied. I confess that, whatever the proper answer may be to the problems which arise in the present case, I do not find them clear. I have come to the conclusion that the interpretation put on these sections by the landlord is the correct one, and so have arrived at a different conclusion from that reached by the registrar and the learned county court judge. It seems to me that the point that the principal Acts had no application to this house on July 17, 1933, is a good one. In my view, for the Acts to apply to a house at any particular moment of time with which the court is concerned (and in this case the court is concerned with July 17, 1933), it is essential that it should, at that moment of time, be a dwelling-house let as a separate dwelling. In that connection, I should like to refer to what was said by SLESSER, L.J., in *Schaffer v. Ross* (1). The question had arisen previously of the effect of the definition of "dwelling-house" in s. 16 of the Act of 1933, having regard to the definition in s. 12 (2) of the Act of 1920. I have read those definitions, and I will not repeat them, but they are not in quite the same language. SLESSER, L.J., said ([1939] 4 All E.R. 365):

"A doubt was expressed in *Brooks v. Brimecome* (2) as to the effect of that definition in the Act of 1933 on the earlier definition which I have cited in s. 12 (2) of the Act of 1920, but, if the matter has now to be considered, for myself, I am of the opinion that, having regard to that subsequent definition, and having regard, indeed, to the whole mischief to which the Acts are directed, s. 12 (2) of the Act of 1920 should be read as if the word 'let' governed the whole house as well as part of it."

I respectfully concur with what SLESSER, L.J., said there, so far as it applies to the case with which we are dealing, and to the extent that it conflicts with the decision of SARGANT, J., in *Woodfield v. Bond* (3). Therefore, in my view, it matters not whether it is the definition of the Act of 1933 or the definition of the Act of 1920 to which we have to look for the purpose of deciding the status of this dwelling-house on July 17, 1933.

In arriving at this decision, I have derived some assistance from *R. & P. Properties v. Baldwin* (4). It is true that the facts of that case are different from those of the present case. In that case, two adjacent flats in a block of flats were controlled under the Acts and let to two separate tenants at separate rents. In June, 1935, the tenant of one of the flats left, and the landlords then made certain alterations in the two flats and turned them into one, and thereafter let the one flat at an increased rent of 15s. The learned deputy county court judge held that the alterations made by the landlords were of a minor kind and did not change the identity of the flats as a separate dwelling-house, and that the combined premises continued to be subject to the Rent Acts. In giving his judgment and coming to a different conclusion from that arrived at by the deputy county court judge, SLESSER, L.J., emphasised the fact that he regarded the reconstruction as having completely altered the identity of the premises. Having set out what the alterations were, SLESSER, L.J., said ([1938] 4 All E.R. 847):

"To my mind, it is impossible, on that evidence, after the new flat rent had been fixed at 15s., following upon the assimilation of No. 69 and No. 70 into one occupied premises, to come to the conclusion, as the judge did, that the identity of No. 69 or No. 70 continued as a separate identity. To my mind, it is clear that there was, after June, 1935, a new occupation of new premises, which did not exist as premises before that time. There was thereafter only one doorway giving access to both the premises. The space in the wall was now capable of utilisation as a passage to and fro, a state of affairs which did not exist before. There were those and other physical alterations. The obligation of rent was an obligation agreed on to pay 15s., extending, as Mr. Stewart said, over the new combined flat. I think that the judge was wrong, on those facts, in coming to the conclusion that, as a matter of law, from the point of view of the Rent Restriction Act, one could still look at No. 69 or No. 70 as separate dwelling-houses, admittedly controlled under the Act before 1935."

Having referred to the provisions of the Act of 1938 and the Act of 1933, he said (*ibid.*):

"If the right view be, as I have said, that this combined flat was let as a separate dwelling, it is clear that it could not have been let as a separate dwelling before June, 1935, because before that date it did not exist, and, therefore, was not a dwelling-house within the meaning of s. 1 (2) of the Act of 1933."

CLAUSON, L.J., and GODDARD, L.J., attached little, if any, importance to the extent of the physical alterations in the premises. CLAUSON, L.J., referred to them and then said (*ibid.*, 848):

"The landlord made the alterations of a quite minor character which were necessary to enable No. 69 and No. 70 together to be occupied as one flat. Those alterations had, however, the very important effect of turning what had previously been two tenements separately occupied into one tenement capable of a single occupation... The position seems to me, when one studies the intricacies of it, to be reasonably plain. By reason of s. 2 of the Act of 1938, a house let as a separate dwelling is not a house to which the Rent Restrictions Acts apply unless it is a house which, let as a separate dwelling, is one to which the Acts applied before the passing of the 1938 Act. It appears from s. 1 (2) of the Act of 1933 that no house let as a separate dwelling before the passing of the Act of 1938 is a dwelling to which the Rent Restrictions Acts apply unless the Acts applied to that house let as a separate dwelling before the passing of the Act of 1933. At the time the Act of 1933 was passed, the combined flat No. 69 and No. 70 was not a house let as a separate dwelling. At that time, two separate flats, No. 69 and No. 70, were separately let and separately occupied. The combined flat of No. 69 and No. 70 thrown together only came into existence as a subject-matter of a letting, and as a house to which the Rent Restrictions Acts might possibly apply, in 1935. In other words, it was not a house which existed at all as a house to which the Act could apply in 1933."

GODDARD, L.J., said (*ibid.*, 849):

"To my mind, it makes very little difference—in fact, it makes no difference, I think—whether or not they have had, at some time since 1933 or 1935, internal connection made between them. They are adjoining premises. In 1935—and, indeed, in 1933, before [July 18] 1933, they were not let as a separate dwelling, but they were let as two separate dwellings."

I pause there because I cannot help feeling that, if the fact had been that at the material date they were not let at all, the reasoning of GODDARD, L.J., would have applied with still greater force. GODDARD, L.J., continued:

"They were treated as two distinct hereditaments, let at two distinct rents to two distinct persons. Therefore, I cannot see how it can be said that the premises which are comprised in the demise to Mr. Baldwin, in respect of which this action is brought, were, at the material date to which I have referred, let as a separate dwelling. If they were let as two dwellings, it follows that they are not let as a separate dwelling."

A I would substitute for that, "If they were not let at all, but were in the occupation of the landlord, it follows that they were not let as a separate dwelling." GODDARD, L.J., continued :

"It may be that those which have been two are made into one. That is another matter. The person who lives in the flat which previously was two flats, and has been reconstructed into one, does not say that he lives in two flats, but that he lives in one flat. The fact is that these premises were never let as a separate dwelling until 1935. As they were not let as a separate dwelling in 1933, the Act does not apply."

Counsel for the tenant says that one material distinction to be made in regard to that case is that, although it might be true to say that, if these premises had never at any time been let and had been owner-occupied on July 17, 1933, they would have been outside the Acts, it is different if at some previous date they had once been let. The difficulty I find about that is that, although it might be quite a possible view of the matter for the legislature to have taken, I cannot anywhere find in the Acts any such provisions, nor can I find any authority to that effect. It seems to me, although I agree that the facts are very different, that the reasoning—at any rate, of CLAUSON, L.J., and GODDARD, L.J.—in the judgments which I have just read apply to the present case. On July 17, 1933, the landlord being in occupation, these premises could not be said to have been let as a separate dwelling. Not being let as a separate dwelling at the material date, they were not within the principal Act. I think the landlord can establish the exclusion of these premises without reference to the Act of 1923 at all, and effect can be given to the provisions of s. 4 of the Act of 1938, by which registration is required in certain circumstances by the landlord, because they are clearly necessary and would operate in a case where the premises had been taken out of the Acts by the Act of 1923 but were let on July 17, 1933. In that case, the only way in which the landlord could preserve the exclusion which the premises had acquired under the Act of 1933 would be by registering under the provisions of s. 4 of the Act of 1938. In my view, in the present case there was no need for the landlord to preserve the exclusion which existed—irrespective altogether of the Act of 1923—and which attached, if I may use the expression, to these premises on July 17, 1933. For these reasons, I think that in this very complicated and difficult case the argument of the landlord prevails. In my view, the appeal succeeds.

G SINGLETON, L.J. : I agree.

Appeal allowed. Declaration that the standard rent was 35s. per week. No order as to costs in the county court. Landlord to have the costs of the present appeal.

Solicitors : *Leslie A. Fawke* (for the landlord) ; *Windsor & Co.* (for the tenant).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

NOTE.**R. v. DUFFY**

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Oliver and Cassels, JJ.), April 4, 1949.]

Criminal Law—Murder—Manslaughter—Provocation—Direction by judge.

APPEAL against conviction.

The appellant, who was convicted on Mar. 16, 1949, before DEVLIN, J., at Manchester Assizes, of the murder of her husband, had been subjected to brutal treatment by him. On the night of the offence, there had been quarrels and blows had been struck. The appellant had wished to take their child away and the husband had prevented her. The appellant left the room for a short while and changed her clothes, and eventually, when her husband was in bed, she returned with a hatchet and a hammer, with both of which she struck him. For the defence it was pleaded that the appellant had acted under provocation, but the jury, having been directed by the judge as to what constituted provocation sufficient to reduce murder to manslaughter, found the appellant guilty of murder. The Court of Criminal Appeal now dismissed the appeal. Giving the judgment of the court, LORD GODDARD, C.J., approved the direction given to the jury by DEVLIN, J., and it is to place the terms of that direction on record that the case is noted.

Stansfield for the appellant.

Barry, K.C., and *T. A. Cunliffe* for the Crown.

LORD GODDARD [delivering the judgment of the court]: The only possible defence that could be set up was that the appellant acted under such provocation as to reduce the crime to manslaughter, and on this point the summing-up of the learned judge, in the opinion of this court, was impeccable. I am going to read a passage from his summing-up, because I think it deserves to be remembered as as clear and accurate a charge to a jury when provocation is pleaded as can well be made. He said:

"Provocation is some act, or series of acts, done by the dead man to the accused which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind. Let me distinguish for you some of the things which provocation in law is not. Circumstances which merely predispose to a violent act are not enough. Severe nervous exasperation or a long course of conduct causing suffering and anxiety are not by themselves sufficient to constitute provocation in law. Indeed, the further removed an incident is from the crime, the less it counts. A long course of cruel conduct may be more blameworthy than a sudden act provoking retaliation, but you are not concerned with blame here—the blame attaching to the dead man. You are not standing in judgment on him. He has not been heard in this court. He cannot now ever be heard. He has no defender here to argue for him. It does not matter how cruel he was, how much or how little he was to blame, except in so far as it resulted in the final act of the appellant. What matters is whether this girl had the time to say: 'Whatever I have suffered, whatever I have endured, I know that Thou shalt not kill.' That is what matters. Similarly, as counsel for the prosecution has told you, circumstances which induce a desire for revenge, or a sudden passion of anger, are not enough. Indeed, circumstances which induce a desire for revenge are inconsistent with provocation, since the conscious formulation of a desire for revenge means that a person has had time to think, to reflect, and that would negative a sudden temporary loss of self-control which is of the essence of provocation. . . . Provocation being, therefore, as

I have defined it, there are two things, in considering it, to which the law attaches great importance. The first of them is whether there was what is sometimes called time for cooling, that is, for passion to cool and for reason to regain dominion over the mind. That is why most acts of provocation are cases of sudden quarrels, sudden blows inflicted with an implement already in the hand, perhaps being used, or being picked up, where there has been no time for reflection. Secondly, in considering whether provocation has or has not been made out, you must consider the retaliation in provocation—that is to say, whether the mode of resentment bears some proper and reasonable relationship to the sort of provocation that has been given. Fists might be answered with fists, but not with a deadly weapon, and that is a factor you have to bear in mind when you are considering the question of provocation."

That is as good a definition of the doctrine of provocation as it has ever been my lot to read, and I think it might well stand as a classic direction given to a jury in a case in which the sympathy of everyone would be with the accused person and against the dead man and it was essential that the judge should see that the jury had an opportunity of vindicating the law, whatever the consequences might be. That the appellant was properly convicted of murder according to law there can be no doubt, and, therefore, this appeal fails.

Appeal dismissed.

Solicitors: *Registrar of the Court of Criminal Appeal* (for the appellant); *Director of Public Prosecutions* (for the Crown).

[Reported by H. McL. MORRISON, Esq., Barrister-at-Law.]

Explained and Applied. LUCAS v. LINEHAM. [1950] 1 All E.R. 586.

LITTLECHILD v. HOLT.

[COURT OF APPEAL (Lord Goddard, C.J., Denning, L.J., and Birkett, J.), March 31, April 1, 1949.]

Rent Restriction—Possession—Landlord becoming such by purchase after Dec. 6, 1937—Death of landlord intestate—Widow suing as administratrix and personally—Whether widow landlord by purchase—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), sched. I, para. (h) (as amended by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938 (c. 26), sched. II).

The Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, sched. I, para. (h) (as amended by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938, sched. II), provides that an order may be made for possession where "the dwelling-house is reasonably required by the landlord (not being a landlord who has become landlord by purchasing the dwelling-house or any interest therein after Dec. 6, 1937) for occupation as a residence for (i) himself..."

On Mar. 9, 1944, L. bought a dwelling-house which was subject to the Rent Restrictions Acts, 1920-1938, and was occupied by M., as statutory tenant, and M.'s daughter, H. On Mar. 17, 1945, M. died, and H. continued to reside in the house, paying the rent, and becoming the statutory tenant by virtue of s. 12 (1) (g) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. On May 26, 1948, L. caused to be served on H. a notice to quit expiring on June 6, 1948. On June 8, 1948, proceedings for possession were started by L., but on the day before that fixed for an adjourned hearing L. died. L.'s widow took out letters of administration and on Oct. 4, 1948, an order to continue the proceedings was made, the widow being substituted for L. as plaintiff.

HELD : (i) it was open to the widow to pursue the claim for possession both as administratrix and in her own right.

(ii) L. was a landlord by purchase after Dec. 6, 1937, and the widow, whether in her personal capacity or as administratrix, having derived her title from L. was in no better position than L. had been, and was, therefore, unable to recover possession.

Baker v. Lewis ([1946] 2 All E.R. 592 ; [1947] K.B. 186 ; 175 L.T. 490) and *Fowle v. Bell* ([1946] 2 All E.R. 668 ; [1947] K.B. 242) distinguished. A

[AS TO RESTRICTIONS ON THE LANDLORD'S RIGHT TO POSSESSION, see HALSBURY, Hailsham Edn., Vol. 20, pp. 329-332, paras. 392-396 ; and FOR CASES, see DIGEST, Vol. 31, pp. 576-581, Nos. 7256-7297.]

Cases referred to :

- (1) *Baker v. Lewis*, [1946] 2 All E.R. 592 ; [1947] K.B. 186 ; 175 L.T. 490 ; 2nd Digest Supp. B
- (2) *Fowle v. Bell*, [1946] 2 All E.R. 668 ; [1947] K.B. 242 ; 2nd Digest Supp.
- (3) *Powell v. Cleland*, [1947] 2 All E.R. 672 ; [1948] 1 K.B. 262 ; 2nd Digest Supp.
- (4) *Epps v. Rothnie*, [1946] 1 All E.R. 146 ; [1945] K.B. 562 ; 173 L.T. 353 ; 2nd Digest Supp. C

APPEAL by the defendant from an order of His Honour JUDGE CLOTHIER at Guildford County Court, dated Nov. 18, 1948, whereby he granted possession of a dwelling-house to the plaintiff.

The proceedings for possession of the house, which was subject to the Rent Restrictions Acts, were started by L. L. died, and an order was made, substituting L.'s widow (and administratrix) as plaintiff. It being apparent that L. would have been unable to succeed in his claim for possession since he had become landlord by purchase after Dec. 6, 1937, the main question for the court was whether L.'s widow was in a better position. The Court of Appeal, differing from the learned county court judge, held that she was in the same position as L. had been and allowed the appeal. The facts appear in the judgment of LORD GODDARD, C.J. D

Niall MacDermot for the tenant.

E. P. Wallis-Jones for the plaintiff (L.'s widow). E

LORD GODDARD, C.J. : On Mar. 9, 1944, Mr. Ernest Edward Littlechild bought a dwelling-house which was occupied by one Mills. It is conceded that Mills was a tenant who was entitled to take advantage of the Rent Acts. Mills' daughter, Mrs. Holt, was living with him when he died on Mar. 17, 1945. Mrs. Holt continued thereafter to live in the premises. On May 26, 1948, a notice to quit expiring on June 6, 1948, was served on Mrs. Holt, who had been paying rent since her father died. The present proceedings were started on June 8, and came on for hearing by the learned judge on July 1. The case was not finished on that occasion and it was adjourned until July 22. Unfortunately, on the day before the case was to be resumed at the Guildford County Court, the landlord, Ernest Edward Littlechild, died. Thereupon, the case had to stand over until his widow had taken out letters of administration and an order to carry on was made. On Oct. 4 an order substituting the widow as plaintiff was made, and the case was heard on Nov. 15. When the case was resumed, the plaintiff took up the position that she was entitled to sue both in her own right and as administratrix. So far as her representative capacity was concerned, she would, of course, only have the rights of the deceased. It may be that she had additional rights in her own capacity as universal devisee and legatee of her husband. F

The first point that was taken by counsel for Mrs. Holt was one of procedure. That can be very shortly dealt with. He said that the plaintiff ought not to be allowed to sue in her own right, and that she could only exercise in G
H

the action the rights, and stand in the shoes, of her deceased husband. In my opinion, that point is not sound. It is always the case that a claim by an executor or administrator, as executor or administrator, can be joined with a claim by the executor or administrator personally. So, too, if there is a claim by the executor personally, it can be joined with a claim by him or by her as executor. That being so, it seems to me that it is open to a

- A person who obtains an order to continue proceedings as administrator or executor to join a claim by himself or herself in his or her personal capacity with the claim that is made in the representative capacity. At any rate, it seems to me, it is within the discretion of the court to allow those two claims to be made at the same time. I can well understand that there might be cases in which the court would refuse the joinder of two such causes of action. Supposing, however, a simple claim for goods sold and delivered is brought by a person who dies during the pendency of the action and his executor is appointed to carry on the proceedings, it may be that the executor himself has a claim either for goods sold and delivered or money lent or some other money claim against the defendant. I can see no reason why those two claims should not be joined and proceeded with in the same action. It might be, of course, that on a simple money claim, such as for goods sold and delivered by the deceased, the executor might desire to join a claim, let us say, for unliquidated damages for a tort which he himself alleged that he had against the defendant. The court might say that it would not allow those two causes of action to be joined because it would be inconvenient or embarrassing. These are matters of discretion for the court, but where the two claims are of a very similar nature I can see no reason at all why they should not be joined. Therefore, I think it was open to the learned judge in this case to allow the plaintiff to pursue the action both in her capacity as administratrix of her husband and in her own right.

The question then arises whether or not Mrs. Holt was in the position of a protected person holding over after her father's death. I think there is no doubt that she was. By the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (1) (g) (as amended by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1935, s. 1):

- E "... the expression 'tenant' includes the widow of a tenant who was residing with him at the time of his death, or, where a tenant leaves no widow or is a woman, such member of the tenant's family so residing as aforesaid as may be decided in default of agreement by the county court."

F Mrs. Holt has been found by the learned judge to be a member of the tenant's family residing with him at the time of his death, and it is necessary that she should have resided there for six months. That also, we must assume, was found in her favour by the learned judge. She never had a contractual tenancy, and her only right to remain in the house appears to me to be that given her by s. 12 (1) (g) of the Act of 1920.

G The next question is whether or not the plaintiff, in her own capacity or as the administratrix of her husband, is in a position to ask for an order for possession. The Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, sched. I, para. (h) (as amended by the Rent and Mortgage Interest Restrictions Act, 1938, sched. II), provides that an order may be made for possession where

- H "the dwelling-house is reasonably required by the landlord (not being a landlord who has become landlord by purchasing the dwelling-house or any interest therein after Dec. 6, 1937) for occupation as residence for—(i) himself . . ."

or certain other persons. When the action was launched by Mr. Littlechild he admittedly was a landlord who had become landlord by purchasing the dwelling-house after Dec. 6, 1937, and he would not, therefore, have been able

to get an order for possession himself. As I have said, we must take it that Mrs. Holt showed during the course of the action that she had been residing in the house as a member of Mr. Mills's family for a period of six months, and, therefore, Mr. Littlechild would not have been able to obtain an order for possession against her. Is the plaintiff in a better position than her husband would have been? It would be a very remarkable hiatus in the Act if she were. Section 12 (1) (g) is inserted in the Act of 1920 for the protection of the tenant. The "tenant" is the expression used all through the Acts as meaning the person who is holding the property. It would be remarkable if the tenant were protected against the landlord, but lost his protection if the landlord died and his interest passed to some other person. The tenant then would have protection as long as the person who bought the property after Dec. 6, 1937, remained the landlord of the property, but the moment that person disposed of his interest in the property otherwise than by sale the tenant would no longer be protected.

I will briefly refer to two cases which have been cited to us: *Baker v. Lewis* (1) and *Fowle v. Bell* (2). Those cases, no doubt, decided that a person who takes by will is not a person who has purchased a house within the meaning of para. (h) of sched. I to the Act of 1933. The Court of Appeal held in those cases that "purchasing" meant "buying," and that it had not got the technical conveyancing meaning attributed to it in relation to real property. *Baker v. Lewis* (1) and *Fowle v. Bell* (2) are, however, distinguishable from the present case, because the persons who there succeeded to the property by will took the property from a person whose title had not got the clog on it (if I may use that expression) that was on Mr. Littlechild's title in this case. In *Baker v. Lewis* (1), the plaintiff had acquired the property by will, and there is nothing in the report to show that the testator was a person who himself would not have been able to gain possession of the house by reason of the fact that he had bought the house since the material date. The testator had probably owned the house for many years. He had left it to the plaintiff, who did not acquire it by purchase, and, accordingly, was in a position to exercise the same rights as the testator had exercised, i.e., to claim possession if she could show greater hardship than the tenant. *Fowle v. Bell* (2) was similar. In the present case, however, the landlord from whom the plaintiff acquired title could not apply for an order for possession because of the provisions of sched. I, para. (h), to the Act of 1933.

Section 12 (1) (f) of the Act of 1920, provides that

"The expressions 'landlord,' 'tenant,' 'mortgagee,' and 'mortgagor' include any person from time to time deriving title under the original landlord, tenant, mortgagee, or mortgagor."

That seems to me clearly to indicate that a person who acquires property from a landlord cannot have a better right to an order for possession than the landlord from whom the property was acquired. As, in this case, the original landlord, Mr. Littlechild, would have come exactly within the words in brackets in para. (h) of sched. I to the Act of 1933 (as amended) and would have been debarred by those words from obtaining an order for possession on the grounds stated in that paragraph so long as the Act is in force, it follows that the plaintiff was debarred from obtaining possession. For these reasons, I think the appeal must be allowed.

DENNING, L.J.: Landlords of houses within the Rent Acts are subject to many restrictions. They cannot, as a rule, get possession without showing that alternative accommodation is available for the tenant, but, if a landlord reasonably requires a house for his own occupation, he may, in certain circumstances, be relieved of the obligation to show that alternative accommodation is available. That, however, does not apply to landlords who have become landlords by purchasing the house since 1937. The intention of the legislature

was that people should not be able to buy houses over the heads of the tenants and then turn them out without giving them alternative accommodation. The question in this case is whether the landlord was under that disability. For a landlord to be under the disability, three requisites are necessary. First, there must have been a "purchase" of the dwelling-house or an interest therein since 1937. The acquisition of the reversion, whether it be a freehold or a leasehold, for money or money's worth, and whether payable in a lump sum or by instalments, is plainly a "purchase," but the acquisition of it under a will is not a purchase: *Baker v. Lewis* (1). Nor, strangely enough, is the acquisition of the reversion in the shape of a new lease at a rack rent: *Powell v. Cleland* (3). Secondly, there must have been a contractual or statutory tenancy in existence at the time of the purchase which is still in existence today, but there need not be the same tenant there. It is the tenancy which is protected, whether it is a contractual tenancy which since the purchase has become a statutory tenancy, or whether it has been a statutory tenancy all the time. The protection is not lost by a contractual tenant assigning his interest to another, or by a member of the tenant's family succeeding to a statutory tenancy, but it is lost when the tenancy expires and a new one is voluntarily created: *Epps v. Rothnie* (4); *Fowle v. Bell* (2). Thirdly, the purchase must have been by the present landlord or his predecessor in title. The disability affects not only the purchaser himself, but also his successors in title: see s. 12 (1) (f) of the Act of 1920. So long as the tenancy continues in existence, the landlord and his successors to the reversion on the tenancy come under the disability. In this case, these three requisites are fulfilled. The house was purchased by Mr. Littlechild in 1944. There was then a statutory tenancy in existence in the hands of Mr. Mills. That tenancy is still in existence today in the hands of his daughter, Mrs. Holt, who, as a member of his family, succeeded to the tenancy. Mr. Littlechild was, therefore, subject to the disability, and his wife, as his successor, is in no better position than he. Therefore, the disability applies, and the landlord cannot get possession without giving alternative accommodation. I agree that the appeal should be allowed.

BIRKETT, J.: I agree. I think the decision of the court which has just been announced is in accordance with the purpose of these rather complicated Acts of Parliament. My Lord, in his judgment, stated clearly the position of Mrs. Holt, and came to the conclusion, both on the construction of the Acts of Parliament and on the findings of the learned county court judge, that she was a protected tenant. If that be so, it seems to me that the question in this case is whether the plaintiff has the right or power to overcome the protection which Mrs. Holt had. It is clear that Mr. Littlechild would have had no power to recover possession against the original tenant, Mr. Mills, and none against Mrs. Holt, and the question is: Is the plaintiff in any better position? The learned county court judge has decided this issue, I think, on the literal interpretation of the words. He said that the plaintiff did not purchase the property and, therefore, did not become landlord by purchasing the dwelling-house. Taking the purely literal meaning of the words, he came to the conclusion that the provision—the "clog," as my Lord termed it—which certainly created a disability in the case of Mr. Littlechild was removed in the case of the plaintiff. I do not think so. It is plain that her position depended entirely on the fact that she had succeeded her husband, and I cannot think that she was in any better position than he was. In my opinion, the judgments delivered are correct and with them both I agree.

Appeal allowed with costs.

Solicitors: *Vizard, Oldham, Crowder & Cash*, agents for *Mellersh & Lovelace*, Godalming (for the defendant); *Potter, Crundwell & Bridge*, Farnham (for the plaintiff).

[Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.]

FAIRMAN v. FAIRMAN.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P. and Ormerod, J.), March 22, 23, 1949.]

Adultery—Evidence—Accomplice—Need of corroboration.

The husband, against whom a maintenance order had been made on the ground of his desertion, applied for the discharge of the order on the ground of his wife's adultery with a man who had been staying with her as a lodger. The only evidence of the offence was that of the lodger himself who swore that over a period of at least three years he and the wife had habitually committed adultery in the house where they were living. The wife denied adultery.

HELD : the same strict proof was required of adultery as was required of an offence against the criminal law; the evidence of the lodger was that of an accomplice; it was not corroborated; and, therefore, it should not be accepted and adultery had not been proved.

Ginesi v. Ginesi ([1947] 2 All E.R. 438; [1948] P. 179), *applied*.

Dictum of WALLINGTON, J., in *Spring v. Spring and Jiggins* ([1947] 1 All E.R. 887), *not approved*.

[AS TO PROOF OF ADULTERY, see HALSBURY, Hailsham Edn., Vol. 10, pp. 660-662, para. 973; and FOR CASES, see DIGEST, Vol. 27, pp. 294-303, Nos. 2708-2801.]

Cases referred to :

- (1) *R. v. Baskerville*, [1916] 2 K.B. 658; 115 L.T. 453; 80 J.P. 446; 14 Digest 463, 4934.
- (2) *Statham v. Statham*, [1929] P. 131; 140 L.T. 292; Digest Supp.
- (3) *Ginesi v. Ginesi*, [1948] 1 All E.R. 373; [1948] P. 179; 112 J.P. 194.
- (4) *Churchman v. Churchman*, [1945] 2 All E.R. 190; [1945] P. 44; 173 L.T. 108; 2nd Digest Supp.
- (5) *Watt (or Thomas) v. Thomas*, [1947] 1 All E.R. 582; [1947] A.C. 484; 176 L.T. 498; 2nd Digest Supp.
- (6) *S.S. Hontestroom v. S.S. Sagaporack*, *S.S. Hontestroom v. S.S. Durham Castle*, [1927] A.C. 37; 136 L.T. 33; 41 Digest 765, 6176.
- (7) *R. v. Tate*, [1908] 2 K.B. 680; 99 L.T. 620; 72 J.P. 391; 14 Digest 464, 4942.
- (8) *Spring v. Spring and Jiggins*, [1947] 1 All E.R. 886; 2nd Digest Supp.

APPEAL by the wife against a decision of Wealdstone justices, dated Dec. 15, 1948, discharging a maintenance order which had been made in her favour on the ground of the husband's desertion on Apr. 16, 1942. The justices discharged this order on the ground that the wife had committed adultery since it was made.

The justices based their finding of adultery on the evidence of a man who during the relevant period had been staying as a lodger in the house where the wife was living and stated that he had frequently committed adultery with her. This was denied by the wife. The Divisional Court held that the uncorroborated evidence of an accomplice to adultery was insufficient to prove that offence and allowed the appeal. The facts appear in the judgment of LORD MERRIMAN, P.

Horner for the wife.

Cridlan for the husband.

LORD MERRIMAN, P. : This is a wife's appeal against a decision, given on Dec. 15 last by the justices for the Gore petty sessional division of Middlesex sitting at Wealdstone, to discharge a maintenance order made in favour of the wife on the ground of her husband's desertion on Apr. 16, 1942. The order was discharged on the ground that the wife had committed adultery

since the making of the order. It is common ground that the man with whom she was alleged to have committed adultery was a lodger for at least three years. That the situation of a landlady and a lodger is such that an opportunity to commit adultery is thereby afforded is indisputable, but it would be preposterous to draw the inference of adultery merely from a business relationship of that sort. A great deal more than such evidence of opportunity is necessary to convict a woman, who, for perfectly valid business reasons and because she has been deserted by her husband, takes people of the opposite sex to lodge in her house, but it is important to bear in mind that in the present case the charge of adultery was not based on merely circumstantial evidence, part of which was the opportunity thus afforded.

There are two main ways in which adultery is normally sought to be proved. The first is where there is no direct evidence of the commission of the offence, but it is sought to prove it circumstantially, by inference from the fact that there is a guilty affection between the two parties coupled with opportunity. If there had been anything worth considering in the present case in the nature of evidence of guilty affection to couple with the evidence of the opportunity afforded by the relationship of landlady and lodger, the case might conceivably have been presented in a different form, but it was not that class of case. It was one of the other group of cases where it is sought to convince the court that adultery has been committed by direct evidence of the offence given by one who, in the nature of things, was an accomplice, for the only evidence was that of the man with whom it was alleged that the wife had committed adultery. Indeed, only two witnesses were called, that man and the wife. He swore that over a period of at least three years, ending in 1946, they had habitually committed adultery in his bedroom at the house in question. She denied on oath ever having committed adultery with him or having been in the same bed. In one respect they were agreed, and that was that there was a time when the man had an accident and was incapacitated from work. Ultimately he recovered compensation in the sum of £300, but meanwhile—for a period which lasted for a considerable time—the wife kept him on as a lodger. When he recovered his compensation he paid her half of it in respect of the time during which he had been unable to pay his rent. The fact that she kept him on in this way was put against her, but it is possible to draw a sinister or a charitable inference from it. The wife herself said that, had she known how long the man would be incapacitated from work and unable to pay his weekly money, she would not have given him credit, but her case was that, once having started to do so, she continued, and at the end he gave her the money which was due to her. I have laid particular emphasis on that matter because it was pressed against her, and it is the only thing which is common ground between her evidence and that of the man, except the overriding fact that he was lodging with her throughout the material time.

The crux of her case is that the finding against her that between 1943 and 1946 she was continually committing adultery with this man depends on his evidence alone and his evidence is plainly that of an accomplice.

There is little doubt how the law stands. I am not going to examine in detail *R. v. Baskerville* (1) where all the authorities were fully reviewed. It is necessary only to refer to two cases, first, the decision of the Court of Appeal in *Statham v. Statham* (2), bearing in mind that, though the court were dealing with a matrimonial offence, they were also considering a question of sodomy which, in addition to being a matrimonial offence, is a criminal offence. In that case, RUSSELL, L.J., called attention to the fact that there was no evidence of the commission of the offence except the statement of the wife, and said ([1929] P. 150) :

“The offence of sodomy is an offence of so serious a nature that a rule has grown up, that in criminal trials for certain offences (which include

sodomy) the judge must warn the jury of the seriousness of convicting, in the absence of some evidence to corroborate the story of the other party to the act alleged. If no such warning has been given a conviction will be quashed. Notwithstanding the warning the jury may convict—but the warning must be given or the conviction will not stand. Is this rule to be confined to criminal trials for the offence? I can see no reason why it should be so confined.”

That brings me to *Ginesi v. Ginesi* (3), where the Court of Appeal examined a dictum of my own (indeed, I think it is more than a dictum) in the reserved judgment of the Court of Appeal which I delivered in *Churchman v. Churchman* (4). In *Churchman v. Churchman* (4) we were dealing with onus of proof in relation to the allegation that a husband had connived at his wife's adultery. Manifestly, as the Court of Appeal recognised both in that case and in *Ginesi v. Ginesi* (3), the same sort of principles apply to an allegation of connivance in the offence of adultery as to the offence of adultery itself. In *Churchman v. Churchman* (4) I said ([1945] 2 All E.R. 195):

“The same strict proof is required in the case of a matrimonial offence as is required in connection with criminal offences properly so-called.”

In *Ginesi v. Ginesi* (3) the Court of Appeal unreservedly approved that observation in relation to a charge of adultery, including as WROTTESELEY, L.J., expressly said ([1948] 1 All E.R. 376) connivance, while leaving open the question whether the current generality of the observation applied to other matrimonial offences. As a footnote to the phrase I then employed, I would like to add that I have always directed juries and myself on the basis that adultery is a quasi-criminal offence, and that, therefore, to that charge the same principles should be applied as in the case of criminal offences properly so-called, but I am not conscious of ever having directed either myself or a jury that the same strictness applies to other matrimonial offences—in other words, in relation, for example, to desertion, cruelty, or wilful neglect to provide reasonable maintenance, that it is necessary to direct oneself more strictly than that the onus lies on the spouse who makes the charge to satisfy the court that the offence is proved. The precise measure of proof in other matrimonial offences is, however, no more in question here than it was in either *Churchman v. Churchman* (4) or *Ginesi v. Ginesi* (3), and I am prepared to leave the subject where it was left by the learned Lords Justices who decided *Ginesi v. Ginesi* (3).

The one thing that emerges is that it is not enough in such a case as the present merely to say: “Here is a witness on one side; here is a witness on the other. Which do we prefer?” I cannot see any trace of a direction by these justices to themselves in the terms summarised by RUSSELL, L.J., in the passage I have read from *Statham v. Statham* (2). It has been suggested to us by counsel for the husband that the justices saw and heard the witnesses and have preferred the evidence of the man to that of the wife, but that will not do on the authority of the House of Lords in *Watt (or Thomas) v. Thomas* (5), or *The Hontestroom* (6), for it is common to both those pronouncements of the House of Lords that an appellate tribunal need not accept the decision of the court below on a question of fact if that court has misdirected itself.

One of the cases which is the foundation of the judgment in *R. v. Baskerville* (1), was expressly approved in *Statham v. Statham* (2), and is implicit in the passage which I read from the judgment of RUSSELL, L.J., is the decision of the Court of Criminal Appeal in *R. v. Tate* (7). There LORD ALVERSTONE, C.J., delivering the judgment of the court, said ([1908] 2 K.B. 682):

“In the present case the judge did not direct the jury in accordance

with the settled practice, but told them that the question for them was which of the two witnesses they believed, the boy or the prisoner, thereby leading them to suppose that if they believed the accomplice's story they might properly convict although his evidence was entirely without corroboration."

A I am not satisfied that that is not what has happened here, and in those circumstances, this finding cannot stand.

We have been referred to a judgment of WALLINGTON, J., in *Spring v. Spring and Jiggins* (8), in which the only evidence of adultery against the co-respondent was that of the wife. The report shows that the learned judge had gone very carefully into the wife's evidence of the adultery and he is stated to have said this ([1947] 1 All E.R. 887):

B

"Counsel has argued that there ought to be corroboration, but corroboration of what? It can only mean corroboration of the wife's testimony. It cannot mean that, if she is believed, the court cannot draw the irresistible inference from it that it involves necessarily adultery by the co-respondent with the wife. In my view, corroboration in such circumstances is not called for. If it is called for, there is abundant corroboration in the whole of the circumstances of this case."

C

With regard to the latter sentence I have no criticism to offer, and if the evidence did afford abundant corroboration of the wife's evidence as against the co-respondent, it follows that the observation that corroboration in such circumstances is not called for was merely *obiter dictum*. Whether it is *obiter dictum* or was necessary to the decision of the case, however, in my view, that statement cannot stand in view of the decision of the Court of Appeal in, among other cases, *Ginesi v. Ginesi* (3).

D

I am satisfied that the decision of the justices in the present case cannot stand for the reasons that I have given, and, in my view, the only proper course to take is to set it aside and to leave the husband—if he is so minded and can get sufficient evidence—to satisfy the justices on a proper direction to themselves about the necessity for corroboration of the evidence of this lodger. In other words the order which I propose is to set aside the finding of adultery and the order discharging the maintenance order in favour of the wife on that ground and to remit the husband's summons for such an order to a different panel of justices for the same petty sessional division for rehearing if the husband is minded to demand a rehearing.

E

F

ORMEROD, J. : I agree.

Appeal allowed with costs.

Solicitors : *Pierron & Morley* (for the wife); *Shaen, Roscoe & Co.* (for the husband).

G

[Reported by R. HENDRY WHITE, ESQ., Barrister-at-Law.]

JENKINS v. HOWELLS.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Oliver and Cassels, JJ.), April 7, 1949.]

Education—School attendance—Duty of parents to secure regular attendance of pupils—"Unavoidable cause"—Permanent incapacity of widowed mother—Education Act, 1944 (c. 31), s. 39 (2) (a).

Section 39 of the Education Act, 1944, provides: "(1) If any child of compulsory school age who is a registered pupil at a school fails to attend regularly thereat the parent of the child shall be guilty of an offence against this section. (2) In any proceedings for an offence against this section . . . the child shall not be deemed to have failed to attend regularly at the school by reason of his absence therefrom with leave or—(a) at any time when he was prevented from attending by reason of sickness or any unavoidable cause."

The respondent, the widowed mother of a child aged fourteen, was a chronic invalid awaiting admission to hospital for an operation on her eyes. She owned a farm of 260 acres, which was worked by three unmarried sons, and there was no one on the farm other than the respondent and the child to attend to the household duties. The child failed to attend school during the period Sept. 6, 1947, to July 31, 1948, on 225 out of 390 sessions and for the period ending Sept. 17, 1948, when the school was open for 102 sessions, the child failed to attend at all. The respondent's case was that the child was required to work at home because of her (the respondent's) incapacity.

HELD: "unavoidable cause" in s. 39 (2) (a) was a cause affecting the child; in the present case, the cause only affected the respondent; and, therefore, the respondent had committed an offence under s. 39 (1).

[FOR THE EDUCATION ACT, 1944, s. 39 (2) (a) see HALSBURY'S STATUTES, Vol. 37, p. 168.]

CASE STATED by Carmarthen justices.

At a court of summary jurisdiction sitting at Newcastle Emlyn, an information was preferred by the appellant, a school attendance officer, under s. 39 (1) of the Education Act, 1944, against the respondent charging that between July 15 and 17, 1948, being the parent of a child of compulsory school age, she was guilty of an offence in that the said child failed to attend regularly at a school where she was a registered pupil. The justices dismissed the charge on the ground that the permanent incapacity of the respondent constituted an unavoidable cause within the meaning of s. 39 (2) (a) of the Act. The Divisional Court now allowed the appeal of the school attendance officer.

R. G. Dow for the appellant.

The respondent was not represented.

LORD GODDARD, C.J.: This Case is stated by justices of the county of Carmarthen who found that the respondent, the mother of a girl aged fourteen years and three months at the time of the hearing of the information, was a chronic invalid and had been forbidden by the doctor to take any part in household work and was awaiting admission to hospital for an operation in connection with her eyes. The child has not been sent to the appropriate school, which is two and a half miles away, and under s. 39 (5) of the Education Act, 1944, absence from school is only excused in the case of a child over eight if the school is three miles away from the child's home. The mother owns a farm of some 260 acres. She has three unmarried sons who work on the farm. The child, who is the only daughter of the house, has been kept at home doing household duties while the sons were engaged on the farm, the mother being unable to work.

The justices dismissed the information because they came to the conclusion

that the child had not attended the school by reason of an "unavoidable cause" within the meaning of s. 39 (2) (a) of the Act of 1944. This court feels that there was no evidence on which the justices could find "unavoidable cause." The child had been continuously away from school. Out of 390 sessions she had missed 225. We think that the words "unavoidable cause" must be construed in relation to the child. It is a defence under s. 39 (2) (a) if the child is absent "at any time when he was prevented from attending by reason of sickness or any unavoidable cause." In our opinion, sickness in that sub-section must mean the sickness of the child and the "unavoidable cause" must be an unavoidable cause which affects the child. The unavoidable cause in this case affects the mother and not the child. Parliament has not seen fit to provide that family responsibilities or duties can be used as an excuse for a child not attending school. If we allowed the facts in this case, which certainly arouse great sympathy, to afford a defence, it would mean that this child would not go to school at all. How the domestic affairs of this farm and this small family are to be carried on, I do not pretend to know, and I can quite understand the justices taking the view that they did, but I think we are bound to hold that the reason for the child's absence does not amount to a defence. I think that "unavoidable cause" in this sub-section must be read as something in the nature of an emergency. If, for instance, the house where the child lived were burnt down that would be regarded, at any rate for a day or two, as an "unavoidable cause." In the circumstances I think we are bound to hold that there was no evidence of "unavoidable cause" within the meaning of s. 39 (2) (a), and the Case must, therefore, go back to the justices with a direction that the offence is proved.

OLIVER, J. : I agree. When the excuse set up is the chronic illness of a parent, the effect of deciding as the justices have decided would be that the child would never go to school at all. I cannot read s. 39 of the Act of 1944 as intending to include such a state of affairs as that.

CASSELS, J. : I agree.

Appeal allowed : case remitted.

Solicitors : *Theodore Goddard & Co.*, agents for *W. S. Thomas*, Carmarthen (for the appellant).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

LOWTHER v. SMITH.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Oliver and Cassels, JJ.), April 8, 1949.]

Justices—Sentence—Fine—Amount—Act under which offender prosecuted only providing penalty of imprisonment—Summary Jurisdiction Act, 1879 (c. 49), ss. 4, 5—Merchant Shipping Act, 1894 (c. 60), s. 376 (1) (d).

By the Summary Jurisdiction Act, 1879, s. 4, where any other Act authorises a sentence of imprisonment, but not a fine, for an offence triable summarily, a court of summary jurisdiction may, nevertheless, instead of imprisonment impose a fine not exceeding £25 and "not being of such an amount as will subject the offender under the provisions of this Act, in default of payment of the fine, to any greater term of imprisonment than that to which he is liable under the Act authorising the said imprisonment." By s. 5 the maximum period of imprisonment in default of payment is fourteen days where the fine exceeds 10s. but not £1.

A court of summary jurisdiction sentenced a seaman to fourteen days' imprisonment for disobeying a lawful order contrary to the Merchant Shipping Act, 1894, s. 376 (1) (d), under which the penalty for the offence is imprisonment for not more than four weeks and forfeiture of two days' wages. On appeal to quarter sessions, the recorder held that the appropriate penalty was a fine and that the maximum fine permissible under the Act of 1879 was one of £1. On appeal to the Divisional Court by the prosecution,

HELD: the amount of the fine must be measured by the length of the imprisonment authorised by the Act under which the offender was convicted, and, therefore, as the maximum imprisonment which could be imposed under s. 376 (1) (d) of the Act of 1894 was four weeks (and so less than a calendar month), the maximum fine permissible was £1, and the decision of the recorder was correct.

[AS TO JUSTICES' POWERS TO INFLICT A FINE IN LIEU OF IMPRISONMENT, see HALSBURY, Hailsham Edn., vol. 21, p. 619, paras. 1075, 1076.]

FOR THE SUMMARY JURISDICTION ACT, 1879, ss. 4 and 5, see HALSBURY'S STATUTES, vol. 11, pp. 323-324, and FOR THE MERCHANT SHIPPING ACT, 1894, s. 376 (1) (d), see HALSBURY'S STATUTES, Vol. 18, p. 302.]

CASE STATED by the Recorder of Kingston-upon-Hull.

At a court of summary jurisdiction sitting at Kingston-upon-Hull, on Sept. 14, 1948, the respondent, a seaman, was convicted of wilfully disobeying a lawful command, contrary to s. 376 (1) (d) of the Merchant Shipping Act, 1894, and was sentenced to imprisonment for 14 days. On Oct. 6, 1948, the respondent appealed to quarter sessions, and the recorder varied the sentence imposed by the court of summary jurisdiction by ordering the respondent to pay a fine of £1 or to be imprisoned for 14 days in default of payment. He held that having regard to the terms of the Summary Jurisdiction Act, 1879, ss. 4 and 5, taken in conjunction with the Merchant Shipping Act, 1894, s. 376 (1) (d), he had no power to impose a fine exceeding £1. The Divisional Court now dismissed an appeal by the prosecution.

Cumming-Bruce for the prosecution.

E. Ould for the respondent.

LORD GODDARD, C.J.: This Case, stated by the recorder of Kingston-upon-Hull, raises a novel point under the Summary Jurisdiction Act, 1879, ss. 4 and 5.

The respondent was charged before a court of summary jurisdiction with wilfully disobeying a lawful command during his engagement to serve in a fishing boat, he being a seaman to whom the provisions of the Merchant Shipping Act, 1894, s. 376 (1) (d), applied. The court of summary jurisdiction sentenced him to fourteen days' imprisonment, and against that sentence he appealed to quarter sessions. The learned recorder came to the conclusion that it was a case in which it was desirable to impose a fine and so avoid sending the respondent to prison if he could pay the fine. He thought that £10 would be a proper fine, but he felt constrained to impose a fine of only £1 because of the provisions of ss. 4 and 5 of the Summary Jurisdiction Act. He has stated this Case asking the court whether he had power to impose a heavier fine. The court had some doubt whether or not a Case could be stated by the recorder on a matter where he had imposed a fine. The more correct procedure might have been for him to refrain from imposing a fine if there were a question of law to be discussed and to take the opinion of the court on what his powers were, but the court does not think that that is a fatal objection to the hearing of this Case because it is stated as a point of law. The fine must be taken to have been imposed subject to the Case, and we need not further consider the point. We have come to the conclusion that the recorder was clearly right in the view he took of the law.

Under s. 376 (1) (d) of the Merchant Shipping Act, 1894, the penalty for the offence of wilfully disobeying any lawful command during an engagement to serve in a fishing boat is imprisonment for any period not exceeding four weeks and forfeiture of two days' wages. It is important to notice that Parliament, in 1894 when the Summary Jurisdiction Act, 1879, was some fifteen years old, deliberately used the expression "four weeks" and not "a month."

A By the Interpretation Act, 1889, s. 3, if the word "month" had been used, it would have meant a calendar month, and so s. 376 (1) (d) should be read as imposing a liability to imprisonment for any period not exceeding 28 days. Section 4 of the Summary Jurisdiction Act, 1879, provides :

" . . . where a court of summary jurisdiction has authority under an Act of Parliament other than this Act, whether past or future, to impose imprisonment for an offence punishable on summary conviction, and has not authority to impose a fine for that offence, that court when adjudicating on such offence may, notwithstanding, if the court think that the justice of the case will be better met by a fine than by imprisonment, impose a fine not exceeding twenty-five pounds, and not being of such an amount as will subject the offender under the provisions of this Act, in default of payment of the fine,

B to any greater term of imprisonment than that to which he is liable under the Act authorising the said imprisonment."

C By s. 5 the scale of imprisonment for non-payment is laid down :

" The period of imprisonment imposed by a court of summary jurisdiction under this Act, or under any other Act, whether past or future, in respect of the non-payment of any sum of money adjudged to be paid by a conviction, or in respect of the default of a sufficient distress to satisfy any such sum, shall, notwithstanding any enactment to the contrary in any past Act, be such period as in the opinion of the court will satisfy the justice of the case, but shall not exceed in any case the maximum fixed by the following scale ;

D . . . where [the fine] . . . Exceeds 10s. but does not exceed £1—Fourteen days. Exceeds £1 but does not exceed £5—One month. Exceeds £5 but does not exceed £20—Two months. Exceeds £20—Three months."

No doubt that scale of imprisonment can be reduced, that is to say, if the court imposes a fine of, *e.g.*, £2, it does not follow that the court is bound to send the defendant to prison for a month in default of payment. If the court thinks that the appropriate sentence should be 21 days or fourteen days it can impose that sentence, but we have to consider what fine can be imposed when the maximum sentence of imprisonment given by the Act "other than this Act,"

F which did not authorise imposition of a fine, is a certain defined term.

It seems to me that s. 4 measures the fine as s. 5 measures the imprisonment. Most statutes when giving power to a court to impose a penalty of a fine or imprisonment, or a fine with imprisonment in default, lay down the maximum amount of the fine. Here counsel for the prosecution argues that the court can impose a fine of any amount up to £25 provided that it makes the term of imprisonment in default not to exceed that which the Merchant Shipping Act, 1894, provides as the penalty under s. 376 (1) (d), that is to say, four weeks. I find it impossible to construe s. 4 in that way. If it had not been for the words "and not being of such an amount as will subject the offender under the provisions of this Act . . . to any greater term of imprisonment" I think

G counsel's argument would be sound, but it seems to me that those words clearly indicate that Parliament intended that the fine should be measured by the term of imprisonment which the Act under which the offender was prosecuted authorised, that is to say, if the Act provides that a man shall be liable to three months' imprisonment, he can be fined £25, and if it provides that he can be sent to prison for one month, he can be fined up to £5. If, however, the Act provides, as it does in this case, that the penalty of imprisonment is less than

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a calendar month, the statute, in any judgment, specifies £1 as the maximum fine that can be imposed. That is the only sensible interpretation that can be given to ss. 4 and 5 of the Act of 1879. They are not intended to leave to justices an unfettered discretion to impose any fine they like so long as it does not exceed £25. In fixing a monetary penalty they must have regard to the length of the imprisonment which is authorised by the Act under which the defendant is convicted. It must be assumed that Parliament considered that a fine of £1 and imprisonment for, *e.g.*, 14 days are almost interchangeable terms, and it follows that, if a defendant can only be sentenced to a period of less than a calendar month, the appropriate fine is £1. If the statute had been intended to provide otherwise the words "not being of such an amount" would not have been included. The statute would have provided that the fine should not exceed £25 and that offenders should not be sentenced in default to a longer term of imprisonment than the Act which authorised the imprisonment provided. For those reasons I think that the decision of the learned recorder was right, and the appeal must be dismissed.

OLIVER, J. : I agree.

CASSELS, J. : I agree.

Appeal dismissed with costs.

Solicitors : *Deacons & Pritchards*, agents for *Andrew M. Jackson & Co.*, Kingston-upon-Hull (for the prosecution); *Russell Jones & Walker*, agents for *Pearlman & Rosen*, Kingston-upon-Hull (for the respondent).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

versed on the facts which were not
ore the judge. C.A. [1950] 1 All E.R.
7.

DOLLFUS MIEG ET COMPAGNIE S.A. v. BANK OF ENGLAND.

[CHANCERY DIVISION (Jenkins, J.), March 10, 11, 15, 16, 17, April 6, 1949.]

Conflict of Laws—Impleading foreign sovereign states—Gold bars belonging to French company seized by Germans and carried off to Germany—Discovery by Allied forces—In possession and under control of governments of United States, United Kingdom and France—Deposit with Bank of England for purpose of applying Agreement by Allied governments on restitution of monetary gold—Action by French company against bank claiming delivery of bars or damages for conversion.

In May, 1939, a French company purchased 64 bars of gold and lodged them for safe custody with a bank at Limoges in a vault hired for that purpose in the company's name. In August, 1944, the gold bars were forcibly seized from the bank by the Germans and carried off to Germany. After the invasion of Germany by the Allied armies, the bars were found by the United States forces in the United States Zone of Occupation and passed into the custody of the United States military authorities. By pt. III of the Agreement on Reparation from Germany, on the Establishment of an Inter-Allied Reparation Agency and on the Restitution of Monetary Gold, dated Jan. 14, 1946, and signed by representatives of eighteen Allied Governments, all the monetary gold found in Germany by the Allied forces was to be pooled for distribution as restitution among the countries participating in the pool in proportion to their respective losses of gold through looting or by wrongful removal to Germany. In September, 1946, a Tripartite Commission for the Restitution of Monetary Gold was set up by the governments of the United Kingdom, the United States and France, for the purpose of applying the terms of pt.

III of the Agreement. The terms "monetary gold" and "non-monetary gold" were not defined by the Agreement, but for the purposes of a questionnaire issued in February, 1947, to enable the Tripartite Commission to carry out its function, "monetary gold" was defined as: "All gold which at the time of its looting or wrongful removal was carried as part of the claimant country's monetary reserve, either in the accounts of the claimant government itself, or in the accounts of the claimant country's central bank or other monetary authority at home or abroad." In March, 1948, the Bank of England was requested by the Treasury to open a gold set-aside account in the name of the Treasury on account of "the governments of the United States, the United Kingdom and France," the account to be operated by the representatives of these three governments on the Tripartite Gold Commission. In agreeing to this request, the bank stated that it would make charges in connection with the account, and it, therefore, became a bailee for reward. On June 29, 1948, the French company presented to the United States Occupation Authorities a claim in respect of the gold bars, and was informed that the bars were at that time located at the foreign exchange depository at Frankfurt and their disposition was subject to the orders of the Tripartite Gold Commission. In July, 1948, under the orders of the Tripartite Commission, who, apparently, regarded the bars as "monetary gold" within the meaning of pt. III of the Agreement of Jan. 14, 1946, the bars were conveyed to England and deposited with the Bank of England in the gold set-aside account for disposal in accordance with the provisions of pt. III of the Agreement of Jan. 14, 1946. In an action by the company against the bank claiming (*inter alia*) delivery of the bars, and, alternatively, damages for their conversion, the bank contended that the court had no jurisdiction to entertain the action as it impleaded two foreign sovereign states who declined to submit to the jurisdiction.

HELD : (i) the principle whereby immunity from process in the municipal courts was accorded to foreign sovereign states was not confined to cases where a foreign sovereign was directly impleaded as a defendant or where relief *in rem* was sought in his absence against property owned by him or in his possession or under his control; any such limitation would be inconsistent with the essential corollary to the principle of immunity that the municipal court would not so exercise its jurisdiction as to put a foreign sovereign to election between being deprived of property owned by him, or of the possession or control of property in his possession or under his control, or else submitting to the jurisdiction of the court; and, therefore, although no foreign sovereign state was a party to the action brought by the French company, and the bank was the sole defendant, and although the relief sought was relief *in personam* and not *in rem*, the action was, nevertheless, one to which the principle of immunity might be applicable.

(ii) in opening the gold set-aside account with the Bank of England, the Treasury was not the bailor, but was acting as an intermediary on behalf of the governments of the United States, the United Kingdom and France, who were the depositors of the gold to be held in the account, and the fact that the bank was a bailee for reward did not exclude the three governments from possession or control of the gold.

Ancona v. Rogers (1876) (1 Ex. D. 285; 35 L.T. 115), *applied*.

(iii) for the purposes of the principle of immunity, "possession" meant legal or constructive, as opposed to actual or physical, possession (*The Arantzazu Mendi* ([1939] 1 All E.R. 719; [1939] A.C. 256; 160 L.T. 513), *applied*), and, therefore, notwithstanding their deposit with the bank, the gold bars were still in the possession of the three governments for the purposes of the principle.

(iv) assuming, however, that the three governments as bailors were not in possession of the gold in the sense intended by the principle of immunity, they were in control of it within the meaning of the principle.

(v) the bailors were not the respective representatives of the three governments on the Tripartite Commission, but the three governments acting for this purpose through their respective representatives on the Commission.

(vi) interference with the joint possession and control of the three governments would be interference with the possession and control enjoyed by each of them jointly with the others, and the fact that the government of the United Kingdom could be sued in this country under the Crown Proceedings Act, 1947, did not give the court jurisdiction to interfere with the joint possession and control *quoad* the two governments of foreign states, and, therefore, the principle of immunity was not excluded by the fact that possession and control of the gold bars was vested in the two foreign governments jointly with the government of the United Kingdom.

(vii) assuming that control for public purposes was to be regarded as an essential condition of immunity, the purposes for which the gold bars were held by the three governments were essentially public purposes within the meaning of the principle of immunity, and none the less so because they were public purposes not merely of the governments of the United Kingdom, the United States and France, but also of the other Allied governments party to the Agreement of Jan. 14, 1946; and, therefore, the court had no jurisdiction to entertain the company's action in respect of its claim for delivery up of the bars or for relief by way of injunction.

(viii) the court could not hold the bank to be wrongfully in possession without also holding the three governments to be wrongfully in possession, and it was only on the footing that the bank was wrongfully in possession that any relief, whether by way of damages or otherwise, could be awarded against the bank; an order for delivery up of the gold to the plaintiff company would have the effect of determining the bailment, putting an end to the estoppel subsisting between the bank and the three governments, and leaving the bank free to set up the title of the plaintiff company in any proceedings brought against it by the three governments as equivalent to an eviction by title paramount, and an award of damages against the bank, involving, as it necessarily would, a decision of the court that the title of the plaintiff company was paramount to that of the three governments, would have the like effect; if the bank was ordered to pay, and paid, to the plaintiff company damages representing the value of the gold, the title of the plaintiff company to the gold would pass to the bank, and the bank could in its own right set up that title against the three governments; and, therefore, damages could not be awarded against the bank without interference with the possession or control of the gold bars by the three governments.

(ix) the action was an attempt to sue indirectly the three governments concerned, two of which (*viz.*, the governments of the United States and France), as governments of foreign sovereign states, could not be directly sued in the courts of this country, and, therefore, the action should not be allowed to proceed.

Twycross v. Dreyfus (1877) (5 Ch.D. 605; 36 L.T. 752), *applied*.

[AS TO IMMUNITY OF FOREIGN GOVERNMENTS, see HALSBURY, Halsbury's Laws of England, Vol. 1, pp. 27-29, para. 30; and FOR CASES, see DIGEST, Vol. 1, pp. 48-50, Nos. 384-400.]

Cases referred to :

(1) *The Parlement Belge*, (1880), 5 P.D. 197; 42 L.T. 273; 11 Digest 537, 394.

- (2) *Compania Naviera Vascongado v. Cristina S.S.*, [1938] 1 All E.R. 719; [1938] A.C. 485; 159 L.T. 394; Digest Supp.
- (3) *Haile Selassie v. Cable & Wireless, Ltd.*, [1938] 3 All E.R. 384; [1938] Ch. 839; 159 L.T. 385; Digest Supp.
- (4) *Gladstone v. Musurus Bey*, (1862), 1 Hem. & M. 495; 1 New Rep. 178; 7 L.T. 477; 11 Digest 537, 392.
- A (5) *Morgan v. Lariviere*, (1875), L.R. 7 H.L. 423; 32 L.T. 41; *affg. S.C.*, *sub nom.*, *Lariviere v. Morgan*, (1872), 7 Ch. App. 550.
- (6) *Twycross v. Dreyfus*, (1877), 5 Ch.D. 605; 36 L.T. 752; 1 Digest 49, 398.
- (7) *Vavasour v. Krupp*, (1878), 9 Ch.D. 351; 39 L.T. 437; 1 Digest 49, 392.
- B (8) *Ancona v. Rogers*, (1876), 1 Ex. D. 285; 35 L.T. 115; 37 Digest 158, 34.
- (9) *Lincoln Waggon & Engine Co. v. Mumford*, (1879), 41 L.T. 655; 7 Digest 117, 682.
- (10) *The Arantzazu Mendi*, [1939] 1 All E.R. 719; [1939] A.C. 256; 160 L.T. 513; Digest Supp.
- (11) *The Davis*, (1869), 10 Wallace, 15.
- C (12) *Long v. The Tampico*, (1833), 16 Federal Reports 491.
- (13) *The Crimdon*, (1918), 35 T.L.R. 81; 41 Digest 815, 6762.
- (14) *Biddle v. Bond*, (1865), 6 B. & S. 225; 5 New Rep. 485; 12 L.T. 178; 29 J.P. 565; 3 Digest 101, 287.

MOTION by the defendants, the Bank of England, applying for an order to set aside the writ and all subsequent proceedings in an action by a French company, Dollfus Mieg et Compagnie S.A., on the ground that the court had no jurisdiction to entertain the action as it impleaded two sovereign states, the governments of the United States of America and the Republic of France, who declined to submit to the jurisdiction.

The plaintiff company was the owner of some gold bars which had been seized and removed to Germany by the Germans during their occupation of France. In 1948, with the object of carrying out the provisions of an Agreement by the Allied Governments dated Jan. 14, 1946, the bars were deposited by the governments of the United States, the United Kingdom and France in a "gold set-aside account" which had been opened on their behalf at the Bank of England at the request of the Treasury. In the action against the bank, the plaintiff company claimed (a) delivery of the gold bars, or, alternatively, damages for their conversion; (b) an injunction restraining the bank from dealing with or parting with possession of the bars, and (c) damages for their detention. JENKINS, J., held that the action was an attempt to sue indirectly the governments concerned, two of which were foreign sovereign states who could not be directly sued, and, accordingly he granted the defendants' application. The facts appear in the judgment.

G Sir Andrew Clark, K.C., and R. O. Wilberforce for the plaintiff company. Sir Valentine Holmes, K.C., and Geoffrey Cross for the defendants, the Bank of England.

The Solicitor-General (Sir Frank Soskice, K.C.), and Danckwerts for the Crown.

Cur. adv. vult.

H Apr. 6. JENKINS, J., read the following judgment. In May, 1939, the plaintiffs, Dollfus Mieg et Compagnie S.A., a French company carrying on the business of thread and yarn manufacturers, purchased from or through a Swiss Bank 64 bars of gold, and lodged them for safe custody with the Crédit Commercial de France at Limoges in a vault hired for the purpose in the name of the plaintiff company. In August, 1944, the 64 gold bars were forcibly seized and removed from the Crédit Commercial de France by a detachment of German troops accompanied by German officials, and carried off to Germany. After the invasion of Germany by the Allied Armies the 64 gold bars were

found by the United States forces in the United States Zone of Occupation and passed into the custody of the United States military authorities, who placed them in the United States Foreign Exchange Depository at Frankfurt. On Dec. 21, 1945, the Paris Conference on Reparation issued its Final Act (published by the Stationery Office as Command Paper Miscellaneous No. 1 (1946) (Cmd. 6721)) which recommended that the governments represented at the Conference should sign in Paris as soon as possible an Agreement on Reparation from Germany, on the Establishment of an Inter-Allied Reparation Agency and on the Restitution of Monetary Gold in the terms of the draft agreement therein set forth. By an Agreement in the terms, or substantially in the terms, of the draft set forth in the Final Act of the Paris Conference on Reparation, dated Jan. 14, 1946, and signed by the representatives of eighteen allied governments (which was published by the Stationery Office as Command Paper Treaty Series No. 56 (1947) (Cmd. 7173)), provision was made (by pt. I) for German reparation including (in art. 8A) a provision to the effect that a share of reparation consisting (in addition to a sum of dollars therein mentioned) of "all the non-monetary gold found by the Allied Forces in Germany" should be "allocated for the rehabilitation and re-settlement of non-repatriable victims of German action"; (by pt. II) for the establishment, functions and organisation of an Inter-Allied Reparations Agency, to which each government was to appoint a delegate and an alternate to take the place of a delegate in his absence, including (in art. 2B) a provision to the effect that the agency should deal with all questions relating to the restitution to a signatory government of property situated in one of the Western Zones of Germany which might be referred to it by the commander of that zone (acting on behalf of his government), in agreement with the claimant signatory government or governments, without prejudice, however, to the settlement of such questions by the signatory governments concerned either by agreement or arbitration; and (by pt. III) for the restitution of monetary gold, this part consisting of a single article in the following terms:

"Pt. III. Restitution of monetary gold. Single article. A. All the monetary gold found in Germany by the Allied Forces and that referred to in para. G below (including gold coins, except those of numismatic or historical value, which shall be restored directly if identifiable) shall be pooled for distribution as restitution among the countries participating in the pool in proportion to their respective losses of gold through looting or by wrongful removal to Germany. B. Without prejudice to claims by way of reparation for unrestored gold, the portion of monetary gold thus accruing to each country participating in the pool shall be accepted by that country in full satisfaction of all claims against Germany for restitution of monetary gold. C. A proportional share of the gold shall be allocated to each country concerned which adheres to this arrangement for the restitution of monetary gold and which can establish that a definite amount of monetary gold belonging to it was looted by Germany or, at any time after Mar. 12, 1938, was wrongfully removed into German territory. D. The question of the eventual participation of countries not represented at the Conference (other than Germany but including Austria and Italy) in the above-mentioned distribution shall be reserved, and the equivalent of the total shares which these countries would receive, if they were eventually admitted to participate, shall be set aside to be disposed of at a later date in such manner as may be decided by the allied governments concerned. E. The various countries participating in the pool shall supply to the governments of the United States of America, France and the United Kingdom, as the occupying Powers concerned, detailed and verifiable *data* regarding the gold losses suffered through looting by, or removal to, Germany. F. The governments of the United

States of America, France and the United Kingdom shall take appropriate steps within the zones of Germany occupied by them respectively to implement distribution in accordance with the foregoing provisions. G. Any monetary gold which may be recovered from a third country to which it was transferred from Germany shall be distributed in accordance with this arrangement for the restitution of monetary gold."

- A The Agreement also contained (in pt. IV) provisions as to its coming into force and signature under which (according to a note in the Stationery Office Print) it in fact came into force on Jan. 24, 1946.

In September, 1946, the governments of the United Kingdom, the United States and France set up a Tripartite Commission for the Restitution of Monetary Gold for the purpose of applying the terms of pt. III of the Agreement of Jan. 14, 1946. The only official document in evidence before me regarding the setting up of this Tripartite Commission consists of a copy of a French Government Order dated Sept. 27, 1946, but it was agreed in the course of the argument before me that complementary action on corresponding lines could be assumed to have been taken by the other two governments concerned, namely, those of the United Kingdom and United States. The French Government Order (according to the exhibited translation) prescribes the constitution,

- C organisation and functions of the Tripartite Commission in the following terms :

"The President of the Provisional Government of the Republic, the Minister of Foreign Affairs and the Minister of Finance. In view of the Decree of Mar. 5, 1946, promulgating the Agreement on Reparation to be received from Germany, on the Establishment of an Inter-Allied Reparation Agency, and on the Restitution of Monetary Gold, signed in Paris, Jan. 14, 1946. Be it ordered : Article I. For the purpose of applying the terms

- D of pt. III of the Agreement on Reparation from Germany, on the Establishment of an Inter-Allied Reparation Agency and on the Restitution of Monetary Gold, the Government of the Republic has decided in agreement with the Governments of the United States of America and the

- E United Kingdom of Great Britain and Northern Ireland to establish a Tripartite Commission for the restitution of monetary gold complying with the following dispositions : The Tripartite Commission for the Restitution of Monetary Gold. 1. For the purpose of putting into effect pt. III of the Paris Agreement on Reparation of Jan. 14, 1946, the governments of the United States of America, of France and the United

- F Kingdom of Great Britain and Northern Ireland have decided to form a commission called the Tripartite Commission for the Restitution of Monetary Gold. 2. Each of the three governments will nominate for Sept. 27, a commission to represent them at the commission. 3. The Tripartite Commission for the Restitution of Monetary Gold will be at Brussels but is independent of the Inter-Allied Reparation Agency already established

- G there. The commission has the right to communicate in the name of the three governments concerned, with the allied governments members of the Inter-Allied Reparation Agency, by the intermediary of accredited delegates of those governments with the agency, with the Inter-Allied secretariat of the agency, and, if necessary, with the other governments concerning the questions arising out of pt. III of the Paris Agreement on

- H Reparation. 4. The official languages of the Tripartite Commission for the Restitution of Monetary Gold will be English and French. 5. The attributes of the Tripartite Commission for the Restitution of Monetary Gold are the following : (a) To instigate and receive from the governments claiming a right to participate in the distribution of monetary gold found in Germany, or which may be recovered from a third country to which it was transferred from Germany, claims for the restitution of gold looted from it by the Germans or wrongfully removed to Germany ; the claims

will have to be supported by detailed and verifiable indications regarding loss suffered. (b) To examine claims received and to determine the share of each claimant government in the gold pooled for distribution as restitution in compliance with pt. III of the Paris Agreement on Reparation and all other agreements relating thereto. (c) To make known at a date required the total value of the monetary pool that has become available for the purpose of distribution as restitution. (d) When all the claims for restitution have been received and decided upon, to make known the portion of the pool of monetary gold available as restitution to each of the countries qualified to participate in its restitution. (e) To co-operate by all the means which the three governments forming the commission may establish for the distribution of the pool of monetary gold to be disposed of as restitution. (f) To take all administrative measures which might be necessary for the carrying into effect of the tasks enumerated in sub-para. (a) to (e) inclusive, subject always to the preceding general observations; to open and operate banking accounts; to enter into contracts for the purpose of fulfilling all the necessary tasks. The expenses of the commission appurtenant to its mission will constitute a prior charge on the monetary gold pool to be distributed. 6. The decisions of the commission will be made by its members unanimously. Article 2. The present Order will be published in the Official Journal of the French Republic. *Made in Paris, Sept. 27, 1946.*"

It appears that in February, 1947, a questionnaire to governments, designed to elicit information required to enable the Tripartite Commission to carry out its functions, was issued by the Tripartite Commission and that for the purposes of this questionnaire the term "monetary gold" was defined as follows :

"All gold which at the time of its looting or wrongful removal was carried as part of the claimant country's monetary reserve, either in the accounts of the claimant government itself, or in the accounts of the claimant country's central bank or other monetary authority at home or abroad."

It is to be noted that the 64 gold bars, having been at the date of their seizure by the Germans the private property of a thread and yarn manufacturing company, did not fall within this definition of "monetary gold." On the other hand, it is to be noted that the definition in question did not form part of the Agreement of Jan. 14, 1946, which, in fact, contained no definition either of "monetary gold" or of "non-monetary gold." In March, 1948, "a gold set-aside account" was opened at the Bank of England in accordance with the terms of a letter from His Majesty's Treasury dated Mar. 9, 1948, and the bank's reply thereto dated Mar. 11, 1948. These letters are as follows :

"Mar. 9. 1948. My Lord and Sir, I am directed by the Lords Commissioners of His Majesty's Treasury to request you to open a gold set-aside account in the name of His Majesty's Treasury on account of 'the governments of the United States, the United Kingdom and France.' This account will be operated by the representatives of the governments of the United States, the United Kingdom and France on the Tripartite Commission for the Restitution of Monetary Gold for the deposit and eventual distribution of a portion of the gold looted by Germany from the Occupied States of Europe and recovered by the Allied Occupation Forces. The authorised representatives of the three above-named governments are as follows . . ."

Then representatives are set out for the United States of America, the United Kingdom and France.

A "I am directed to inform you that the above-named representatives are authorised to communicate directly with you and to give you all the instructions they may consider necessary for the operation of this account. Such communications should be signed by a representative of each of the three above-named governments. I am further directed to inform you that their Lordships will arrange for a letter of introduction from His Majesty's Treasury to accompany the first communication from the above-named representatives.

This letter is signed by an official of the Treasury, and addressed to the Governor and Deputy Governor, Bank of England. The bank's reply is dated Mar. 11, 1948, addressed to the Secretary of His Majesty's Treasury :

B "Sir, In accordance with the request contained in Mr. Rowe-Dutton's letter of Mar. 9, I am directed to state that a gold set-aside account has today been opened in the books of the Bank of England in the name of—
C His Majesty's Treasury o/a the governments of the United States, the United Kingdom and France, to be utilised for the deposit and eventual distribution of gold coming under the jurisdiction of the Tripartite Commission for the Restitution of Monetary Gold. Due note has been made
D that operations on this account may be effected over the joint signatures of one authorised representative of each of the three governments concerned, the names of which representatives were given in the letter referred to. It is also noted that the first communication to the Bank of England from these representatives will be routed *via* His Majesty's Treasury for purposes of authentication. I am to add that the bank would propose to make charges in connection with this account on the basis indicated in the semi-official letter from Mr. Gunston to Mr. Maitland of Jan. 28, 1948."

This letter is signed by the assistant chief cashier. The bank's proposal in the last paragraph of the letter of Mar. 11, 1948, as to the charges to be made
E in connection with this account appear to have been accepted, so that the bank became a "bailee for reward" of gold deposited to the account in question.

In the meantime the plaintiff company appears to have been pursuing inquiries as to the whereabouts of the 64 gold bars, and a claim in respect of them dated June 29, 1948, seems to have been presented to the United States Occupation Authorities through Colonel J. L. Bonet-Maury of the French
F Mission for Restitution. This claim was dealt with by Colonel William G. Bray of the United States Army, as Chief of the United States Foreign Exchange Depository at Frankfurt, who replied to it by a letter dated June 29, 1948, in the following terms :

G "To Colonel J. L. Bonet-Maury, French Mission for Restitution, A.P.O. 403 U.S. Army. June 29, 1948. Receipt is acknowledged of your claim No. O.F.R. 869 dated Apr. 30, 1948, in connection with certain gold bars which were lost by Dollfus Mieg & Cie, and claimed to be held by the Foreign Exchange Depository. It is understood that you merely desire to ascertain the location of these bars in Germany in order to support the claim of Dollfus Mieg & Cie, that they were looted from that company.
H In order to facilitate your proof of this claim, you are advised that the 64 gold bars, the numbers of which are listed on the attached sheet which bears my initials, are presently located in the Foreign Exchange Depository. As you know, the disposition of this gold is subject to the orders of the Tripartite Gold Commission and the Office of Military Government for Germany (U.S.) especially with respect to claim, and further dealings in connection with this matter should be taken up with these agencies."

This was signed by Colonel Bray as Chief of the Foreign Exchange Depository.

In July, 1948, the 64 gold bars (as part of a larger consignment of gold) were conveyed to England and deposited with the Bank of England in the gold set-aside account. This was clearly done under the orders of the Tripartite Commission or the three constituent governments, who seem, rightly or wrongly, to have treated the 64 gold bars as "monetary gold" within the meaning of the Agreement of Jan. 14, 1946, and, therefore, as falling to be dealt with under the provisions of pt. III of that Agreement. On July 16, 1948, the Secretary-General of the Tripartite Commission (at the instigation of the French delegation of the Inter-Allied Reparations Agency) wrote from his office in Brussels a letter to the Bank of England in the following terms :

"Sir, I am directed by the commission to write with regard to the following question. 2. The commission has received a request from the representative of France on the commission that certain gold bars which are included in the second consignment from Frankfurt, now on its way to the Bank of England, should be set aside pending receipt by the commission of a communication from the French government. 3. These bars, net weight of which is stated to be 789 kg., 72654, are said to have been formerly the property of the Société Française Dollfus-Mieg, looted by the Germans in 1944, and to have been recently identified among the bars at Frankfurt. 4. The commission understands that the French government is considering a claim for restitution which it has received from the Société Dollfus-Mieg and that its intention is to request the commission to have these bars set aside, if such action is possible, and included in any future delivery which the commission may decide to make to France. The bars would thus be available for restitution by the French government to the Société Dollfus-Mieg should the French government so decide. 5. A list containing all available particulars concerning these bars is attached hereto. A comparison with the inventories forwarded to you under cover of the commission's letter C/BE 498, dated July 6, 1948, shows that the major portion, if not all, of these bars appear to be contained in [certain boxes referred to in the letter, listed as mentioned in the letter]. The commission would be grateful, providing such action does not present insuperable technical or administrative difficulties, if you could see your way to having these bars set aside intact on arrival, if they can be identified, pending receipt of a further communication from the commission on the subject. 7. The bars are described as Russian Mockba bars (with acceptable London assays) which are normally good delivery bars and there will presumably be no difficulty over assessing their value for the commission's account."

To this letter the bank replied on July 19, 1948, as follows :

"Dear Sir, I write to acknowledge the receipt of your letter (C/BE 523) of July 16 regarding the allocation to the French of specific bars. The proposal which you make is acceptable to the Bank of England provided that at the time we receive the authority of the commission to hold the gold at the disposal of the Bank of France we also receive instructions from them to ship the gold from London. As you are aware, it is now contrary to the Bank of England's practice to set aside specific bars in the name of a customer, but if the French act as indicated above it will not be necessary for the bank to do more than hold the gold at the disposal of the Bank of France. I might perhaps add that the bank have been able to identify all but one of the bars shown on the schedule enclosed in your letter. The unidentifiable bar is shown in the first column and numbered 11090 . . ."

and the weight is stated. That is signed for the chief cashier of the bank.

No action was ever, in fact, taken on these two letters, and on their arrival at the Bank of England the 64 gold bars were simply deposited in the "gold set-aside account" and have remained so deposited to this day. There is no doubt whatever, and it is not disputed, that they are, in fact, the identical 64 gold bars which were seized by the Germans from the vault at Limoges.

A The plaintiff company maintains that, inasmuch as the 64 gold bars are indisputably identified as those which, being the plaintiff company's property, were forcibly taken and carried away by the Germans, they ought on identification to have been forthwith restored to the plaintiff company and were not, and should not have been treated as, "monetary gold" within the meaning of pt. III of the Agreement of Jan. 14, 1946. In support of this contention reliance is placed in particular on (i) the Tripartite Commission's definition of "monetary gold" to which I have already referred. (ii) The Inter-Allied Declaration against Acts of Dispossession Committed in Territories under Enemy Occupation or Control, dated Jan. 5, 1943 (published by His Majesty's Stationery Office as Command Paper Miscellaneous No. 1 (1943) (Cmd. 6418)), by which (so far as need be stated for the present purpose) the allied governments declared their intention to do their utmost to defeat the methods of dispossession practised by the governments with which they were at war, and reserved all their rights to declare invalid any transfers of, or dealings with, property which was, or had been, situated in the territories which had come under the occupation of the governments with which they were at war, or which belonged, or had belonged, to persons (including juridical persons) resident in such territories, whether such transfers or dealings had taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purported to be voluntarily effected. This Declaration, read in conjunction with the explanatory notes attached to it, was relied on on behalf of the plaintiff company as amounting to a declaration that the policy of the allied governments was to secure that identifiable goods looted by the Germans (as for example the 64 gold bars in the present case) should be the subject of restitution to their true owners. (iii) The plaintiffs also relied on Law 59 promulgated in 1947 by the United States Military Government in the United States Zone of Occupation which made provision for the restitution of identifiable property in terms which (according to the plaintiff company) were applicable, and should have been applied, to its claim for restitution of the 64 gold bars.

F By a letter from its solicitors to the Bank of England dated Sept. 24, 1948, the plaintiff company made a formal claim to the 64 gold bars. This letter having produced no satisfaction, the plaintiff company by a writ dated Oct. 18, 1948, commenced against the Bank of England as defendant the action in which the application now before me is made. The relief claimed by the writ as originally framed comprised: (i) delivery to the plaintiff company of the 64 gold bars; (ii) an injunction restraining the bank, its servants and agents from selling, charging, dealing with, or parting with possession of the 64 gold bars or any of them otherwise than as directed by the plaintiff company; (iii) further or other relief; (iv) costs. After service on the plaintiff company of notice (dated Nov. 2, 1948) of the motion on the part of the bank which is now before me, the plaintiff company on Mar. 8, 1949 (pursuant to leave obtained on the previous day) amended the indorsement of the writ by adding to the claim for delivery up of the 64 gold bars a claim for damages for their detention and by inserting as an alternative to the claim for delivery up a claim for damages for conversion of the 64 gold bars.

H The bank now moves the court for an order that the writ and all subsequent proceedings in the action may be set aside on the grounds (as stated in the notice of motion):

"1. That the 64 bars of gold in the writ mentioned are in the possession

or under the control of the governments of the U.S.A., the Republic of France and the United Kingdom of Great Britain and Northern Ireland.
 2. And that this action impleads two foreign sovereign states, namely, the governments of the United States of America and the Republic of France, who decline to submit to the jurisdiction of this honourable court."

The evidence in support of the motion includes evidence showing that the governments of the United States of America and the Republic of France decline to submit to the jurisdiction of the court in this matter, and that the bank has been desired by these governments and also by the government of the United Kingdom to take the objection to the jurisdiction of the court on which the motion is based. A

I am not now concerned with the validity of the plaintiff company's claim to the effect that its title to the 64 gold bars, which, admittedly, were its absolute property at the time of their seizure by the Germans, has not been displaced by the course of events above narrated. The sole issue before me is whether (as contended on the part of the bank) the present action, brought in pursuance of that claim, is *ex facie* one which this court has no jurisdiction to entertain by reason of the well-known principle of international law (which I will term "the principle of immunity"), whereby immunity from process in the municipal courts is accorded to foreign sovereign states. The case has been ably and exhaustively argued and I have been referred to a great number of reported cases and text-books. It will not, however, be necessary for me to embark on any comprehensive review of the authorities by which the principle of immunity is established, for, as I understand the arguments addressed to me, the general principle is not seriously in dispute, and the real contest centres on the application of the general principle to the facts of this particular case, having regard to the form of the present action, the nature and effect of the relief sought in it, and the circumstances in which such relief is sought. B C D

The principle of immunity was thus stated by BRETT, L.J. (5 P.D. 214) in *The Parlement Belge* (1):

"The principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence and dignity of every other sovereign state, each and every one declines to exercise by means of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and, therefore, but for the common agreement, subject to its jurisdiction." E F

It will be observed that this statement of the principle refers to "the property" of foreign sovereign states, but it has since been recognised that a like immunity is enjoyed by a foreign sovereign state in respect of property in its possession or under its control. This clearly appears from the speeches in the House of Lords in *Compania Naviera Vascongado v. Cristina S.S.* (2). G

It is, however, to be noted that, where the principle of immunity is invoked in cases in which the foreign sovereign state is not itself sued but which concern property in which the foreign sovereign state claims some proprietary or possessory interest, then in the absence of a proved or admitted right of property in the foreign sovereign state, possession or control by it of the thing in suit is a condition essential to the application of the principle. A mere claim by a foreign sovereign state to property in the possession of a third party will not oust the jurisdiction of the municipal court over an action to recover the property brought by some other claimant against the third party. This clearly appears from the speech of LORD MAUGHAM ([1938] 1 All H

E.R. 738) in the *Cristina* case (2) and from the judgment of the Court of Appeal delivered by SIR WILFRID GREENE, M.R. ([1938] 3 All E.R. 386) in *Haile Selassie v. Cable & Wireless, Ltd.* (3). The cases appear to establish a further limitation on the principle of immunity to the effect that, if property in this country is subject to a trust, the court has jurisdiction to administer the trust at the suit of any person interested, even though the persons interested include a foreign sovereign state which does not submit to the jurisdiction of the court: see *Gladstone v. Musurus Bey* (4) (1 Hem. & M. 503) and

- A *Lariviere v. Morgan* (5). The latter decision was reversed in the House of Lords, but the correctness of the statement of the law it contains on this point was not questioned and seems to have been accepted as authoritative by LORD MAUGHAM ([1938] 1 All E.R. 740) in the *Cristina* case (2). With, I think, only two exceptions, *viz.*, *Twycross v. Dreyfus* (6) and *Vavasour v. Krupp* (7), all
- B the cases cited to me in which the principle of immunity has been held to apply (other than cases involving the direct impleading of a foreign sovereign or person entitled to a similar immunity under the Diplomatic Privileges Act, 1708, by making him a party to the suit) have been Admiralty cases involving judgment *in rem*. A judgment *in rem*, of course, differs from an ordinary judgment *in personam* in the important respect that the latter is binding only
- C as between the parties to the suit, while the former affects the status of the property in respect of which it is made and binds all persons claiming an interest in the property inconsistent with the judgment, even though pronounced in their absence. Thus, a judgment *in rem* against property in which a foreign sovereign is interested, whether as owner or as having possession or control of it, must clearly have the effect of ousting the foreign sovereign's interest,
- D whether he is a party to the proceedings or not, and is, therefore, manifestly one which the municipal court has no jurisdiction to pronounce. On the other hand, assuming circumstances enabling relief *in personam*, in respect of property in which a foreign sovereign is similarly interested, to be claimed in proceedings constituted, without manifest deficiency of parties, against a defendant or defendants other than the foreign sovereign himself, any order
- E made in the absence of the foreign sovereign would not be binding on him, but would leave him free, if so minded, to assert his interest thereafter. But I do not think it can be maintained that the principle of immunity is confined to cases where either a foreign sovereign is directly impleaded as a defendant or relief *in rem* is sought in his absence against property owned by him or in his possession or control. I cannot regard any such limitation as warranted by
- F the statements and discussions of the principle of immunity contained in the authorities. Indeed, it would be inconsistent with, *e.g.*, the statement of the principle by SIR WILFRID GREENE, M.R., in delivering the judgment of the Court of Appeal in *Haile Selassie v. Cable & Wireless, Ltd.* (3) and with much of what was said by LORD MAUGHAM in his speech in the *Cristina* case (2). It would also, I think, be inconsistent with *Twycross v. Dreyfus* (6) and
- G *Vavasour v. Krupp* (7), though it is true to say that in the former case the action was defective as regards parties in the absence of the foreign sovereign, quite apart from the question of immunity. It would, moreover, be inconsistent with the essential corollary to the principle of immunity that the municipal court will not so exercise its jurisdiction as to put a foreign sovereign to election between being deprived of property owned by him, or of the
- H possession or control of property in his possession or control, or else submitting to the jurisdiction of the court, as the following example will show. Suppose a foreign sovereign brings to this country in his possession chattels seized by him in his own country by some act of expropriation, the validity of which is questioned by the person who owned them at the date of the seizure. Suppose, further, that the foreign sovereign deposits the chattels in this country for safe custody with an agent not in his own person entitled to diplomatic immunity and the claimant then sues the agent for an injunction

restraining him from parting with the chattels otherwise than to the plaintiff and an order for their delivery up. If in these hypothetical circumstances the injunction and order for delivery up were granted against the agent, the foreign sovereign would not be bound, but the agent undoubtedly would be bound. The injunction would entitle and bind the agent to refuse to deliver the chattels to the foreign sovereign without an order of the court, and the foreign sovereign would, therefore, be compelled to elect between submitting to the jurisdiction of the court, by applying to have the injunction dissolved in order to regain the custody of the chattels, and acquiescence in being permanently deprived of their custody. The order for delivery up, with which the agent would be bound to comply, would transfer the chattels from the custody of the agent holding them on the foreign sovereign's behalf to the possession of the claimant, and, although it would leave the foreign sovereign free to assert his right to the chattels, he would again be compelled to elect between submitting to the jurisdiction of the court as plaintiff in an action in which he would have to prove his title, and acquiescence in losing the chattels to the claimant.

In *The Parlement Belge* (1), BRETT, L.J., said (5 P.D. 219) :

"To implead an independent sovereign in such a way is to call upon him to sacrifice either his property or his independence. To place him in that position is a breach of the principle upon which his immunity from jurisdiction rests."

It is true that this observation was made in relation to an Admiralty action *in rem*, but I think it applies with equal force to an action *in personam* of the type postulated above. Accordingly, although in the present case no foreign sovereign is a party to the action, and the sole defendant is the bank, which is obviously not entitled in its own person to any immunity, and the relief sought in respect of the 64 gold bars is obviously relief *in personam* and not *in rem*, it is, in my judgment, nevertheless an action to which the principle of immunity may be applicable.

The principle being, therefore, in my view, potentially applicable to the present action, its application or exclusion seems to me to turn on the answers to the following questions : (i) For the purposes of the principle of immunity, are the 64 gold bars, notwithstanding their deposit with the bank, in the possession or control of the governments of the United Kingdom, the United States of America and the Republic of France ? (ii) If so, is such joint possession or control equivalent for the purposes of the principle of immunity to possession or control simply by the two foreign sovereign states concerned or by one of them ? (iii) If so, is such possession or control for public purposes ? (It is not entirely clear on the authorities whether this element is still to be regarded as an essential condition of immunity, but I will assume so for the purposes of this case). (iv) If so, would the relief claimed in the action, if granted, infringe the principle of immunity ?

I shall deal with these four questions in the above order. (i) I am clearly of opinion that the three governments were in possession or control of the 64 gold bars within the meaning of the principle of immunity. Counsel for the plaintiff company contended the contrary on (in effect) two main grounds. First he contended that, the bank being a bailee for reward of the gold, the only bailor in the case, the only other party to the contract of bailment, was the government of the United Kingdom acting by His Majesty's Treasury. I find myself unable to place this construction on the letter of Mar. 9, 1948. It is true that this letter came from His Majesty's Treasury and that it requested the opening of the gold set-aside account "in the name of His Majesty's Treasury on account of 'the governments of the United States, the United Kingdom and France'." But it is, in my view, abundantly plain from the remainder of the letter that the intention was, not merely to open a Treasury account labelled for departmental convenience as being on account

of the three governments, but to open an account for the three governments, whose representatives on the Tripartite Commission were to operate the account and were to be the depositors of the gold to be held in the account pending its eventual distribution as mentioned in the letter, which distribution was to be done on their instructions. I think the position may fairly be summarised by saying that in opening the account His Majesty's Treasury was acting as an intermediary on behalf of the three governments, and that the account when opened was to comprise gold jointly deposited by and to be held at the joint disposal of the three governments. It clearly appears from the evidence that this is the view of the position taken not only by the bank but also by the three governments themselves. In particular, a letter from His Majesty's Treasury dated Oct. 21, 1948, which is in evidence, described the gold in question as "jointly held by His Majesty's government in the United Kingdom and the governments of the United States and the French Republic," and I fail to see how I, for the purpose of investing myself with jurisdiction, can ascribe to His Majesty's government a claim which it does not make to the effect that the gold is held solely by His Majesty's government, to the exclusion of the other two governments concerned. I am, accordingly, of opinion that this contention fails.

Counsel for the plaintiff company, secondly, contended that the legal implications of the bank's position as bailee for reward of the gold are such as to exclude the three governments from possession or control of the gold even though the three governments are joint bailors of it (as I hold them to be), and even though the bailment is merely a bailment at will for safe custody and disposal as directed by the bailors, which is clearly the type of bailment in question here. The result of this contention, if well-founded, would be to reduce the status of the three governments for the present purpose to that of mere claimants of property in the possession of a third party (*viz.*, the bank), and it would follow from *Haile Selassie v. Cable & Wireless, Ltd.* (3) that the mere claim of the three governments to the 64 gold bars, divorced, as it would be, according to this contention, from possession or control, would not oust the jurisdiction of the court over an action brought by the plaintiff company against the bank for the purpose of establishing its title to, and recovering, possession of the gold. In my view, however, this contention is ill-founded. I accept as applicable to the present case the statement of the law on this point contained in the judgment of the Court of Appeal delivered by MELLISH, L.J. (1 Ex. D. 292) in *Ancona v. Rogers* (8) from which I need only quote the following short passage :

"It seems to us that goods which have been delivered to a bailee to keep for the bailor, such as a gentleman's plate delivered to his banker, or his furniture warehoused at the Pantechnicon, would, in a popular sense, as well as in a legal sense, be said to be still in his possession, and we see no valid ground for holding that they are not still in his possession within the meaning of the Bills of Sale Act."

It was suggested that this part of the judgment was merely *obiter*. I cannot so regard it. The question in the case was whether the goods comprised in an unregistered bill of sale were in the possession of the grantor of the bill at the date of her insolvency. It was argued that the goods in question were not then in her possession because they were the subject of a bailment by her to one Horlock and, therefore, in the possession, not of the bailor, but of the bailee, Horlock, at the critical date. The court held on the facts that there was no bailment to Horlock and that the goods had remained in the actual possession of the insolvent. They then went on to consider what the position would be if they were wrong in supposing that the goods were not delivered to Horlock as bailee, and on that hypothesis came to the conclusion appearing from the passage quoted above. This part of the judgment was, therefore, by no means merely *obiter*, since it stated an alternative ground for the decision. Some

reliance was placed by counsel for the plaintiff company on the later decision of the Exchequer Division in *Lincoln Waggon and Engine Co. v. Mumford* (9), but I think this case turned on its own particular facts and especially on the circumstance that the goods there in question were pledged to the bailee as security for a loan, and, if and so far as it conflicts with *Ancona v. Rogers* (8), I think I must clearly prefer the statement of the law contained in that case as a decision of the Court of Appeal. It was suggested that, even if the statement of the law in *Ancona v. Rogers* (8) should be accepted as correct, it is limited in its application to cases in which the bailor is the owner of the goods delivered to the bailee, and, therefore, does not apply in the present case, because the three governments had at most no more than bare possession or control of the gold, the owner of it being the plaintiff company. I think that this argument (besides prejudging in favour of the plaintiff company the very matter in dispute in the action) involves a confusion between possession and title. Setting aside, as without relevance here, cases of palpably unlawful possession, as of stolen goods deposited by the thief with a receiver, I fail to see how the question whether goods remain in point of law in the possession of a bailor after he has delivered them to a bailee for safe custody can be made to depend on whether the title under which the bailor was in possession of them at the time of such delivery is, or is not, claimed by some third party to be invalid. It was further suggested that the bank, as a bailee for reward, would have a lien on the gold for its charges, and that this in itself would suffice to prevent the gold, once delivered to the bank, from remaining in point of law in the possession of the three governments. It is not clear to me that in the absence of some special bargain (of which there is no evidence) the bank would be entitled to any such lien, but, in any case, I do not think the mere possibility of such a lien being asserted in the event of the charges not being duly and punctually paid would suffice to exclude the three governments from legal possession. I, therefore, hold that the gold, notwithstanding its delivery to the bank, may (in the words of MELLISH, L.J., in *Ancona v. Rogers* (8)) "in a popular sense, as well as in a legal sense" be said to be still in the possession of the three governments. I hold further, that, accordingly, the gold must be regarded as still in the possession of the three governments for the purposes of the doctrine of immunity. I see no ground for the view that the term "possession," when used in that connection in the authorities, is used in any specially narrow or restricted sense or is to be understood as confined to actual physical possession. A foreign sovereign state (unless embodied in a personal sovereign visiting this country) cannot, so far as I can see, be in actual physical possession of property here otherwise than by its servants. Accordingly, if actual physical possession by a foreign sovereign state were essential to immunity on the score of possession by such state, immunity on that ground could only be claimed in respect of property in this country in the actual physical possession either of some personal sovereign or of a person who could be shown to be in the strict sense a servant of a foreign sovereign state (so as to make his possession that of his master) or else to be himself entitled to diplomatic immunity. The application or exclusion of the principle of immunity would thus be made to depend on nice distinctions respecting the particular mode in which a foreign sovereign state might happen to exercise dominion over property brought by it to this country in its possession or control. For instance, if gold was brought to this country by a foreign sovereign state to be applied in the purchase of goods for the public purposes of that state and placed in the hands of a servant of the state concerned, to be applied in making such purchases in accordance with its directions, the gold would be protected by the principle of immunity on the score of possession by the foreign sovereign state, irrespective of any immunity from process the servant might be entitled to claim in his own person. If, on the other hand, gold brought to this country by a foreign sovereign state for similar purposes was deposited by it with a banker or other agent for safe custody and disposal

in accordance with its directions, the gold would at once become exposed in the hands of the banker or other agent to any adverse claims there might be, and the principle of immunity would afford no protection from actions brought by third parties against the banker or other agent for the purpose of establishing such claims. I cannot think that it would be right to make the application or exclusion of the principle of immunity (based as it is on substantial reasons of policy) turn on nice distinctions of this kind. Moreover, I think the contention that "possession" for the purpose of the principle of immunity means actual physical possession is really impossible to reconcile with the decision of the House of Lords in *The Arantzazu Mendi* (10), where it was held that the vessel was in the possession of the Spanish Nationalist Government by virtue of a decree of General Franco requisitioning it for public services, coupled with declarations by the managing director of the owners and by the master of the vessel that they consented to the order of requisition and held the vessel at the disposal of the Nationalist government. That seems to me clearly to involve the view that legal or constructive, as opposed to actual or physical, possession is possession for the purposes of the principle of immunity.

If I were wrong in my view that the three governments as bailors are in possession of the gold in the sense intended by the principle of immunity, I think it abundantly plain that they are in control of it within the meaning of the principle. I can imagine no better example of control than the case of property deposited with a bank for safe custody and disposal in accordance with the directions of the depositor. I see no justification for limiting "control" for this purpose to "control" *ejusdem generis* with the powers of direction and user conferred by the requisitioning of a vessel.

I should, perhaps, here mention three more or less subsidiary points taken by counsel for the plaintiff company. He submitted (as I understood him) that the bailors were not the three governments but the respective representatives of the three governments on the Tripartite Commission. In my view, there is no substance in this contention. I think the position clearly is that the bailors are the three governments acting for this purpose through their respective representatives on the Tripartite Commission. He also submitted (as I understood him) that, even if (contrary to his contention) the 64 gold bars were "monetary gold," there was no power in the three governments or the Tripartite Commission under the Agreement of Jan. 14, 1946, and the Orders by which the Commission was set up, to take possession of it, bring it to England and deposit it with the bank. With that contention (whatever its effect, if well founded, on the question of title) I am not now concerned, the question now before me, as I have already said, being simply and solely the question of jurisdiction. Counsel for the plaintiff company also suggested (though I think somewhat faintly) that the 64 gold bars were impressed with trusts under which the plaintiff company was interested, and, consequently, that the case could be brought within the exception to the principle of immunity recognised (for instance) in *Gladstone v. Musurus Bey* (4) and *Lariviere v. Morgan* (5). I fail to discover any vestige of a trust in favour of the plaintiff company in this case. It seems to me to be simply a matter of competing claims, the rival claimants being the three governments, on the one hand, and the plaintiff company, on the other hand, the claim of the three governments being coupled with possession. The fact that, if the three governments are right in their claim, they may be said to hold the 64 gold bars as trustees for the purposes of pt. III of the Agreement of Jan. 14, 1946, is, so far as I can see, wholly without relevance for the present purpose.

Before passing from question (i) I should perhaps mention (in case I should be thought to have overlooked them) *The Davis* (11) and *Long v. The Tampico* (12), two American cases relied on by counsel for the plaintiff company. Of these two cases I need only say that they seem to have turned very much on

their own special facts, but that, if and so far as they can be regarded as inconsistent with the views expressed in this judgment, I decline to follow them.

(ii) In my judgment, the principle of immunity is not excluded by the fact that possession and control of the 64 gold bars is here vested in the two foreign governments concerned jointly with the government of the United Kingdom. Interference with the joint possession and control of the three governments would, in my view, necessarily be interference with the possession and control enjoyed by each of them jointly with the others. I fail to see how the court could arrogate to itself jurisdiction to interfere with the joint possession and control *quoad* the two of the three governments concerned which are governments of foreign sovereign states because the third is the government of the United Kingdom and capable of being sued in this country under the Crown Proceedings Act, 1947.

(iii) In my judgment, the purposes for which the 64 gold bars are (rightly or wrongly) held by the three governments (*viz.*, disposal in accordance with the provisions of pt. III of the Agreement of Jan. 14, 1946) are manifestly and essentially public purposes within the meaning of the principle of immunity, and none the less so because they are public purposes not merely of the governments of the United Kingdom, the United States and France, but also of the other allied governments party to the Agreement of Jan. 14, 1946.

(iv) It follows from what I have already said that, in view of the answers which should, in my judgment, be given to questions (i), (ii) and (iii), I hold that this court has no jurisdiction to entertain the plaintiff company's action so far as the claims for delivery up of the 64 gold bars and for relief by way of injunction are concerned.

It remains to consider the claims for damages. It was urged by counsel for the plaintiff company that there was, at all events, jurisdiction to entertain these claims, and that the action should, accordingly, be allowed to proceed as an action for damages only. He included in this submission the claim for delivery up on the ground that the court could, in the exercise of its discretion, order payment by the bank of the value of the 64 gold bars in lieu of an order for delivery up. It should be noted that the claims for damages here (including the claim for payment of the value of the 64 gold bars in lieu of delivery up, which the claim for delivery up by implication includes) are founded on the self-same cause of action as the claims for delivery up and relief by way of injunction, namely the alleged wrongful detention of the 64 gold bars. These claims for damages are, therefore, in no way comparable to a claim for damages for an independent wrong, such as the liability of private owners of a vessel for a collision taking place while the vessel is being operated under the orders of a foreign sovereign state for public purposes, *cf. The Crimdon* (13), or such as might arise on land in the case, *e.g.*, of a garage proprietor who, being entrusted by a foreign sovereign with a motor car for safe custody, ran down a pedestrian while driving the motor car to his garage. Nor can I regard this case as in any way comparable with one in which a bailee for a private individual is sued in *detinue* or *trover* by a third party and elects not to bring in his bailor by interpleader proceedings, but to defend the action on the strength of, and stand off fall by, the title of his bailor. In such a case the question of title is a question arising between private individuals and one which the court has jurisdiction to try, and the bailor is not bound, simply because he is not a party to the suit, and not because the court has no jurisdiction to bind him. In such a case there is no reason, in point of jurisdiction, why the bailor should not be brought before the court or left to make his own application to the court, if so minded.

Here, the bank cannot interplead because two of its three joint bailors are not amenable to the jurisdiction of the court, and the question of title as between the three governments and the plaintiff company is one which the court has no jurisdiction to try. The bank's possession of the 64 gold bars cannot, in my

view, be distinguished from the possession of them by the three governments. The bank is in possession simply in right of the three governments and has no independent interest or title whatsoever. It is, moreover, estopped as between itself, as bailee, and the three governments, as bailors, from denying the three governments' title. In sum, the bank must stand or fall simply by the title of the three governments. Therefore, this court cannot hold the bank to be
A wrongfully in possession without also holding the three governments to be wrongfully in possession, and it is only on the footing that the bank is wrongfully in possession that any relief, whether by way of damages or otherwise, can be awarded against the bank.

Moreover, an order for delivery up of the gold to the plaintiff company would, I think, clearly have the effect of determining the bailment, putting an end to
B the estoppel subsisting between the bank and the three governments and leaving the bank free to set up the title of the plaintiff company in any proceedings brought against it by the three governments as equivalent to an eviction by title paramount : see *Biddle v. Bond* (14). I think an award of damages against the bank, involving, as it necessarily would, a decision of the court that the title of the plaintiff company was paramount to that of the three governments,
C would have the like effect. Further, if the bank was ordered to pay, and paid, to the plaintiff company damages representing the value of the gold, the title of the plaintiff company to the gold would pass to the bank, and the bank could in its own right set up that title against the three governments. I cannot, therefore, accept the proposition that damages could be awarded against the
D bank without any interference with the possession or control of the 64 gold bars by the three governments. I should add that I find difficulty in appreciating how the court could have jurisdiction to order the bank to pay damages (in effect) for failing to do that which the court has no jurisdiction to order it to do, *viz.*, to deliver up the 64 gold bars to the plaintiff company.

Those considerations seem to me to point strongly to the conclusion that for the present purpose no distinction should be made between the claims for
E delivery up and relief by way of injunction and the claim for damages. But I think that the objection in point of jurisdiction to the claim for damages can be put on wider grounds. The principle of immunity precludes the court from exercising jurisdiction over any property of, or in the possession or control of, a foreign sovereign state. I think that that necessarily means that, so long as property is in the possession or control of a foreign sovereign state, this court
F can entertain no proceedings which, if successful, would result in an interference with the foreign sovereign state's exercise of such possession or control, whether directly (as by removing the property from the custody of an agent to whom the foreign sovereign state has entrusted it) or indirectly (as by casting in damages for wrongful possession an agent through whom the foreign sovereign state is exercising its possession or control). I think it would be a wholly unwarrantable
G restriction on the principle of immunity to hold that a foreign sovereign state in possession or control of property in this country cannot entrust such property to an agent for safe custody without exposing the agent to the risk of being sued by third parties for wrongful possession, or that an action against the agent for wrongful possession involves no interference with the possession or control of the foreign sovereign state if the court, while holding the possession
H of the agent, and, therefore, that of the foreign sovereign state, to be wrongful possession, declines for want of jurisdiction to order delivery up of the property, but in lieu thereof awards damages against the agent as the price (in effect) of his continuing in possession of the property on the foreign sovereign state's behalf—a price which, as between the foreign sovereign state and the agent, must ultimately fall on the foreign sovereign state itself.

Looking at the substance of the whole matter, I think this action can fairly be described as, in effect, an attempt to sue indirectly the three governments

concerned, of which two, *viz.*, the governments of the United States and France as governments of foreign sovereign states, cannot be directly sued in this court, and I think it would be what JAMES, L.J., in *Twycross v. Dreyfus* (6) termed (5 Ch.D. 618) "a monstrous usurpation of jurisdiction" to allow such an action to proceed. For all these reasons I am of opinion that the motion by the bank in this case should succeed, and I will make an order accordingly.

Order that all further proceedings in the action be stayed. The plaintiff company to pay the bank's costs of the action including costs of the motion.

Solicitors : *Slaughter & May* (for the company) ; *Freshfields* (for the bank) ; *Treasury Solicitor* (for the Crown).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

LARNER v. LONDON COUNTY COUNCIL.

[COURT OF APPEAL (Lord Goddard, C.J., Denning, L.J., and Birkett, J.), March 29, 30, 31, April 11, 1949.]

Mistake—Mistake of fact—Money overpaid under mistake—Resolution of local authority to make up to employees difference between war service pay and civilian pay—Right of authority to recover overpayments.

On Oct. 17, 1939, the defendants, the London County Council, acting under the Local Government Staffs (War Service) Act, 1939, resolved to pay to all their employees who went on war service the difference between their war service pay and their former civilian pay. The resolution expressly provided that every employee should be responsible for advising the council immediately of any change arising in the amount of his war service pay, and that the council should be authorised to make consequential adjustments by deduction from subsequent payments to him. The plaintiff, who was employed by the council as an ambulance driver, was called up for war service in March, 1942. He was aware of the resolution of the council to make up his pay and of his responsibility under that resolution to advise them of changes in the amount of his war service pay. After his call-up he received rises in war service pay of which he did not notify the council, and, in consequence, they made overpayments to him. Some part of the amount of the overpayments the council recouped by first reducing and then discontinuing his allowance to make up his service pay, but the whole had not been recouped by the time of his demobilisation. He returned to the service of the council, and in due course they began to deduct weekly amounts from his wages on account of the balance outstanding. After they had deducted £22 10s. in this way, the plaintiff brought proceedings claiming repayment of the amounts deducted from his wages, and the council counterclaimed for the balance of the sum overpaid then outstanding. It was admitted that the overpayments had been made under a mistake of fact, and it was found that the mistake was due, at least in part, to the failure of the plaintiff to advise the council of the changes in his service pay and that the council were not at fault.

HELD : the payments to make up service pay were not mere gratuities, but were made by the council as a matter of duty in accordance with their resolution under the Act of 1939 ; the fact that the plaintiff had spent the money overpaid and it was beyond recall was not a change of circumstances to his prejudice which would disentitle the council to recover, because the overpayment was due to the fault of the plaintiff and not to

that of the council; and, therefore, the council were entitled to recover the overpayments.

[AS TO RECOVERY OF MONEY PAID UNDER A MISTAKE OF FACT, see HALSBURY, Hailsham Edn., Vol. 23, pp. 162-166, paras. 234-242; and FOR CASES, see DIGEST, Vol. 35, pp. 147-158, Nos. 456-542.]

Cases referred to :

- A (1) *Aiken v. Short*, (1856), 1 H. & N. 210; 27 L.T.O.S. 188; 35 Digest 148, 461.
- (2) *Morgan v. Ashcroft*, [1937] 3 All E.R. 92; [1938] 1 K.B. 49; 157 L.T. 87; Digest Supp.
- (3) *National Asscn. of Local Government Officers v. Bolton Corpn.*, [1942] 2 All E.R. 425; [1943] A.C. 166; 167 L.T. 312; 106 J.P. 255; 2nd Digest Supp.
- B (4) *Skyring v. Greenwood*, (1825), 4 B. & C. 281; 6 Dow. & Ry. K.B. 401; 35 Digest 157, 537.
- (5) *Holt v. Markham*, [1923] 1 K.B. 504; 128 L.T. 719; 35 Digest 157, 533.
- (6) *Jones (R. E.), Ltd. v. Waring & Gillow, Ltd.*, [1926] A.C. 670; 135 L.T. 548; Digest Supp.
- C

APPEAL by the plaintiff from a decision of His Honour JUDGE DAYNES, sitting at Southwark County Court, on Nov. 8, 1948, dismissing his claim against the defendants, the London County Council, for £22 10s. which had been deducted from his wages, and allowing the council's counterclaim for £52 10s. the balance of overpayments made to the plaintiff in making up his war service pay to the level of his civilian pay. The Court of Appeal dismissed the appeal. The facts appear in the judgment of the court read by DENNING, L.J.

P. M. O'Connor for the plaintiff.

Lloyd-Jones for the defendants.

Cur. adv. vult.

Apr. 11. DENNING, L.J., read the following judgment of the court. On Oct. 17, 1939, the London County Council, acting under statutory authority, resolved to pay to all their employees who went to the war the difference between their war service pay and their civil pay. The resolution expressly provided that every employee should be responsible for advising the council "immediately of any change arising in the amount of his war service pay" and the council should "be authorised to make consequential adjustments by deductions from subsequent payments" to him.

The plaintiff was an ambulance driver employed by the London County Council. He was a married man with two children, and was not called up until March, 1942. He had not actually seen the resolution of the council, but he knew they had decided to make up the difference between war service pay and civil pay and that it was his business to tell them what his war service pay was. Moreover, when he went into the Royal Air Force he filled in a form asking that the allowance "due" to him should be paid to his wife, and on that form there was a clear notice that all alterations in service pay were to be notified immediately to the council. It was, indeed, obvious in 1939 that the men ought to tell the council of any changes in their war service pay, because otherwise the council would not be able to work out what the difference was. At that time the Royal Air Force authorities would not inform employers what a man's service pay was, but three years later they changed their policy and gave the information when asked for it. It served, of course, as a valuable check on the information supplied by the man, but it did not do away with the necessity for the men themselves telling the council of any changes in their service pay. Indeed, most of the 7,000 or 8,000 men did so quite regularly.

The plaintiff, however, did not keep the council accurately informed of the various changes in the amount of his war service pay, and when he did tell them, they did not rely on what he said. They relied on the information received from the Royal Air Force, but this information was only given on request and was not always accurate. Nevertheless, unless the plaintiff told the council whenever he had a rise in service pay, they would not have occasion to ask the Royal Air Force for any information on the subject. Hence, if he did not tell them of a rise, a long time might elapse before it came to their notice. Meanwhile, they would have been paying him too much. This can be illustrated from the facts of this case. Take for the sake of simplicity his service pay excluding the family allowances. A

On Mar. 16, 1942, the plaintiff's service pay was 2s. 6d. a day. This was certified by the Royal Air Force authorities to the council, who paid the difference accordingly. In and after October, 1942, at the end of six months' training, he had increases in pay, and by March, 1943, he was receiving service pay of 5s. a day. There is no trace of any letter from him telling the council of this increase to 5s. The council were calculating his allowance on the basis that he was only receiving service pay of 3s. a day. They did not become aware of the increase to 5s. until July, 1944, and then only because a query had arisen on family allowances which made them write to the Royal Air Force for information about his pay. Meanwhile, the council had been overpaying him at the rate of 2s. a day, that is, £2 16s. 0d. on every monthly cheque they sent him or his wife. The judge has found that this was not due to any carelessness on their part. When they discovered the overpayments, they told the plaintiff about it, started to make deductions from his monthly allowance in order to recoup themselves, and a few months later discontinued payments to him altogether, but they had not succeeded in recouping themselves by the time he was demobilised. He returned to their service and in due course they started to deduct 10s. a week from his wages on account of the balance outstanding. He disputed their right to do this and brought this action for £22 10s. 0d., being 10s. a week withheld for 45 weeks. The council counterclaimed the balance of the sum overpaid, which is said to be £52 10s. 0d. D E

The real question in this case arises on the counterclaim. Are the council entitled to recover from the plaintiff the sums which they overpaid him? Overpay him they certainly did. That is admitted. The overpayment was due to a mistake of fact. That is also admitted. They were mistaken as to the amount of his service pay. But it is said that they were voluntary payments which were not made in discharge of any legal liability, and cannot, therefore, be recovered back. For this proposition reliance was placed on the *dictum* of BRAMWELL, B., in *Aiken v. Short* (1) (1 H. & N. 215), but that *dictum*, as SCOTT, L.J., pointed out in *Morgan v. Ashcroft* (2) ([1937] 3 All E.R. 101), cannot be regarded as an exhaustive statement of the law. Take the present case. The London County Council, by their resolution, for good reasons of national policy, made a promise to the men which they were in honour bound to fulfil. The payments made under that promise were not mere gratuities. They were made as a matter of duty: see *National Association of Local Government Officers v. Bolton Corpn.* (3) ([1942] 2 All E.R. 430, 434). Indeed, that is how both sides regarded them. They spoke of them as sums "due" to the men, that is, as sums the men were entitled to under the promise contained in the resolution. If then, owing to a mistake of fact, the council paid one of the men more than he was entitled to under the promise, why should he not repay the excess, at any rate if he has not changed his position for the worse? It is not necessary to inquire whether there was any consideration for the promise so as to enable it to be enforced in a court of law. It may be that, because the men were legally bound to go to the war, there was in strictness no consideration for the promise, but that does not matter. It is F G H

not a question here of enforcing the promise by action. It is a question of recovering overpayments made in the belief that they were due under the promise, but, in fact, not due. They were sums which the council never promised the plaintiff and which they would never have paid him had they known the true facts. They were paid under a mistake of fact, and he is bound to repay them unless he has changed his position for the worse because of them.

- A It is next said, however, that the London County Council should not be allowed to recover the money because the plaintiff changed his position for the worse before the council asked for it back. He spent the money on living expenses—or his wife spent it for him—and he spent it in a way which he would not otherwise have done. This defence of estoppel, as it is called—
- B or more accurately, change of circumstances—must, however, not be extended beyond its proper bounds. Speaking generally, the fact that the recipient has spent the money beyond recall is no defence unless there was some fault, as, for instance, some neglect or breach of duty or misconduct, on the part of the paymaster and none on the part of the recipient. In both *Skyring v. Greenwood* (4) and *Holt v. Markham* (5) there was a breach of duty by the paymaster and none
- C by the recipient: see also *Jones v. Waring & Gillow, Ltd.* (6), per LORD SUMNER ([1926] A.C. 693). But if the recipient was himself at fault and the paymaster was not—as, for instance, if the mistake was due to an innocent misrepresentation or a breach of duty by the recipient—he clearly cannot escape liability by saying that he has spent the money. That is the position here. On the judge's findings the London County Council were not at fault
- D at all, but the plaintiff was. He did not keep them accurately informed of the various changes in his service pay. It does not lie in his mouth to say that, if he had done so, it would have made no difference. It might well have put them on inquiry and the mistake might not have been made at all. Many men did, in fact, fulfil their duty and were not overpaid. It would be strange, indeed, if those who neglected their duty were to be allowed to keep their
- E gain. This view of the case makes it unnecessary to discuss the question of *ultra vires*.

The one remaining question is whether the London County Council were entitled to recoup themselves, after the plaintiff's return, by deductions from his wages. In point of law they were not entitled as of right to make deductions from his wages except by agreement with him, and we do not think the resolution

F is such an agreement. It is, however, of no practical consequence in this action because the amounts due on claim and counterclaim must clearly be set off one against the other. The judge below has given judgment for the balance and that is the correct way of doing it. This appeal must, therefore, be dismissed.

Appeal dismissed with costs.

- G Solicitors: *Foss, Bilbrough, Plaskitt & Co.* (for the plaintiff); *J. H. Pawlyn*, The Solicitor, London County Council (for the council).

[*Reported by C. N. BEATTIE, Esq., Barrister-at-Law.*]

Re DOWIE'S WILL TRUSTS. BARLAS AND OTHERS
v. PENNEFATHER AND OTHERS.

[CHANCERY DIVISION (Roxburgh, J.), April 6, 1949.]

Settlement—"All that the share and interest of and in the residuary trust fund under the will of " A.D.—Whether an appointed share is a share under the will—Whether settlement an assignment of present interests only.

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By his will A.D. gave his residuary estate to his trustee on trust to sell and hold the proceeds equally for his two daughters, M. and L., for their respective lives. By cl. 6 (2) of his will A.D. directed that, after the death of M., the trustee was to hold her share of the residuary trust fund on trust for all or such one or more of her children or remoter issue as M. should by deed or deeds revocable or irrevocable or by will or codicil appoint. In default of and subject to any such appointment her share was directed to be held on trust equally for all her children attaining the age of 21, or, if daughters, marrying. On Sept. 24, 1936, V., a daughter of M., made an ante-nuptial settlement in which was recited the will of A.D., including the power of appointment, and also the agreement that V. should settle "all her share and interest of and in the residuary trust fund under the will" of A.D. Clause 1 of the operative part of the settlement provided: "The wife [V.] hereby assigns unto the trustees all that the share and interest of the wife of and in the residuary trust fund under the will of the said Adam Dowie deceased and the investments for the time being representing the same upon trust for the wife until the marriage and after the marriage upon trust that the trustees shall as to those parts of the premises to which the wife is entitled in possession immediately and as to the residue of the premises when her expectant interests therein respectively shall or may fall into possession call in or procure the transfer or payment thereof to them and shall either retain the same in their then form of investment or with the consent of the wife during her lifetime and afterwards at the discretion of the trustees sell the same and invest the proceeds" and hold the same on trust for V. during her life, and thereafter to the issue of the marriage. On June 15, 1940, M. exercised by deed her power of appointment under the will and *inter alia* appointed five twenty-fourths of her share of the residuary trust fund under the will of A.D., subject to her life interest, to be held by the trustee of the will on trust on M.'s death for V. absolutely. On July 29, 1947, M. died.

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HELD: (i) although the interest created by the appointment did not arise until the appointment was executed, when it did arise V. took it by virtue of the will, and it was, therefore, an interest in the residuary trust fund under the will of A.D.

Dictum of LORD ROMER in *Muir v. Muir* ([1943] A.C. 485), *applied*.

(ii) *prima facie* the assignment of "the share and interest of the wife" by the marriage settlement would as a matter of construction be limited to a present share and interest at the date of the deed, but, having regard to the words "expectant interests," it was impossible to construe the assignment as limited to a present interest, and, therefore, the share appointed to V. by the deed of June 15, 1940, formed part of her marriage settlement funds.

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Lovett v. Lovett ([1898] 1 Ch. 82; 77 L.T. 650), *distinguished*.

[AS TO POWER OF APPOINTMENT AMONG A CLASS, see HALSBURY, Hails-
ham Edn., Vol. 25, pp. 537, 538, paras. 970, 971; and FOR CASES, see DIGEST,
Vol. 37, pp. 426-429, Nos. 345-366.]

Cases referred to:

(1) *Re Dickinson's Settlements*, [1939] Ch. 27; 159 L.T. 614; Digest Supp.

- (2) *Re De La Bere's Marriage Settlement Trusts*, [1941] 2 All¹E.R. 533 ; [1941] Ch. 443 ; 165 L.T. 393 ; 2nd Digest Supp.
- (3) *Muir v. Muir*, [1943] A.C. 468.
- (4) *Re Rush*, [1922] 1 Ch. 302 ; *revsd.*, [1923] 1 Ch. 56 ; 127 L.T. 713 ; 27 Digest 113, 906.
- (5) *Marlborough (Duke) v. Godolphin (Lord)*, (1750), 2 Ves. Sen. 61 ; 37 Digest 112, 447.
- (6) *Lovett v. Lovett*, [1898] 1¹Ch. 82 ; 77 L.T. 650 ; 37 Digest 478, 760.

ADJOURNED SUMMONS to determine how a share of the residuary estate of the testator, Adam Dowie, devolved and should be dealt with.

- By his will, dated July 1, 1921, Adam Dowie, who died on Nov. 17, 1922, gave and devised his residuary personal and all his real estate to his trustee (later replaced by three trustees, the present plaintiffs) on trust for sale and to stand possessed of the proceeds, subject to the payment of debts, death duties and certain legacies, on trust for his two daughters, Mary and Lilian, in equal shares subject as therein provided. By cl. 6 (1) of his will the testator provided that the share of each daughter should not vest absolutely in her; but should be held by the trustee on trust to pay the income of the said share to such daughter for her life without power of anticipation. By cl. 6 (2) he provided that after the death of Mary the trustee "shall hold her share in my residuary trust fund or the investments for the time being representing the same and the income thereof upon trust for all or such one or more exclusively of the others or other of her children or remoter issue (such remoter issue to be born and take vested interests within 21 years after her death) at such age or time or respective ages or times if more than one in such shares and with such future or other trusts for their benefit and such provisions for their respective advancement either in the lifetime or after the death of my said daughter and maintenance and education at the discretion of my trustee or any other person or persons and in such manner in all respects as my said daughter shall by any deed or deeds revocable or irrevocable or by will or codicil appoint and in default of and subject to any such appointment upon trust for all or any of the children or child of my said daughter who being male attain the age of 21 years or being female attain that age or marry if more than one in equal shares." The daughter, Mary, married and had six children, one of whom was the defendant, Vera Margaret Wyllie Pennefather. Before her marriage with John Pennefather, Vera executed a settlement dated Sept. 24, 1936. The settlement recited the will of the testator (including the power of appointment) and that on the treaty for the marriage it was agreed that the wife should settle in the manner thereafter appearing "all her share and interest of and in the residuary trust fund under the will" of the testator, and declared: "The wife hereby assigns unto the trustees all that the share and interest of the wife of and in the residuary trust fund under the will of the said Adam Dowie deceased and the investments for the time being representing the same upon trust for the wife until the marriage and after the marriage upon trust that the trustees shall as to those parts of the premises to which the wife is entitled in possession immediately and as to the residue of the premises when her expectant interests therein respectively shall or may fall into possession call in or procure the transfer or payment thereof to them and shall either retain the same in their then form of investment or with the consent of the wife during her lifetime and afterwards at the discretion of the trustees sell the same and invest the proceeds" and hold the same on trust for the wife for life, and thereafter to the husband for life or until re-marriage, and thereafter for the children or remoter issue of the marriage. By a deed of appointment, dated June 15, 1940, Mary, in exercise of the power given her by the testator's will, irrevocably appointed and declared that, subject to her life interest, the trustee of the will should stand possessed of her half

share of the residuary trust fund under the will on trust on her death to hold five twenty-fourths thereof for the defendant, Vera Margaret Wyllie Pennefather, absolutely. Mary died on July 29, 1947, and the question arose whether Vera's appointed share belonged to her absolutely or should be paid to the trustees of Vera's marriage settlement to be held on the trusts thereof. ROXBURGH, J., held that the share was caught by the marriage settlement.

Stranders for the plaintiffs, present trustees of the will of Adam Dowie. A

R. L. Lazarus for the defendant, Vera Margaret Wyllie Pennefather.

Tonge for the remaining defendants, trustees of the marriage settlement.

ROXBURGH, J. [having stated the facts.] The question I have to decide is whether the interest so appointed is comprised in the property assigned to the trustees of the marriage settlement.

Counsel for the wife claims that the appointed fund is not caught by the settlement, and puts his case in two ways. First he says that, even if the assignment includes future property, it does not include the interest created by this appointment because it is not a share or interest of and in the residuary trust fund under the will of Adam Dowie. In the alternative he says that, if he is wrong in that submission, this marriage settlement on its true construction does not extend beyond interests which could be properly described as present interests at the date of the settlement. B

In support of his first contention counsel relied on a number of cases, including *Re Dickinson's Settlement* (1) and *Re De La Bere's Marriage Settlement Trusts* (2). In my judgment, these cases do not enable him to make good his proposition of law, and in saying that I found myself on the speech of LORD ROMER in *Muir v. Muir* (3) in which LORD CLAUSON concurred. That was a Scottish case and related to the application of the Scottish rule against perpetuities which is quite different from the English rule. During the course of the argument *De La Bere's Marriage Settlement Trusts* (2), *Re Dickinson's Settlements* (1) and *Re Rush* (4) were cited, and LORD ROMER dealt with the proposition of law for which counsel now contends. He said ([1943] A.C. 483): C

"If, for example, property be settled on trust for A. for life and after his death on trust for such of A.'s children or remoter issue and in such proportions as B. shall by deed appoint, B. has no interest in the property whatsoever. He has merely been given the power of saying on behalf of the settlor which of the issue of A. shall take the property under the settlement and in what proportions. It is as though the settlor had left a blank in the settlement which B. fills up for him if and when the power of appointment is exercised. The appointees' interests come to them under the settlement alone and by virtue of that document. These remarks apply equally well to the case where the donee of the power of appointment has, not only the power of saying which of the class shall take under the trust, but also the power of saying what interests they shall take." D

Later he said (*ibid.*, 484): E

"It would be strange, indeed, if it were now found that the decision of LORD HARDWICKE in *Duke of Marlborough v. Lord Godolphin* (5) had contradicted or qualified the principle on which the courts of England have acted for so long. But, in truth, it does nothing of the sort. With all possible respect to the learned judges of the Second Division, LORD HARDWICKE's decision has no bearing on the question that is now before the House. The decision was really no more than the logical application of the principle to the facts of that case. No statement of the principle that I have ever seen has suggested that the appointees under an appointment in their favour take any interest in the subject-matter of the power until the appointment takes effect. It is, on the contrary, quite plain F

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that they do not, and that is all that LORD HARDWICKE decided in the case in question."

After referring to the facts of that case LORD ROMER continued (*ibid.*, 485) :

A "LORD HARDWICKE pointed out (2 Ves. Sen. 77) that, although an appointee under a special power takes under the deed that creates the power, he does not take from the time of the creation of the power. Until the power is executed he takes nothing. In other words, the blank in the instrument creating the power has not until then been filled up. But, where a power is executed by a will, the interests appointed only vest on the death of the donee of the power and can only vest in appointees who are then living, for the donee cannot appoint to persons who are dead when the appointment takes effect and an appointment by will does not take effect until the death of the donee. Had the son and daughter survived their mother, their interests would have vested as at her death, but the interests would, nevertheless, have been created, not by the will of the wife, but by the will of the husband and would have come to the son and daughter by virtue of the latter document. My Lords, that the interests appointed in pursuance of a special power only arise in point of time when the appointment takes effect was also one of the questions decided by RUSSELL, J., in *Re Rush* (4). The particular question was this. Under the Treaty of Peace Order, 1919, all property, rights and interests within His Majesty's dominions belonging to German nationals at the date when it came into force were subjected to the charge mentioned in the treaty. Now at that date certain German nationals were entitled to reversionary interests in a settled fund and these interests were unquestionably subject to the charge. The interests were, however, liable to be defeated by the exercise of a special power of appointment of which the German nationals were among the objects. After the said date the donee of the power exercised it in favour of the German nationals in question. It was held that the interests that had been so appointed to them were not interests to which they were entitled at the date when the Treaty came into force. But no one could have successfully contended that the interests appointed to them were not created by the instrument from which the power was derived or that they did not take such interests by virtue of that instrument."

F In my judgment, that last sentence, in which LORD CLAUSON concurred, shows clearly that, though the interest created by the appointment did not arise until the appointment was executed, when it did arise the beneficiary took his interest by virtue of the instrument creating the power, or, in other words, the will.

G That, however, is by no means the end of the case, for it is settled and clear also from LORD ROMER's speech that the interest which arises under the appointment is a different interest from that which the beneficiary had in default of appointment, and, accordingly, it is clear that at the date of the marriage settlement the expectancy which the beneficiary had was not a present interest. Therefore, I have now to consider whether or not this settlement is, on its true construction, an assignment of present interests and nothing else. In this connection I ought to refer to *Lovett v. Lovett* (6), where H the same question arose. In that case ROMER, J., said ([1898] 1 Ch. 86) :

"I bear in mind that the deed was a settlement by an infant of her then property. *Prima facie* it would only pass her then interest under the settlement referred to in the deed, and not an interest she had not then and only obtained afterwards, namely, the interest under the exercise of the power of appointment by the mother. Ought I in the first place to construe the deed dealing with it as a question of construction as one intended to pass this possible future interest—this expectancy ? "

It is to be noted that ROMER, J., uses that word "expectancy" as the most appropriate description of this possible future interest under the appointment. He continued :

"In the absence of some overwhelming reason to the contrary, I think I ought not to do so, bearing in mind, as I have already said, that the lady was an infant at the time, and seeing that the deed does not purport to pass anything but estates or interests then existing, and does not purport to settle or deal with after-acquired property. In the deed of settlement there is no reference whatever to the power of appointment."

How different is the present case. This is a marriage settlement. The recitals refer not only to the interest in default of appointment, but to the possible future interests under the appointment. I can think of no rational ground for supposing that anyone making a marriage settlement would wish to settle property coming from a particular source in default of appointment and not to settle property coming from the same source under an appointment. If he desired for some special reason to differentiate between the two, I should expect him to do so in plain language.

It is true, however, that considerations of that kind would be irrelevant if the language of the marriage settlement itself were unambiguous, but, in my judgment, it is not. I think that *prima facie* the assignment of "the share and interest of the wife of and in the residuary trust fund under the will of the said Adam Dowie deceased" would, as a matter of construction, be limited to shares or interests which were present shares or interests at the date of the deed. On the other hand, in the circumstances which I have indicated, I think that no very strong context would be required to exclude that *prima facie* construction. Here, however, I have what I regard as a strong context, for the assignment goes on to direct the trustees to hold property assigned after the marriage :

"... upon trust that the trustees shall as to those parts of the premises to which the wife is entitled in possession immediately and as to the residue of the premises when her expectant interests therein respectively shall or may fall into possession call in or procure the transfer or payment thereof to them."

In the face of the words "expectant interests," it seems to me impossible to construe this assignment as limited to interests which were present interests at the date of the assignment. Counsel for the wife faces up to this difficulty and asks me to read the word "expectant" as though it were "reversionary." If I could do that, it would fit in with his argument, because a reversionary interest is, undoubtedly, a present interest, but it seems to me that there is nothing to suggest that the word "expectant" is a mistake. It is entirely consistent with what I should expect to find in the circumstances, and I should not be justified in striking out the word which is quite appropriate to an interest under an appointment not yet made and substituting for it some word which is only suggested in order to exclude that construction. I feel bound to construe this deed as including the wife's expectant interests in the residuary trust fund devolving under the will of Adam Dowie, and the interest which the wife subsequently obtained under the appointment was, in my judgment, an expectant interest in the residuary trust fund under the will of the said Adam Dowie at the date of the marriage settlement.

Order accordingly. Costs as between solicitor and client out of the appointed fund.

Solicitors : Simon, Haynes, Barlas & Cassels (for the plaintiffs) ; Monro, Saw & Co. (for the defendants).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

MALLETT AND ANOTHER v. DUNN.

[KING'S BENCH DIVISION (Hilbery, J.), March 17, 18, April 11, 1949.]

Husband and Wife—Action by husband and wife for injury to wife—Husband's claim for medical and household expenses—Injury to wife through defendant's negligence—Wife's contributory negligence—Reduction of damages awarded to husband—Law Reform (Contributory Negligence) Act, 1945 (c. 28), s. 1 (1).

- A By the Law Reform (Contributory Negligence) Act, 1945, s. 1 (1):
 "Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage . . ."

- B A married woman was injured through the negligence of the defendant. In an action for damages brought by her and her husband, she was found guilty of some contributory negligence and the damages awarded to her were, accordingly, reduced under the Law Reform (Contributory Negligence) Act, 1945, s. 1 (1). In respect of the special damages claimed by the husband for medicine and household expenses,

- C HELD: the husband's cause of action was personal to him and distinct from the claim made by the wife, and it was not defeated by the fact that she was guilty of contributory negligence; as the contributory negligence was the fault of the wife and the husband had not been at fault, in making his own claim in respect of the damage which he had suffered the husband was not a person who had suffered damage "as the result partly of his own fault" within the meaning of s. 1 (1) of the Act of 1945; and, therefore, he was entitled to recover in full the damages claimed.

[FOR THE LAW REFORM (CONTRIBUTORY NEGLIGENCE) ACT, 1945, s. 1 (1), see HALSBURY'S STATUTES, Vol. 38, p. 357.]

- E Cases referred to:

- (1) *Hyde v. Scysson*, (1619), Cro. Jac. 538; 27 Digest 80, 633.
- (2) *Winsmore v. Greenbank*, (1745), Willes, 577; 27 Digest 81, 640.
- (3) *Smith v. Kaye*, (1904), 20 T.L.R. 261; 27 Digest 81, 643.
- (4) *Place v. Searle*, [1932] 2 K.B. 497; 147 L.T. 188; Digest Supp.
- (5) *Young and Young v. Otto*, [1947] 2 W.W.R. 950.

- F ACTION by a husband and a wife claiming damages for negligence.

The wife, Mrs. Mallett, was knocked down and injured by the defendant's car while she was walking along a lane. HILBERY, J., found that the defendant had been guilty of negligence, but that the wife had also been at fault, and he apportioned the responsibility for the damage as to three-quarters to the defendant and as to one quarter to the wife and reduced the £1,600 at which he assessed the general damages for personal injuries to £1,200. On the husband's claim for £290 special damages in respect of medical and household expenses he held that the husband's right of action was not defeated by the wife's contributory negligence and that no reduction of this amount fell to be made under the Law Reform (Contributory Negligence) Act, 1945, s. 1 (1). The case is reported only on the question raised by the husband's claim.

Glyn-Jones, K.C., and *Glazebrook* for the plaintiffs.

Salmon, K.C., and *Armstrong-Jones* for the defendant.

Cur. adv. vult.

Apr. 11. HILBERY, J., read the following judgment. At the conclusion of this case I decided that, so far as the claim for personal injuries was the claim of Dorothy Amy Mallett, wife of Robert Stanley Mallett, the claim was partly met by the defendant having established some contributory

negligence on the part of that plaintiff. Accordingly, I acted on the provisions of s. 1 and other sections of the Law Reform (Contributory Negligence) Act, 1945, and reduced her claim to the extent which I thought just and equitable, having regard to her share in the responsibility for the damage which she had sustained. The question then arose: What effect, if any, had that finding on the claim by the husband? It was argued by the defendant that the husband's claim must wholly fail since it depended on establishing, in the first place, a tortious act done to his wife for which the defendant was responsible in law, and, unless the husband's claim was saved by the Law Reform (Contributory Negligence) Act, 1945, the defendant, having established the contributory negligence of the wife, had absolved himself in law from responsibility for the alleged tortious act, and, secondly, that, if the husband's claim was not wholly defeated, it was abated in the same fraction as that of the wife by reason of the provisions of the Law Reform (Contributory Negligence) Act, 1945, s. 1 (1).

The question thus raised can only be answered by examining, and, if possible, discovering, the true legal basis of the husband's claim. If, in order to sustain his claim, he must be regarded as standing in his wife's shoes and his cause of action is the same as hers, then it must be true to say that what is an answer to her is an answer to him. If, on the other hand, his cause of action is one which is distinct from that of his wife and is personal to him, then what would suffice to answer his wife's claim, because it is her claim, will not necessarily defeat his action. I, therefore, pass to an examination of the basis of the husband's cause of action. The husband's cause of action is a remedy given by the common law to enable him to recover in respect of the personal damage which he has suffered through a tortious act of the defendant which has injured his wife and consequentially injured him. It has always been a remedy by action on the case given by the common law to the husband for injury done to him by an interference with his right of *consortium* and for the consequential damage suffered by him. It was not, and still is not, the only form of action on the case given by the common law for an act of a defendant which deprives a husband of his *consortium* with his wife. An action still lies at the suit of a husband against a defendant for enticing and persuading a wife to leave her husband. In each of these cases the gist of the husband's action, as the old-time lawyers expressed it, lay in the *per quod*, i.e., the basis of the action was that it was to recover for the husband the damage due to him and to his rights as a husband.

The wife's right to damages for the same act of the defendant as was complained of by the husband was a different and distinct cause of action. True, she had to join with her husband in an action to recover the damages which were claimed for the injury done to her. That was because at that time a married woman could not acquire or own, with certain exceptions, any property apart from her husband, and so he had to join as a party in a claim for her damages, but from the earliest time the husband could bring his action for the wrong done to him *per quod consortium amisit* without joining his wife as a co-plaintiff. In other words, his cause of action was his own and distinct from that of his wife. It was for the wrong done to him. The headnote to *Hyde v. Scysson* (1), decided in the seventeenth year of the reign of James I, begins as follows (Cro. Jac. 538):

"In trespass for beating a wife, both the husband and wife must join in the action; but if it be with a *per quod consortium amisit*, the husband may sue alone . . ."

The first error assigned in that case was that:

" . . . the action was by the husband solely for the battery of his wife, which ought not to be; for the tort and damages are properly done to

the wife, and therefore the husband sole without the wife could not maintain this action; and then the damages being entirely given, the judgment is erroneous."

As to that objection the report states :

- A "But all the justices and barons held, that true it is the husband, for the battery of his wife, ought to join his wife with him in the action, if this had been brought for that cause; but here the action is not brought for the battery of his wife, but for the loss and damage of the husband, for want of her company and aid: all is concluded with the *per quod consortium amisit*, which extends to all that was before; as where an action brought by the master for the battery of his servant, *per quod servitium amisit*, etc."
- B Here, then, is direct authority for the statement so often to be found in the text-books that the husband's cause of action is separate from that of the wife. How distinct the two causes of action were is plain from the fact that the wife's claim for damages for the personal tort done to her died with her. Her husband had to be joined with her in an action for the damage she had suffered, and, if the action was brought for those damages only, it died with her because the action was brought to remedy the wrong done to her.
- C More-over, her claim for the damage she had suffered was so personal to her that it survived the death of the husband, and she might bring the action after his death.

In BACON'S ABRIDGEMENT OF THE LAW, 7th ed. (1832), vol. 1, p. 732, under the title "Baron and Feme," it is said :

- D "For a battery or other personal tort done to the wife, they must join; and if the wife dies, the action dies with her. (Not for personal or other wrongs done to them both, unless where they have a joint interest, and they have wrong in respect thereof . . .) But the baron may bring an action alone for the battery, carrying away and detaining of his wife, *per quod solamen et consortium* of his said wife *amisit*, because the action is founded upon the special damage done to himself, and will be no bar to another action brought by baron and feme, or by the feme after the death of the baron, for the same battery."
- E

- I have searched in vain for any authority which lays it down that such an action by a husband for a tort done by his wife *per quod consortium amisit* was defeated by the defendant showing that the wife had been guilty of contributory negligence. Nor do I see any sound reason why it should be. The claim by the wife was answered if, at the conclusion of the case, all that had been established was that both she and the defendant had tortiously caused her injury and damage, *i.e.*, if the defendant had proved that she had been guilty of committing negligence, but it was implicit in such a result that the defendant had been guilty of negligence, *i.e.*, the tort alleged against him.
- G It might be just to say that the plaintiff wife ought not to obtain compensation out of the defendant's pocket where she herself was also a cause responsible for her injury and damage. In an action by the husband *per quod consortium amisit* he must show, as the first part of his action on the case, a wrong-doing of the defendant which has resulted in the damage which the husband claims.
- H If in such an action the husband shows that the defendant was negligent in a way which was partly the cause of the injury to the wife as a consequence of which the husband suffered the damage he claims, he has proved the tort alleged. In my opinion, he is then entitled to succeed, just as a passenger in a vehicle who claims that the defendant, the driver of the other vehicle which collided with that in which the plaintiff was riding, is entitled to succeed although the defendant shows that there was contributory negligence on the part of the driver of the vehicle in which the plaintiff was a passenger. The

law says that the passenger is not dependent on his driver's cause of action. The passenger is not identified with his driver and is not defeated through the wrong-doing of his driver which contributed to bring about the accident and the plaintiff's injury. For the reasons I have given, in my opinion, the husband's claim is likewise not defeated by the fact that his wife was guilty of wrong-doing which was also a cause of the injury to her as a consequence of which he has suffered damage.

It must be remembered that it was not the wife who gave her husband the right to *consortium*. It was the status of marriage which gave that right. The husband did not derive his cause of action from his wife, but from his marriage. Some support for this line of reasoning is, I think, to be found by glancing at the other action on the case given to the husband *per quod consortium amisit* to which I have already alluded, the action for damages for enticing away a wife. In such an action the fact that a wife is shown eventually to have chosen to leave her husband as a result of persuasion, or inducement, or incitement, or procuring, on the part of the defendant is not only no answer to the claim by her husband against a defendant for damages for so bringing about his wife's desertion of him, but is, in fact, the basis of the cause of action given him by the law: see *Winsmore v. Greenbank* (2) and *per R. S. WRIGHT, J., in Smith v. Kaye* (3) quoted with approval by SCRUTTON, L.J. ([1932] 2 K.B. 514) in *Place v. Searle* (4). In such a case the claim is not based on duress of the wife, which would mean that her will did not go with her act of leaving, nor is it alleged that the wife has been forcibly taken away. The cause of action is for the persuasion or inducing of the wife so that she yields and voluntarily goes. The fact that the husband's loss of *consortium* in such cases is partly the result of the wife's own wrongful act in leaving her husband in breach of her legal duty to reside and consort with him is a fact in the case which has no effect on the husband's cause of action. None the less, as in the case of contributory negligence, she has herself been guilty of a legal wrong-doing without which her husband would not have suffered the injury and damage for which he brings his action. In my view, the husband's cause of action here is unaffected by the contributory negligence of the wife and he recovers his damages in full.

If it be right that the husband's cause of action *per quod consortium amisit* is his own and distinct from the claim made by his wife (as I hold), it follows, in my view, that it is not within the words of the Law Reform (Contributory Negligence) Act, 1945. By s. 1 (1) of that Act:

"Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage . . ."

That section applies in express terms to a case where any person suffers damage as the result partly of his own fault and partly of the fault of another person, and a claim in respect of that damage is not to be defeated by reason of the fault of the person suffering the damage. The husband making his own claim for the damage which he has sustained is not a person claiming in respect of damage which is the result partly of his own fault. He has not been at fault. Since the Law Reform (Married Women and Tortfeasors) Act, 1935, there seems no vestige of a reason left for imputing a wife's contributory negligence to her husband. She has full responsibility for her own tort. She is a fully independent legal person.

Young and Young v. Otto (5), decided in the Supreme Court of Alberta (Canada) by BOYD MCBRIDE, J., was cited to me as showing that in Canada it has been held that a husband's claim such as I am here considering abates

by the same fraction as that of the wife where contributory negligence on the part of the wife is found by the court. The view which the Canadian courts seem to have taken is that before the Contributory Negligence Act, 1942 (the Canadian Act corresponding with our Act of 1945) the husband's claim would have been defeated by a decision that his wife had been guilty of contributory negligence, and that since the passing of the Act the defendant's liability for the consequences of the accident in question is limited to his proportion of fault, and the defendant is answerable only to that extent towards the person claiming damages resulting from the accident, although the claimant be the husband of a wife who has been injured or the father of an injured child. The courts there have said ([1947] 2 W.W.R. 959) that the true purport of the Canadian Contributory Negligence Act "is a limitation as to responsibility."

With great respect to those who have so held, I venture to think that the Law Reform (Contributory Negligence) Act, 1945, is not so framed. In express terms it only applies to a claim by a person who suffers as the result partly of his own fault. This cannot apply to the husband's claim here unless his claim is identified in law with that of his wife. I have endeavoured to show why, in my view, it is not so identified. In my opinion, the husband here must succeed as to all his claim or totally fail. In my judgment, he succeeds.

Judgment for both plaintiffs with costs.

Solicitors: *Neil Maclean & Co.* (for the plaintiffs); *Wm. Easton & Sons* (for the defendant).

[*Reported by F. A. AMES, Esq., Barrister-at-Law.*]

LYONS v. DENSCOMBE.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Oliver and Sellers, JJ.), April 12, 1949.]

Street Traffic—Express carriage—Car used to take owner's fellow workmen home from work—Owner paid lump sum a week—Road Traffic Act, 1930 (c. 43), s. 61 (1).

Insurance—Motor insurance—Third party risks—Policy excluding "use for hire or reward other than private hire"—Supply of car "direct from garage"—Car used to take owner's fellow workmen home from work—Car taken to place of work hours before.

A mineworker drove to the colliery each morning in his motor car and in the evening drove home four fellow workmen, who, pursuant to an agreement made by the mineworker with one of them, paid him 8s. a week (2s. each) whether they used the car or not. The car was licensed as a private hire car and hackney carriage, and it was insured, but the insurance policy did not cover "use for hire or reward other than 'private hire'", which was defined to mean the "letting of the vehicle supplied direct from the policy holder's garage."

HELD: (i) the contract was for the lump sum of 8s. a week and not for separate fares and, therefore, the car was not used as an express carriage as defined by the Road Traffic Act, 1930, s. 61 (1), without a public service vehicle licence or a road service licence contrary to ss. 67 (1) and 72 (1) of the Act.

(ii) "private hire" meant hire for a defined journey at a defined time as distinct from plying for hire and included the picking up of passengers away from the policy holder's garage even though the car went to the place some hours before the hirers got into it, and, therefore, the car was covered by the policy.

[AS TO PUBLIC SERVICE VEHICLE LICENCES, ROAD SERVICE VEHICLE LICENCES, and THIRD PARTY INSURANCE under the Road Traffic Act, 1930, see HALSBURY, Hailsham Edn., Vol. 31, pp. 738-40, paras. 1141-1146, and Vol. 18, pp. 561-3, paras. 908-912; and FOR CASES, see DIGEST Supp.

FOR THE ROAD TRAFFIC ACT, 1930, ss. 35 (1), 61 (1), 67 (1), 72 (1), see HALSBURY'S STATUTES, Vol. 23, pp. 636, 654-5, 658, 661.]

CASE STATED by Glamorgan justices.

At a court of summary jurisdiction sitting at Cowbridge on Nov. 16, 1948, informations were preferred by the appellant charging the respondent with having used his Austin 12 h.p. saloon motor car on a road at Llanharan between July 13, 1948, and Sept. 1, 1948, without there being in force in relation thereto a policy of insurance or other security in respect of third party risks as required by the Road Traffic Act, 1930, s. 35 (1), and with having caused the car over the same period to be used on a road at Llanharan as an express carriage without his being the holder of a licence to use it as a vehicle of that class, contrary to s. 67 of the Act, and without being the holder of a road service licence granted by the Road Traffic Commissioners, contrary to s. 72 thereof. The car was licensed for private and hackney purposes and there was no road service licence or public service licence in respect of it. There was a certificate of insurance in force in respect of it which did not cover use for hire or reward other than "private hire," which was defined as the letting of the car supplied direct from the policy holder's garage. The respondent contended that the car was a private hire car. The justices dismissed the informations. The prosecutor appealed and the Divisional Court dismissed the appeal. The facts appear in the judgment of LORD GODDARD, C.J.

Lloyd-Jones for the appellant.

The respondent did not appear.

LORD GODDARD, C.J. : The respondent was summoned for using an uninsured motor car on the ground that the use to which he put it was not covered by his policy of insurance. It was also alleged that he had committed an offence because his car was used "as an express carriage without his being the holder of a licence to use the said motor car as a vehicle of that class," and also "for that he between the dates and at the place aforesaid did use the said motor car on a service as an express carriage without being the holder of a road service licence granted by the Road Traffic Commissioners."

The justices found that the respondent was a mineworker at Llanharan Colliery, Brynna, and there also worked at the colliery four men called Ware, Witts, Evans and Dykes. The respondent drove himself to the colliery every morning, and he drove these four men home every night. He had a licence covering the use of his car for private and hackney purposes, and, therefore, so far as the licence was concerned, he was entitled to use the car as what is generally known as a hire car. The four men were brought home each night by the respondent

"in pursuance of an arrangement entered into between Ware and the respondent whereby in consideration of a weekly payment of the sum of 8s. the respondent agreed to convey the said Ware, Witts, Evans and Dykes from the said colliery to Brynna aforesaid on six days in each week."

Each man contributed 2s. a week towards that 8s. a sum which was payable whether all of them rode in the car or not. In other words, the justices found that there was a contract between Ware and the respondent for the use of his car for 8s. a week.

For a vehicle to be an express carriage there must be an agreement for separate fares, and the contention of the appellant is that the justices should have regarded this contract, not as one for a lump sum of 8s., but as four

different contracts of 2s. each because these men contributed equally to the 8s. The justices do not find how the men would have contributed if one of them was ill or away from work for a week and the other three continued to use the car. I should expect that in that case those who used it would have to make up the 8s., but the contract the justices have found is clearly one of 8s. a week for the use of the car. That seems to me to put the case entirely outside the provisions with regard to express carriages in the Road Traffic Act and to show that the transaction was simply the hire of a hire car. Therefore, I think the two summonses with regard to the use of the car as an express carriage were rightly dismissed.

The third summons (for using the car when there was not a policy of insurance in force in respect of it) also presents no difficulty. It is found :

- B " . . . that there was in force between the said dates in relation to the said motor car a certificate of insurance which provided that the said certificate did not cover the said motor car against (*inter alia*) use for hire or reward other than 'private hire,' which expression in the said certificate was stated to mean the letting of the vehicle supplied direct from the policy holder's garage."
- C It is said that the letting of the vehicle was not direct from the policy holder's garage because it was driven to the colliery in the morning and the four men only travelled in it in the evening. It seems to me, however, that this is clearly private hire. Private hire is distinct, in my opinion, from plying for hire, that is to say, using the car as a taxicab, standing in the street or driving about seeking passengers. It is private hire in the way that any private hire car is used, namely, by hiring the vehicle for a defined journey at a defined time.
- D It is said that what occurred in this case was not letting the vehicle direct from the policy holder's garage, but every person who hires a private hire car expects the car to pick him up somewhere. He may, of course, go to the garage and get into the car, there, but he need not do so. If I want a car to meet me at a railway station, it has to come to the station from the garage where it is kept.
- E If it does so, it is supplied direct from the garage. It is not plying for hire. Can it make any difference for the purpose of insurance that the car is driven to the place where the hirers are going to get into it some hours before they do get into it? Admittedly, if this car came straight out from the garage to the colliery and picked up the men there, it would be a letting direct from the garage. Why does it cease to be a letting direct from the garage if it gets to the colliery five minutes before the men get into it? If not, does it cease to be such a letting if half-an-hour or an hour elapses? Obviously not. For these reasons, I think that the policy was in force in respect of this car, that the justices came to a perfectly right decision in this case, and that the appeal must be dismissed.

G OLIVER, J. : I agree.

SELLERS, J. : I agree. The definition of an express carriage is : "A motor vehicle carrying for hire or reward at separate fares," and our decision turns on the finding of the justices that this was a contract for one fare paid weekly. It is possible on the evidence that they might have come to another conclusion, but on their conclusion no infringement has been established.

Appeal dismissed.

Solicitors : *Torr & Co.*, agents for *Richard John*, Cardiff (for the appellant).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

ERIC GNAPP, LTD. v. PETROLEUM BOARD.

[COURT OF APPEAL (Tucker, Asquith and Singleton, L.J.J.), March 28, 29, April 12, 1949.]

County Court—Appeal—Leave—Debt or damages claimed not exceeding £20—Claim for less than £20 on one cause of action coupled with claim exceeding £20 on another—Whether leave to appeal required in respect of smaller claim—County Courts Act, 1934 (c. 53), s. 105.

Weights and Measures—"Measures"—"Measuring instrument"—Liquid fuel—Road tank wagon and dip rod—Whether separately or together a "measure" or "measuring instrument"—Weights and Measures Act, 1878 (c. 49), ss. 25, 29—Weights and Measures Act, 1889 (c. 21), s. 35.

Contract—Undue influence—Duress—Failure of consideration—Contract with body having monopoly—Petroleum board having sole right to supply petrol—Conditions of contract excluding liability of board for short measure—Whether contract obtained by undue influence or duress.

The County Courts Act, 1934, s. 105, provides: "If any party to any proceedings in a county court is dissatisfied with the determination or direction of the judge in point of law or equity or upon the admission or rejection of any evidence, the party aggrieved by the judgment, direction, decision or order of the judge may appeal therefrom to the Court of Appeal in such manner and subject to such conditions as may be for the time being provided by the Rules of the Supreme Court: Provided that, without the leave of the judge, there shall be no appeal: (a) in any action founded on contract or on tort . . . where the debt or damages claimed does not exceed £20."

A company claimed in a county court against the Petroleum Board (i) £1 3s. 4½d. overpaid by the company in respect of alleged short deliveries of petrol, (ii) £4 7s. 6d., and (iii) general damages not exceeding £200, in respect of the failure and refusal of the Board to supply petrol, but limiting the total claim to £200. The county court judge found for the Board in respect of both the short deliveries and also the failure to supply. It was conceded that with regard to the issue as to the failure to supply out of which claims (ii) and (iii) arose the company was entitled to appeal without leave, but it was argued that leave was required in respect of claim (i).

Held: proviso (a) to s. 105 referred to the debt or damages "in any action" and not "in any cause of action," and, as in the action as a whole the "debt or damages" in the aggregate amounted to more than £20, no leave to appeal was required.

The Weights and Measures Act, 1878, s. 25, provides: "Every person who uses or has in his possession for use for trade any weight measure scale balance steelyard or weighing machine which is false or unjust, shall be liable to a fine . . . and any contract bargain or sale or dealing made by the same shall be void, and the weight measure scale balance or steelyard shall be liable to be forfeited."

Soon after the outbreak of the 1939-1945 war the Petroleum Board was established by agreement with the government as the sole suppliers to retailers of petrol, subsequently receiving statutory recognition as such. The Board delivered petrol subject to certain conditions of sale including: "1. The buyers shall accept as having been discharged from the sellers' road tank wagon such quantity shown by the sellers' road tank wagon dip rod in connection with deliveries of motor spirit. 2. Owing to the volatile nature of petroleum products the sellers cannot guarantee that each package when delivered contains the quantity originally measured, although every precaution is taken when filling packages to see that the correct (full) measure is given, each package being filled by means of a

government stamped measure.” A company of petrol retailers, whose contract with the Board contained those conditions complained to the Board from time to time of short deliveries. The Board discovered that the sword-type dip rod (which was calibrated for use with the tank wagon to which it belonged) used for checking deliveries to the company had a loose cross head, and stated that they were willing to make an allowance of one gallon per compartment for every delivery from the vehicle concerned since the date of the last examination of the vehicle. The company insisted, however, that that allowance was inadequate, and that, in using that particular vehicle, the Board was defrauding them with short measure. The Board refused to execute further orders from the company until the allegations were withdrawn. The company did not withdraw, and received no further supplies until the Board ceased to control the supply of petrol. The company claimed damages against the Board for refusal to supply them, and the return of money overpaid to the Board by them. The county court judge found as a fact that deliveries were² short by eleven gallons, but that, in view of the conditions of sale, the company was precluded from recovering the money overpaid.

HELD : (i) the order from which the Board derived its authority at the date of the refusal to supply (the Control of Motor Fuel Order, 1947 (S.R. & O., 1947, No. 2058)) did not impose on the Board a duty to supply a dealer with petrol equivalent in quantity to that shown on the coupons surrendered by the dealer, and failure to supply was not made an offence, and, therefore, no right of action was afforded to the company in respect of the failure.

(ii) the fact that the company was bound to accept the terms of contract offered by the Board because it was the sole supplier did not make the contract one obtained by duress or undue influence, nor, having regard to the conditions of sale had there been any failure of consideration.

(iii) neither the dip rod alone (because *per se* it gave no indication of the amount of its contents), nor the rod and the wagon together (because they were not a simple container) constituted a “measure” within s. 25 or s. 29 of the Act of 1878, and, although the rod and wagon together were a “measuring instrument” within (*inter alia*) s. 35 of the Weights and Measures Act, 1889, the provisions of s. 25 were only applied (by the Measuring Instruments (Liquid Fuel and Lubricating Oil) Regulations, 1929) to such instruments used for the measurement of individual quantities not exceeding twenty gallons; here the “instrument” was used to measure quantities up to 300 gallons; and, therefore, the contract between the company and the board was not avoided by s. 25.

[AS TO USE OF FALSE OR UNJUST MEASURES, see HALSBURY, Hailsham Edn., Vol. 33, pp. 653, 654, para. 1147; and FOR CASES, see DIGEST, Vol. 44, pp. 133-136, Nos. 20-42.]

Cases referred to :

(1) *Dreesman v. Harris*, (1854), 9 Exch. 485; 18 J.P. 330; *sub nom.*, *Harris and Taylor v. Dreesman*, 22 L.T.O.S. 246; 18 J.P. 458; 13 Digest 525, 751.

(2) *Robinson v. Golding*, (1910), 74 J.P. 335; 103 L.T. 248; 44 Digest 133, 22.

APPEAL by a company from an order of His Honour JUDGE GRANVILLE SMITH, at Barnet County Court, dated Oct. 21, 1948.

The company alleged that various deliveries to them of petrol by the Petroleum Board were short, and that, on their charging the Board, after frequent complaints, with dealing fraudulently, the Board refused them further supplies. The company claimed repayment to them of sums alleged to have

been overpaid in respect of deliveries of petrol and damages for the Board's refusal to supply. The county court judge dismissed the company's claims. On appeal, after a preliminary point (on the question of the right of the company to appeal without leave of the county court judge) had been decided in favour of the company, the decision of the county court judge was affirmed. The facts appear in the judgment of TUCKER, L.J.

King-Hamilton for the company.

Milmo for the defendants, the Petroleum Board.

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TUCKER, L.J. : A preliminary objection was taken that there is no jurisdiction to entertain part of the appeal on the ground that no leave to appeal was obtained from the county court judge.

The claim was one by a company, *Eric Gnapp, Ltd.*, against the Petroleum Board, and the first three paragraphs of the particulars of claim claim £1 3s. 4½d. moneys overpaid in respect of alleged short deliveries of petrol by the Board to the plaintiffs. The remainder of the claim is based on an alleged breach by the Board of their obligation to supply petrol to all licensed retailers provided the said retailers pay the proper price and surrender the appropriate number of coupons. It is alleged that, after disputes had arisen with regard to the matters alleged in the first three paragraphs, the Board refused to supply petrol to the plaintiffs; that they were under a legal obligation so to do; and that, by reason of that breach, the plaintiffs suffered damage. They claim the small sum of £4 7s. 6d. in respect of one failure to deliver and they claim general damages, bringing their total claim up to £200 in respect of the failure to supply. The learned judge decided both these issues in favour of the Board and the plaintiffs now appeal. It is conceded that with regard to the plaintiffs' claim for general damages amounting to £196 odd, they are entitled to appeal without leave, but in respect of the claim relating to £1 3s. 4½d., a point is taken by counsel for the Board that, that being a claim in respect of a debt not exceeding £20, the plaintiffs require leave.

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The matter turns on the proper interpretation of s. 105 of the County Courts Act, 1934, which provides :

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"If any party to any proceedings in a county court is dissatisfied with the determination or direction of the judge in point of law or equity or upon the admission or rejection of any evidence, the party aggrieved by the judgment, direction, decision or order of the judge may appeal therefrom to the Court of Appeal in such manner and subject to such conditions as may be for the time being provided by the Rules of the Supreme Court."

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In the present case the plaintiffs are a party aggrieved by a judgment of the county court judge. The section goes on :

"Provided that, without the leave of the judge, there shall be no appeal : (a) in any action founded on contract or on tort . . . where the debt or damages claimed does not exceed £20."

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This is an action founded both on contract and on tort, and the debt and damages together far exceed £20, but it is said that the proviso should be read in such a way as to require the plaintiffs to obtain leave to appeal. It is argued that if any one cause of action which goes to make up the totality of their claim is for an amount not exceeding £20 they require leave to appeal from any judgment or decision on that cause of action. I do not think that that is the proper interpretation to be put on the proviso. Although the language is by no means clear, I think the words "in any action" are decisive in favour of the plaintiffs. It would have been easy to limit the appeal to specific causes of action, but the words in the proviso are "in any action," and I think the effect is that if, in any action, the total debt or damages claimed exceeds £20,

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the plaintiff is entitled to appeal without leave. To render it necessary that leave should be obtained there must be a claim for a debt or damages which does, or do, not amount to £20.

We have been referred to *Dreesman v. Harris* (1), but that was a case under the old Act relating to county courts—13 & 14 Vict., c. 61—and, though the language there was slightly different, I do not think it affords any assistance in the solution of this point. I think the preliminary objection fails.

A

ASQUITH, L.J. : I agree. Taking the language of proviso (a) to s. 105, it is impossible to say that there was here more than one action, however many causes of action there may have been. It is equally impossible to deny that in that action more than £20 in all was claimed taking debt and damages together. This means substituting “and/or” for “or,” but it does seem to me clearly to be the meaning intended. I agree that the preliminary objection fails.

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SINGLETON, L.J. : I agree.

[Having heard the arguments of counsel on the main issue the Lordships indicated that they would consider their judgments.]

C

Cur. adv. vult.

Apr. 12. The following judgments were read.

TUCKER, L.J. : The appellants, who were plaintiffs in the action, are a company who were at all material times carrying on business as garage proprietors and licensed suppliers of petrol at South Mimms. Shortly after the outbreak of war the Petroleum Board was established by agreement with the government, and thereafter dealers in petrol could only obtain supplies from the Board. It subsequently received statutory recognition by the Petroleum (No. 2) Order, 1939 (No. 1447). The order in force at the material date was the Control of Petroleum Order, 1944, art. 8 of which reads, so far as material, as follows : “No person other than the Petroleum Board shall (a) dispose of any petroleum except under the authority of a licence.” The Board, accordingly, by orders having the force of law obtained a monopoly in the disposal of petrol. The terms on which they were willing to do business with dealers contained the following clause :

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“Delivery of each product is made subject to sellers’ usual conditions of sale applicable to that product and acceptance of goods will be treated as acceptance of these conditions.”

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The conditions of sale provided :

“1. The buyers shall accept as having been discharged from the sellers’ road tank wagon such quantity shown by the sellers’ road tank wagon dip rod in connection with deliveries of motor spirit. 2. Owing to the volatile nature of petroleum products the sellers cannot guarantee that each package when delivered contains the quantity originally measured, although every precaution is taken when filling packages to see that the correct (full) measure is given, each package being filled by means of a government stamped measure.”

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The contract or contracts between the company and the Board with which this appeal is concerned contained these conditions. Before the formation of the Board some, if not all, of the companies supplying motor spirit had the same or similar conditions in their contracts. The company had always objected to these conditions, and in 1942, after having, as they said, received short deliveries on many occasions, they protested that the conditions amounted to a denial of justice. On Sept. 9, 1942, the Board wrote :

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“We acknowledge your letter of the 3rd instant containing the serious allegation that we use unjust methods of trading, adding the comment

that you have not time to go fully into the matter. We have to inform you that we are not prepared to continue selling to a buyer who takes up that attitude. If, therefore, you wish us to continue to supply, will you either withdraw the allegation or find time to justify it. We deny that we have made any short deliveries to you."

On the next day the company withdrew their allegations in a letter from which the following is an extract :

"We withdraw the allegation contained in our letter to you dated Sept. 3, 1942. This confirms our telephone conversation of today with Mr. H. K. Stein, [and] we hope a better feeling of understanding will be mutual."

Thereafter the company, according to their evidence, continued to receive short measure. Early in 1948 further complaints were made, and ultimately, by letter of Feb. 18, the Board wrote informing the company that it had been found that the cross head of the sword type dip rod used to measure vehicle No. 1458 was loose, and saying this would have accounted for short measure to the extent of one gallon in each compartment. They, accordingly, stated they were willing to make an allowance to the extent of the price of one gallon per compartment for every delivery from this vehicle since Mar. 12, 1946, when it was last checked. This amounted to £1 7s. 3d. The last of such deliveries which was admitted to have been short to the extent of one gallon was a delivery of 300 gallons on Jan. 17, 1948. The company were, however, not satisfied with the Board's explanation, as, in their view, the shortages had exceeded one gallon per compartment and short deliveries continued to be made after the date when the dip rod was said to have been rectified. On Apr. 13, 1948, the company wrote :

"We enclose cheque value £27 10s. 0d. and request delivery of three hundred gallons of petrol in a vehicle whose tank is accurately and properly calibrated. In our opinion, your delivery to us today ex vehicle No. 1458 front compartment is defrauding us with short measure, and that you are defrauding us with intent by continuing to use this vehicle. We have coupons ready ; please acknowledge."

The Board replied :

"Our St. Albans depot have today received a cheque for £27 10s. 0d. together with your order for 300 gallons petrol. This order included certain conditions and observations which are at variance with the arrangement reached between our legal department and yourselves in September, 1942, and are also not in line with an undertaking then given by you to our legal department. We are instructed to inform you that the Board is not prepared to execute an order subject to the observations and conditions contained in your communication now to hand, and may consider it necessary to implement what was indicated to you in the correspondence and conversations of September, 1942. If you agree to withdraw the observations made in your last communication and to tender us a fresh order on a basis in line with the understanding reached in September, 1942, we shall be pleased to give the matter our attention."

The company did not withdraw. On Apr. 19 their cheque for £27 10s. 0d. was returned, and thereafter they received no supplies of motor spirit until July 7, by which date the Petroleum Board had ceased to control the supply of motor spirit. The company brought an action in Barnet county court claiming £1 3s. 4½d. as money overpaid in respect of short deliveries on Jan. 17, Mar. 18, Mar. 19 and Apr. 12, 1948, from vehicle 1458 amounting in all to eleven gallons. The delivery on Jan. 17 which was the last of the deliveries admitted by the Board to be short to the extent of one gallon, was alleged by the company to have been deficient to the extent of four gallons. The

other deliveries were alleged to have been deficient to the extent of two gallons on Mar. 18, and two and a half gallons on each of the other two occasions. They also claimed damages for the Board's refusal to supply the 300 gallons order on Apr. 13, 1948, and for their refusal to make any further supplies thereafter, making their total claim £200. The learned county court judge found in favour of the Board under both heads of claim.

A I will deal first with the claim for damages for refusal to supply. It was contended, in the first place, that the company were entitled to succeed by virtue of the Statute of Monopolies, 1623, s. 4, although it was conceded that the monopoly was lawfully given to the Board by virtue of the Emergency Powers (Defence) Act, 1939, s. 1 (4). A study of s. 4 of the statute of 1623 makes it clear that it affords no remedy to a trader with whom the grantee of a monopoly refuses to do business. It deals with damage caused by the creation of a monopoly. The claim based on s. 4 of the statute clearly fails.

B It was said, however, that where there is a monopoly created or recognised by an instrument having statutory force which prohibits a trader already established in business from obtaining supplies essential to his trade from any other source, there is a duty on the monopoly holder to supply the commodity against tender of the appropriate price and on compliance by the trader with any of the requirements of the relevant statutory rules and orders or other lawful directions governing the control and supply of the commodity in question, for example, in the present case, the surrender by the dealer of the requisite number of coupons. It was further contended that a breach of this duty gives the injured party a remedy in damages. Such a duty, if it exists, must in the present case be found in the orders and regulations governing petrol rationing. The Order in force on Apr. 13, 1948, was the Control of Motor Fuel Order, 1947 (No. 2058). In pt. I of this Order it is provided :

E “ (1) Except under the authority of a licence (a) no person other than a supplier shall furnish any supply of motor fuel, and no person shall acquire any such supply otherwise than from a supplier; and (b) no person shall furnish or acquire a supply of motor fuel otherwise than against the surrender of valid coupons to the supplier at the time of supply, and in accordance with any condition or instruction appearing on or attached to those coupons. (2) (1) The provisions of the preceding article shall not apply to (a) a supply of motor fuel furnished to a dealer, against the delivery by him to a supplier of coupons indicating the previous supply by him of a quantity of motor fuel not less than the quantity thereof then supplied to him (less an allowance of one per cent.), if such information as is required to be so furnished has, except in so far as the Minister may otherwise direct, been inserted by him in writing.”

F “ Dealer ” and “ supplier ” are defined in art. 35 as follows :

G “ ‘ Dealer ’ means a supplier carrying on that business as a retail business. ‘ Supplier ’ means a person carrying on the business of supplying motor fuel.”

H The Order nowhere in terms requires a supplier to supply to a dealer motor fuel equivalent in quantity to that shown on the coupons surrendered by the dealer. The failure to supply is not made an offence, nor is any such obligation placed on the Board by the Order which gave it the monopoly. This kind of question may some day in a proper case require careful consideration. With the growth of statutory corporations to which monopolies are given by the statutes creating them, it may become of supreme importance to decide, on the construction of the relevant statute, to what extent, if any, a refusal by the statutory body to do business with a particular trader may afford that trader a right of action. In the present case we are dealing with a temporary monopoly given in time of war for the safety of the realm, and I can find

nothing in the relevant orders which have been brought to our attention which affords a right of action to a dealer where the Board in the *bona fide* exercise of its discretion has imposed reasonable terms as a condition of doing business with that dealer. I, accordingly, agree with the learned county court judge that this part of the claim fails.

With regard to the claim for the return of money overpaid different considerations arise. The judge has found as a fact that the deliveries complained of were short to the extent of eleven gallons, but held that the company were precluded by the conditions of sale from recovering the money overpaid. A number of points were taken at the trial on behalf of the company in support of their contention that the conditions of sale were not binding on them and most of these points have again been relied on in this court. Some of them can be shortly disposed of. First, it was contended that the company's consent to the contract had been obtained by duress or undue influence, and that, accordingly, they were not bound by its terms. It was truly said that for a contract to be enforceable it must be freely entered into, but that does not mean that one party to a contract can escape its provisions merely because he was compelled to accept the terms of the other contracting party because there was no one else with whom he could contract for the supply of the particular commodity he required. There is here no question of force or threat of force or fear of personal suffering or abuse of legal proceedings. None of the essential elements of duress is present, nor is it a case where undue influence of one party over the other is presumed or has been proved to have been acquired and abused. Secondly, it was said that the price of the motor fuel which was paid in advance included tax, and that the company were entitled to recover that part of the money paid for motor fuel which represented tax collected from them in respect of fuel which they never received. In truth, no tax is paid or collected from the dealer. The tax is payable at an earlier stage and is merely reflected in the increased price charged to the dealer and by him to the public. There is no substance in this point. Thirdly, it was argued that the money was recoverable as on a total failure of part of the consideration. If, as I have held, the conditions of sale are binding, there has been, as I see it, no failure of consideration. There was, in truth, no contract for the delivery of 300 gallons on the dates in question. The contract was for the delivery of and payment for the quantity shown by the dip rod as being in the compartments of the wagon. The company got what by the contract they were bound to accept as good delivery. There was, accordingly, in my view, no failure of consideration. Fourthly, it is contended that the contracts under which each of the deliveries in question were made were void under the Weights and Measures Act, 1878, s. 25 (as amended by the Weights and Measures Act, 1889, s. 3), which provides :

"Every person who uses or has in his possession for use for trade any weight measure scale balance steelyard or weighing machine which is false or unjust, shall be liable to a fine not exceeding £5, or in the case of a second offence £20, and any contract bargain sale or dealing made by the same shall be void, and the weight measure scale balance or steelyard shall be liable to be forfeited."

The first question is whether, as the company contend, the tank wagon and/or dip rod either singly or in combination is a "measure" within the meaning of the section, and the next, if so, whether it was "false" or "unjust." The Act contains no definition of a "measure." It was common ground that the dip rod which is affixed to each wagon is calibrated so that it can be used to ascertain the contents of a particular wagon. There are different markings on each side of the dip rod appropriate to each compartment. A dip rod is of no use for measuring purposes save in the compartments of the particular wagon in relation to which it has been calibrated. The wagon

by itself contains no markings by which its contents can be measured. It was contended for the Board that neither the wagon nor the dip rod singly or in combination is a "measure." It was said that the wagon is merely a vessel for transporting motor fuel and that the dip rod is a "measuring instrument" within the meaning of the amending Weights and Measures Act, 1889, which is to be read together with the principal Act. By s. 35 of the Act of 1889 a

- A "measuring instrument" includes "any instrument for the measurement of length, capacity, volume, temperature, pressure, or gravity, or for the measurement and determination of electrical quantities." By s. 1 of the Weights and Measures Act, 1926, the definition is extended to include "any instrument for the measuring of superficial area, or for measurement by counting." In my view, the contention of the Board is correct. A study of the provisions of the
- B Act as a whole leads me to the conclusion that a measure of liquid connotes a simple vessel or container which by itself constitutes an independent unit of measurement. I have had the advantage of reading the judgments which are to be delivered by ASQUITH, L.J., and SINGLETON, L.J., on this part of the case, and I am content to say that I am in agreement with the reasoning by which they have arrived at the same conclusion.

- C I am, accordingly, of opinion that this contention also fails, with the result that the appeal should be dismissed.

ASQUITH, L.J. : I agree. The main question in this case is whether a contract which includes condition (1) of the conditions of sale is avoided by s. 25 or s. 29 of the Weights and Measures Act, 1878. Section 25 of that

- D Act avoids contracts made by any "measure" which any person has in his possession for use for trade, if such "measure" is "false or unjust." Section 29 avoids contracts made by a "measure" which any person has in his possession for use for trade which is not stamped as required by that section. These particular sections apply, as between "measures" and "measuring instruments," only to the former. Is the dipstick used in this case, or the tank, or the complex of dipstick plus tank, a "measure"? "Measure," as
- E contrasted with "measuring instrument," is nowhere defined in the Weights and Measures Acts, 1878, 1889, 1904 or 1926, and few cases have been decided in relation thereto as compared with those decided on weights and weighing machines, but (a) these few authorities, (b) other provisions of the Act of 1878, and (c) regulations made in 1907 all concur to suggest that a "measure" means a simple vessel or container which, when full or full up to a certain mark,
- F purports to hold a gallon or some multiple or aliquot part thereof, for instance, eight gallons, or a quart, pint, gill, etc. (a) As to the authorities, *Robinson v. Golding* (2) decided that a pint pot of milk, in fact holding, when full, a pint, but unstamped, is a "measure," so, again, a milk churn marked internally with discs purporting to show, for the purposes of trade, the quantity of milk it contains is a "measure" if used for measuring the volume of milk, but
- G not if used merely for carriage of milk; (b) the same conclusion is pointed to by such provisions of the Act of 1878 as s. 17. It is headed "Measure of capacity when used to be stricken or filled up." It deals with dry measures of capacity and provides that an imperial measure of capacity shall be, not "heaped," but either "stricken" or, if the article cannot from its size or shape "be conveniently stricken," shall be "filled in all parts as nearly to the level
- H of the brim as the size and shape of the article will admit." This, again, suggests a plain container with a mouth or brim which, when full to the brim, holds the amount it professes to hold. The Weights and Measures Regulations, 1907, embodied in S.R. & O., 1907, No. 698 (made under s. 5 of the Act of 1904), not only reinforce this suggestion, but in the section headed "Liquid Measures of Capacity" make it, to my mind, irresistible. For example, by reg. 35 :

"A glass measure shall not be stamped unless the capacity is defined either (a) by the brim of the measure, or (b) by a line at least two inches in

length, distant not less than half an inch nor more than one and a half inches from the brim."

Or reg. 38 :

"Every measure from eight gallons to a quarter gill, both inclusive, shall be tested by filling the standard with water and emptying the contents of the standard into the measure submitted for verification."

Now, the dipstick *per se* is plainly not a container, and, therefore, not a "measure." Indeed, by itself it can measure nothing, for it is useless except in combination with a tank specially adapted to it. Nor is the tank *per se* a "measure," for, although a container, it gives *per se* no indication as to what it will contain when full or full up to any given level. Is, then, the complex of dipstick plus tank a "measure" ? No, for this complex is not a simple container (and, incidentally, it is difficult to see how it could be stamped). On the other hand, the complex of the two seems to fall exactly within the class of things which is referred to in the Acts, in a manner which impliedly contrasts them with "measures," under the designation of "measuring instruments."

Section 35 of the Act of 1889 defines a "measuring instrument" as any instrument for the measurement, *inter alia*, of capacity or volume. The Act of 1926 extended the regulation-making power given by s. 5 of the Act of 1904 by enabling the Board of Trade to apply to such "measuring instruments used for trade as may be specified in the regulations" any of the provisions of the Acts of 1878 and 1904, and the Board of Trade, by art. 2 of the Measuring Instruments (Liquid Fuel and Lubricating Oil) Regulations, 1929 (S.R. & O., 1929, No. 183), applied s. 25 of the Act of 1878, among other sections, to "any instrument used in trade for the measurement of liquid fuel . . . in individual quantities not exceeding twenty gallons other than a simple independent measure." No other provision applies s. 25 (or s. 29) to "measuring instruments" as opposed to "measures." Such a composite apparatus as the dipstick and tank would be caught by the regulations of 1929 but for the words "not exceeding twenty gallons," for, as the evidence shows in this case, the apparatus was used in trade for the measurement of liquid fuel in individual quantities greatly exceeding twenty gallons, namely, 300 gallons.

For these reasons, I think the apparatus in question (1) was not a "measure", and was, therefore, not hit by the provisions of s. 25 or s. 29 of the Act of 1878 ; (2) was a "measuring instrument," but was not hit by the Liquid Fuel Regulations, 1929, for the reason just given ; and, accordingly, (3) that the contracts of sale, including condition of sale 1, are not void by reason of the Weights and Measures Acts. On this and the other points of the case I wholly concur in the judgment of my Lord, and the appeal must be dismissed.

SINGLETON, L.J. : The learned county court judge found that there were shortages in the deliveries of petrol to the company of the amounts claimed in the particulars of claim. He further found that there was no evidence before him to show that any measuring instrument of the Board was inaccurate or wrong. Now, the Board had admitted that their dipstick was out of order at the time of the first delivery of which complaint was made in the claim, and that that "would have accounted for short measure on each compartment to the extent of one gallon" : see their letter of Feb. 18, 1948. In those circumstances, the judge ought to have found that at least one gallon of the shortage in January, 1948, was due to the faulty dipstick. He might have found that the whole of the shortage (four gallons) on that delivery was due to that cause though he was not bound to do so if was of opinion that there was another cause.

The point of importance in the appeal is whether the company are bound by condition No. 1 of the conditions of sale which has already been read. They relied on the Weights and Measures Act, 1878, s. 25, and they claimed

that the dip rod (or dipstick) was a "measure" within the meaning of the word in that section, that on the Board's admission it was false or unjust (at least in regard to the January, 1948, delivery), and that the contract, bargain, sale or dealing made by it was void accordingly. If that argument is sound, the company are entitled to succeed in regard to the January delivery. Later deliveries would not be affected in view of the findings of fact to the effect that the fault in the dip rod was a temporary matter and was corrected before

- A the next delivery. Among dictionary definitions of "measure" I find the following: "An instrument for measuring," "a graduated rod, line, tape, etc.," "that by which anything is computed or estimated, or with which it is compared in respect of quantity." It might be thought that the dip rod falls within some of these. The question to be determined depends on whether the dip rod is a measure within the meaning of s. 25 of the Act of 1878.
- B The Act does not give any definition of "measure." It is to be noticed that s. 25 makes it a criminal offence for anyone to have in his possession for use for trade a measure which is false or unjust. Section 28 provides that weights and measures shall be stamped, and s. 29 provides that every measure and weight whatsoever used for trade shall be verified and stamped by an inspector with a stamp of verification under the Act, and provides penalties for breach.
- C Thus, if the dip rod is a measure within s. 25, a further penalty was incurred under s. 29. Each road tank wagon carried its own dip rod, and each dip rod was calibrated for the tank wagon to which it belonged. The vehicles differ in construction. If the dip rod has to be verified and stamped with a stamp of verification that can only be done in its relation to a particular tank wagon, from which it would seem that the dip rod is not a measure in the same sense as
- D is a pint vessel or a yard stick. It would create an impossible position if you had thousands of dip rods marked with the stamp of verification and yet varying according to the tank wagon to which each was calibrated.

The submission of the Board is that the dip rod is no more than an instrument for measuring what is in, or what is taken out of, a particular tank wagon.

- E Counsel pointed out that the difference between a measure and a measuring instrument was recognised by the legislature, and he referred to the Weights and Measures Act, 1889, s. 12, and to later enactments. Again, in 1929, the Board of Trade made regulations, the Measuring Instruments (Liquid Fuel and Lubricating Oil) Regulations, 1929, which defined a "measuring instrument" as "any instrument used in trade for the measurement of liquid fuel or lubricating oil for sale in individual quantities not exceeding twenty gallons, other than a simple independent measure to which the Weights and Measures Regulations, 1907, apply": reg. 2. See also regs. 4 and 5 and the schedule to the Order. I should add that regulations had been made by the Board of Trade under the Weights and Measures Act, 1904 (Statutory Rule and Order, 1907, No. 698), and that those regulations dealt with instruments, including measuring instruments. It is, indeed clear that there is a well recognised
- G distinction between a measure and a measuring instrument.

I have come to the conclusion that the contention of the Board is right. The difficulties of verification and stamping, and which would arise therefrom, seem to me conclusive against the argument that the dip rod is a measure within the meaning of s. 25 of the Act of 1878. I have considered whether it can be said that in the circumstances the Board cannot be heard to say that as between

H them and the company the dip rod was not a measure within the meaning of s. 25. The section is a penal section, and its terms do not apply unless the dip rod is a "measure." I do not so regard it, and I cannot see that the doctrine of estoppel can help the company. I agree that the appeal of the company should be dismissed.

Appeal dismissed with costs.

Solicitors: *E. H. Hiscocks* (for the company); *A. Davies* (for the Board).

[*Reported by C. St.J. NICHOLSON, Esq., Barrister-at-Law.*]

Re ST. LUKE'S HOSPITAL, CHELSEA. LONDON COUNTY COUNCIL *v.* WAR DAMAGE COMMISSIONERS.

[COURT OF APPEAL (Somervell and Evershed, L.J.J., and Wynn-Parry, J.), March 31, April 1, 12, 1949.]

War Damage—Temporary works payment—“Works reasonably executed for temporarily meeting the circumstances created by the damage”—Provision of alternative accommodation on the hereditament but away from site of damage—Permanent structures—War Damage Act, 1943 (c. 21), s. 6 (2). A

In 1941 the S. hospital suffered severe damage by bombing. In 1942, to bring the hospital back into use, the hospital authorities carried out certain works which involved (a) the construction, on the site of a former store room, of a new main kitchen and scullery, in place of a kitchen and scullery which had been rendered unusable, and (b) the dividing of a former ward on the ground floor into several parts which were converted into a new operating theatre, surgeon's dressing room, sterilising room, anaesthetising room, X-ray room, dark room and office, to replace those on the first floor which had been damaged. In the course of construction it was necessary to take up a timber floor, fill in the cavity with rubble and lay down a thick concrete floor, provide electric lighting, tap the electric main in the street for intake and instal heavy electric cables to the X-ray room. In respect of these works the hospital authorities claimed a temporary works payment under the War Damage Act, 1943, s. 6 (2). B

HELD: the damage contemplated by the War Damage Act, 1943, was limited to damage to land and buildings; the temporary works payment under s. 6 (2) of the Act was limited to payment of the cost of dealing in an essentially temporary manner with the direct result of such damage and did not include payment in respect of the provision of substituted accommodation erected at a distance from the damage even though it was within the curtilage of the hereditament; and, therefore, the works in question were not “works reasonably executed for temporarily meeting the circumstances created by the damage” within the meaning of s. 6 (2). C

Per curiam: The work for which payment could be made was not limited to repair, but included works of precaution, and the durability of any works done was not necessarily the test of their temporary character. D

Decision of VAISEY, J. ([1948] 2 All E.R. 444), affirmed. E

[FOR THE WAR DAMAGE ACT, 1943, s. 6 (2), see HALSBURY'S STATUTES, Vol. 36, p. 342.] F

APPEAL by the London County Council, owners of St. Luke's Hospital, Chelsea, from an order of VAISEY, J., dated July 9, 1948, and reported [1948] 2 All E.R. 444, dismissing their appeal from a determination of the War Damage Commission that certain works completed by the council were not “works reasonably executed for temporarily meeting the circumstances created by [war] damage,” within the meaning of the War Damage Act, 1943, s. 6 (2), so as to entitle the council to a temporary works payment in respect of them. The respondents, the War Damage Commission, contended that the repairs were adaptations, for the convenience of the council, of the undamaged, or comparatively undamaged, portions of the hospital. VAISEY, J., upheld the determination of the commission, and the council's appeal from his decision was now dismissed by the Court of Appeal. The facts appear in the judgment of SOMERVELL, L.J. G H

Moelwyn Hughes, K.C., and *Squibb* for the London County Council.
Rowe, K.C., and *Danckwerts* for the War Damage Commission.

Cur. adv. vult.

Apr. 12. The following judgments were read.

SOMERVELL, L.J. : This is an appeal from a decision of VAISEY, J., in an appeal by the appellants, the London County Council, on a point of law from a determination of the War Damage Commission. The right of appeal is given by the War Damage Act, 1943, s. 32 (3), and the procedure is regulated by R.S.C., Ord. 55c. The issue comes before the court by way of a Case stated by the War Damage Commission. By agreement between the parties certain correspondence was admitted by the learned judge by way of amplifying the facts as set out in the Case. I do not think any difficulty arises in the present appeal, but it is desirable, if possible, that all facts which the court may be required to consider should be contained in the Case or exhibits thereto.

It is, perhaps, unnecessary to state that the War Damage Act, 1943, provides primarily for two categories of payment, a payment for the cost of works executed for making good the damage, or a value payment when the damage involves a "total loss" as defined in s. 7 (2) of the Act. It is agreed that the damage in the present case was such that it will rank ultimately for a cost of works payment. The present appeal is not concerned with this, but with whether the London County Council can claim in respect of certain works a payment which is referred to in the Act as a "temporary works payment."

On May 11, 1941, St. Luke's Hospital, Chelsea, provided and maintained by the London County Council, sustained war damage within the meaning of the War Damage Act, 1943. The damage, caused by a high explosive bomb, was mainly to the central building. In 1942 certain works of permanent or temporary reinstatement were done as to which no question arises, and the War Damage Commission, the respondents to the appeal, admit that their cost falls within the provisions of the Act. The dispute arises as to other works which are described in para. 5 of the Case Stated, which reads as follows :

"These works, which were carried out for the purpose of affording substituted accommodation for the provision of services, were not executed by way of reinstating or repairing the parts of the damaged building in which the corresponding accommodation and services had been provided before the occurrence of the war damage, but were carried out in different parts of the building as follows : (i) the main kitchen and scullery, which had been in the basement, were constructed in a space formerly occupied by stores in the basement at the southern end of the main building ; and (ii) the operating theatre, surgeon's dressing room, sterilising room, anaesthetising room and X-ray room, dark room and office, which had been on the first floor, were constructed in a space previously occupied by a ward on the ground floor at the north end of the main building. The works relating to (i) consisted of the removal of stud and matchboard partitions which formed basement rooms, the taking up of a timber floor, the filling of the cavity with brick rubble, forming channels and putting down a concrete floor about six ins. thick, the installing of sinks, and the installing of gas, electric and general engineering services. The works relating to (ii) consisted of the division of a ground floor ward by the erection of partitions constructed of timber covered with wallboard so as to form separate rooms, the painting of the walls and doors, the provision of electric lighting, the tapping of the electric main in the street for intake, and installing heavy electric cables to the X-ray room."

The question is whether the cost of these works falls within the provisions of s. 6 (2) of the War Damage Act, 1943. The learned judge decided that it did not. The correspondence makes clear the urgent need for the reinstatement of bed accommodation at the hospital and the necessity or importance of the works in dispute if the hospital was to function.

I will now refer to the relevant provisions of the Act. Section 1 (1) (a) provides that payment shall be made in respect of "war damage to land." Section 2 defines "war damage." Nothing, I think, turns on this, but the

categories of damage must be damage to land to be within the Act. As the learned judge said ([1948] 2 All E.R. 447):

"The Act does not deal with damage to a man's pocket or to his convenience, but only with damage to his tangible property—in this case damage to his buildings."

It does not set out to make provision for the expense a man will be put to in living or carrying on his business elsewhere than in the property damaged. There is a reference in s. 2 (2) to "any physical change in land." Section 5 defines the units that are to be treated as hereditaments for payments in respect of war damage. It is common ground that the works in question were within the "developed hereditament" into which the bomb fell, though in undamaged portions of it. The case turns on s. 6, which is:

"(1) Subject to the provisions of this Part of this Act, a payment to be made thereunder shall be of one or other of the following kinds, that is to say, (a) a payment of cost of works, being a payment of an amount determined by reference to the cost of works executed for making good the damage, as provided by s. 8 of this Act; or (b) a value payment, being a payment of an amount determined by reference to the depreciation in the value of the hereditament caused by the damage, as provided by s. 10 of this Act. (2) Where either a payment of cost of works or a value payment is made in respect of war damage to a hereditament, there shall be made, in addition to that payment, a payment (in this Act referred to as a 'temporary works payment') of an amount equal to the proper cost of any works reasonably executed for temporarily meeting the circumstances created by the damage, being (a) where a payment of cost of works is made, works, other than those taken into account in computing the amount of that payment, executed between the occurrence of the damage and the time when it is made good."

Section 6 (2) (b) deals with a value payment case.

The case for the county council may be formulated as follows. These works were temporary in that they were not intended to be permanent. They were make-shifts until permanent work could be done. They were necessary if the hospital was to be brought back into use and were, therefore, reasonably executed to meet "the circumstances created by the damage." As the county council said in their statement, what was done could in no sense be regarded as the equivalent of that which was in use prior to the occurrence of the damage, or as a making good of the damage by alterations to the hereditament. If the words of s. 6 (2) are read apart from their context, the phrase "the . . . cost of any works . . . executed for temporarily meeting the circumstances created by the damage," might cover the cost to a man, whose factory had been destroyed, of putting up on a different site a building where work could be carried on. The county council do not suggest that this would be covered. They submit, however, that, if the works are within the area of the hereditament, though in an undamaged portion of it, their cost is covered. This would be illogical, but may be the effect of the words used. The words must be read in their immediate context and in the context of the Act as a whole. I agree with the learned judge that "temporarily" means that the works are to be superseded by works intended to be permanent. In the present case, when this damaged building is repaired, the substituted operating theatre will remain an operating theatre and the kitchen a kitchen capable of being used as such. The distinction which I draw is well illustrated by the learned judge's examples. Under the heading of temporary repairs he instances ([1948] 2 All E.R. 447) the insertion of fabric materials in windows to be later glazed, or the patching-up of holes in a roof which will later be re-slatted. They are "make-shifts" for meeting the physical circumstances caused by the damage where that damage

occurred, and not make-shifts constructed elsewhere, as in this case, to enable effective, or more effective, use to be made of the undamaged parts of the building, together with such damaged part as can be repaired at the time. The learned judge also, I think, rightly regarded what he described as "works of precaution" as covered by the clause. A protective fence round a crater to keep people from falling into it is a work where the damage occurred, and it temporarily meets the circumstances because, when the damage is made good, there is no danger from which people would need to be protected. Part of it, at least, would have to be removed when the crater was filled up. The fact that as a matter of physical possibility, however unlikely, the remainder or, indeed, the whole might be left standing to serve some other purpose, or no purpose, would not, I think, affect the matter.

A The learned judge's other example, an outside staircase, to take the place of an interior one which had been damaged and became insecure, was referred to in the argument as a difficult, and, perhaps, border-line case. It is distinguishable from the present case in that the work would be done to that part of the building which was damaged. It would be there to enable the building, or the upper part of it, to be used as a building, whatever purpose it were put to. It is not necessary to decide the point, but I think that, if the commission were satisfied that it was the reasonable method of meeting the physical circumstances of the damage to the staircase, it would be within the words. In both classes of case the physical circumstances created by the damage are met temporarily on the site of the damage. In most cases the works of physical necessity are removed when the damage is made good. In some cases their removal may not be a matter of physical necessity, but, looked at objectively as a part of the structure or on the land, they are there to be removed when the damage is made good. It was said that, if the narrower construction for which the War Damage Commission contend had been intended, a simpler formula would have been used. On the construction which I give to the word "temporarily," which sets the primary limits of the clause, I think the latter words are natural. "Temporarily repairing the damage" would have been too narrow, as it would have excluded the "works of precaution," to use the learned judge's phrase. The nature of the damage that might be caused could not be foreseen, and, the general limits having been set by the use of the word "temporarily," it seems to me natural that the later words should give a certain latitude.

E The conclusion to which the learned judge came, with which I agree, is reinforced by the fact that it is only "works" which are to be paid for. F It would be illogical if a factory owner, who built a shed on an undamaged part of his hereditament, could recover the cost, whereas, if he leased a shed next door, he could not. The Act is concerned with physical damage and not with the cost of alternative or substituted accommodation. I would like to add that, if the words are not construed in this sense, but cover substituted accommodation erected at a distance from the damage, I find it difficult to restrict their scope, as counsel for the county council sought to do in argument, to works within the developed hereditament. No such limitation is expressed, and it must, therefore, be implied. So far from its being necessary to give the provision reasonable effect, it would, as it seems to me, make it capricious and unfair. One man has room to put a shed in his yard, and he will or may get indemnified for the cost. Another has to put up a similar shed for a similar purpose in an empty plot he obtains near by, and he cannot get paid for it. G If the words cover substituted accommodation at a distance from the damage, I find it difficult to restrict them. H I myself am clear that they do not.

I should say a word in regard to para. 6 of the Case, which reads as follows :

"In the opinion of the commission the works referred to in para. 5 looked at as a whole would with ordinary care have an effective physical

life of about twenty-five years and some of the works would individually have a life of from forty to fifty years."

I agree with the learned judge that, if the substituted accommodation of the kind contended for by the county council was within s. 6 (2) of the Act, it would not be necessary to show that the works were likely to decay at an early date. They would, of course, have to be reasonably executed, and, therefore, not made (if there was a choice) of unnecessarily durable material. On the construction which I put on the clause, the works in this case are not within s. 6 (2) for the reasons which, I hope, I have made plain. The appeal will be dismissed.

EVERSHED, L.J. : I confess that I have felt considerable difficulty in regard to this case, and not the less so because, according to the correspondence which has been before us, the earlier view of the War Damage Commission appeared to be favourable to the council's case. But, having had the advantage of seeing in advance the judgments of my brethren and the clear conclusions they have reached, I have, on the whole, come to the conclusion that the decision of the learned judge ought not to be disturbed. In the circumstances I shall state very briefly the reasons which have led me to this conclusion.

The phrase "works reasonably executed for temporarily meeting the circumstances created by the damage" is, *prima facie*, one of broad import, and it is to be noted that it is to be contrasted with the phrase in s. 2 (1) (b)—"measures taken . . . to mitigate the consequences of such damage." I am, however, satisfied (i) that the Act does not contemplate any payment under this head in respect of losses of profit or amenities to the owner as a result of war damage, and (ii) that the "works" to be undertaken must be executed on or in the single entity, namely, the developed or undeveloped "hereditament" which has sustained the damage. The owner is, therefore, disentitled to make a claim in respect of temporary works executed by him to provide substituted accommodation for himself or his business elsewhere than on the damaged hereditament, notwithstanding that such works could, in other contexts, be fairly said to have been executed for the purpose of "temporarily meeting the circumstances created by the damage." Is he also disentitled to claim in respect of similar works executed on the "hereditament" which has been damaged, although on land separate from that on which the damaged building stands, or on a part of the damaged building or group of buildings removed from the scene of the damage? And, if not, where should the line be drawn?

I think myself that clearly the phrase in question covers something more than works of mere temporary repair or protective works—to take the examples cited during the argument, the insertion of fabric windows or the railing of a crater. In my judgment, the words are apt to cover also the case put by the learned judge of an outside staircase to take the place, temporarily, of an interior one rendered insecure, or the case put by me of the (temporary) replacement of a lift by a staircase. To some extent, therefore, regard must be had to the use and the means of user of the hereditament, and counsel for the commission conceded as much. The real difficulty to my mind, therefore, lies in deciding how far substituted accommodation of the kind above mentioned extends? Does it extend to works reasonably executed to parts of the hereditament other than those damaged for the purpose of temporarily enabling the hereditament *as a whole* to continue, more or less, to perform its previous function? On the whole, I agree that regard to the use of the buildings should be limited to their use as buildings and ought not to extend to their use for some particular business or purpose or for some special function. If this is not the correct view, then it would, at any rate, appear to follow that, so long as the works were executed in or on the hereditament in question, the "circumstances" would cover the disturbance of the particular business carried on

by the owner or the special use to which he had put the building, and (subject, of course, to the important qualification that the works must have been "reasonably executed") might entitle him to claim in respect of extensive works executed by him on other parts of the hereditament to enable him "temporarily" to continue the business or special use, and the continued use of such works would by no means be necessarily inconsistent with the restoration of the damaged part of the hereditament. I am, therefore, on the whole not prepared to say that the cost of the works here in question falls within the ambit of s. 6 (2) on the ground that they were works reasonably done to parts of the premises other than those parts damaged (or, at least, unrelated to any damage in fact done to them) in order to make the premises as a whole temporarily (*i.e.*, for the time being and not by way of permanent substitution) usable in the way in which they were being used before the damage occurred.

I only add that I agree with SOMERVELL, L.J., that the durability of any works done is not, or, at any rate, is not necessarily, the test of their temporary character. Baulks to shore up a dangerous wall must obviously be capable of lasting a very long time, and a temporary staircase must be substantial enough to bear safely any traffic to which it may be subjected. In the circumstances, I agree that the appeal ought to be dismissed.

WYNN-PARRY, J. : This appeal involves the construction of the phrase in s. 6 (2) of the War Damage Act, 1943 :

" . . . the proper cost of any works reasonably executed for temporarily meeting the circumstances created by the damage . . . "

The facts on which the appeal arises are set out in the Case Stated as amplified by the correspondence, which by agreement between the parties was read in the court below in amplification of the Case, and those facts have also been referred to by SOMERVELL, L.J., in his judgment. I need not, therefore, refer to them further.

Two possible constructions have been put forward. That put forward by counsel for the county council has been described by counsel for the commission as unreasonably wide, while that put forward by counsel for the commission has been described by counsel for the county council as unreasonably narrow. I have been unable to discover any half-way house, and I think one must choose between those two constructions. It is plain from the language of the words under consideration that the "damage" referred to is the cause and "the circumstances" referred to are the effect. The damage is the physical damage sustained by the hereditament in question while the circumstances to be met mean the position resulting from that damage. It is clear that some limit must be placed on the right of a claimant to claim for a payment as a temporary works payment in respect of the cost to him of dealing with the position created by physical damage to the hereditament. This was realised by counsel for the county council in his attractive argument, and he submitted that the limitation, but the only limitation, must be that the work should be done to or on the hereditament. Such a formula would clearly allow the cost of providing substituted accommodation, and must involve the proposition that the section intends that regard should be had to the particular user of the premises or the user for which the premises were designed or adapted at the time of or immediately preceding the damage. This proposition does not find any place in s. 6 (2) by way of express provision, and it can, therefore, be sound only if it follows by necessary implication from the language under consideration. It can, if at all, be extracted only from the words "for temporarily meeting the circumstances created by the damage." I think that, if those words were to be construed *in vacuo*, they could be said to be wide enough to warrant the proposition. But clearly those words cannot be construed *in vacuo*. They

must be considered in the light of the other relevant sections of the Act and in the light of the scheme of the Act to be deduced therefrom.

It is clear from a study of such sections as ss. 2 and 5 that the damage which is contemplated by the Act is limited to damage to land and buildings, and from a study of the scheme of the Act that damage consisting of loss or profit or the cost of providing alternative accommodation is not damage in respect of which the War Damage Commission is to be liable to make payment. From this it appears to me that what is contemplated by s. 6 (2) in providing for temporary works payments is essentially something limited in conception. A
It is the cost of dealing in an essentially temporary manner with the direct result of the damage. That does not mean that the work concerned is limited to repair. The example of railing off the crater, which was put in argument and in the judgment of the learned judge, is sufficient to demonstrate that. B
For my own part I am content to adopt the contention put forward by counsel for the War Damage Commission in his forceful argument that the phrase, "the circumstances created by the damage," was inserted in the Act because until the end of the war, during which new engines of destruction were continually being evolved, it could not be known with certainty what would be the circumstances or position resulting from particular damage. To take the simplest case, a high explosive bomb might blow a hole in a wall, but if there were gas in the bomb or if the high explosive bomb were followed by a gas bomb, or a bomb which created a high degree of radio-activity, different or additional considerations might obtain. The draftsman of the Act, therefore, may well have said deliberately to have phrased the sub-section to meet the possible, but not accurately foreseeable, results of such occurrence. So read, full effect is given to the phrase, "to meet the circumstances created by the damage," D
on the basis that it imports, as it must import, a wider meaning than mere repair of the damage, while at the same time not involving such a wide meaning as to allow of payments in respect of the provision of substituted accommodation, even within the curtilage of the hereditament.

This result avoids the illogicality which must result from the argument of counsel for the county council if one takes two possible cases which seem to me permissible to test the argument. Suppose a hereditament of considerable acreage area, on part only of which a factory is erected. Suppose the building incurs serious damage. The damage is such that it will ultimately rank for a cost of works payment, but no temporary repairs possible in war time will enable it, or, anyhow, the major part of it, to be used as a factory. There is room on the unbuilt-on part of the hereditament to construct buildings in which the apparatus and activities of the factory, or that part of it put out of action by the bomb, can be carried on as before. On the argument of counsel for the county council, if this work was done, any necessary licences being obtained, the cost would be the subject of a temporary works payment, though the result in reality is a new works arising and subsisting by the side of the ruins of the old. I cannot bring myself to believe that this is the necessary consequence of the words of s. 6 (2) of the Act, the policy of which Act is, as I have already remarked, not to provide compensation for loss of profit or the cost of the provision of alternative accommodation elsewhere. E

Contrast with this case a hereditament, consisting of a building covering the whole area of the land in question. The building receives a direct hit and is so damaged that, while it will form the subject of a cost of works payment, no work of temporary repair will enable the building to be used for its previous purpose until the permanent work of repair and reinstatement is undertaken. F
Suppose the building to have housed a factory or commercial undertaking : suppose it to have been a private dwelling-house : it matters not which. G
One thing is clear : the Act does not cover the cost of obtaining alternative accommodation. The only difference, however, between this and the previous example is that in the first there was the accident that the building did not H

cover the whole of the hereditament, while in the second case it did. If the argument of the county council is right, then in the first case the owner can claim the cost of providing substituted accommodation, while in the second case he cannot. For my part, I feel driven to the narrower construction, which, after all, is not so narrow, for it includes not merely works of repair, but works of precaution and any other work directly related to the damage as the nature of the damage requires by way of temporary work. For these reasons I would dismiss the appeal.

Appeal dismissed with costs.

Solicitors : *J. H. Pawlyn*, Solicitor to the London County Council (for the appellants) ; *The Treasury Solicitor* (for the War Damage Commission).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

VICTORIA LAUNDRY (WINDSOR), LTD. v. NEWMAN INDUSTRIES, LTD. (COULSON & CO., LTD. (Third Party)).

[COURT OF APPEAL (Tucker, Asquith and Singleton, L.JJ.), March 18, 21, 22, 23, April 12, 1949.]

Damages—Remoteness of damage—Loss of profit—No notice to defendant of special circumstances—Purchase of boiler for use in business—Need to extend business—Seller ignorant of need—Delay in delivery.

The defendants, an engineering company, agreed to sell a boiler to the plaintiffs, a company of launderers and dyers. The defendants knew at the time of the contract of the type of business carried on by the plaintiffs, that the boiler was required for that business, and that the plaintiffs wanted the boiler for immediate use. They did not know that it was required to extend the business. The boiler was damaged while being dismantled by the third party, sub-contractors employed by the defendants to load it on the plaintiffs' transport vehicle, and delay in delivery resulted :

HELD : (i) damages for loss of profit were recoverable if it was apparent to the defendants as reasonable persons that the delay in delivery was liable to lead to such loss by the plaintiffs, and it was not necessary for the defendants to be specifically informed of the particular purpose for which the boiler was required ; on the facts, the defendants had means of knowledge that some loss was likely to result ; and they were, therefore, liable to the plaintiffs.

HELD, further : the fact that the boiler only constituted a part of a profit-making machine was only significant in so far as it bore on the capacity of the defendants to foresee the consequences of non-delivery.

Hadley v. Baxendale (1854) (9 Exch. 341; 23 L.T.O.S. 69) ; *British Columbia, etc., Saw Mill Co. v. Nettleship* (1868) (L.R. 3 C.P. 499) ; and *Portman v. Middleton* (1858) (4 C.B.N.S. 322 ; 31 L.T.O.S. 152), *distinguished*.

Decision of STREATFEILD, J. ([1948] 2 All E.R. 806), reversed in part.

[AS TO DAMAGES IN CONTEMPLATION OF BOTH PARTIES WHEN CONTRACT IS MADE, see HALSBURY, Hailsham Edn., Vol. 10, pp. 97-102 ; and FOR CASES, see DIGEST, Vol. 17, pp. 93, 112, Nos. 101, 230.]

Cases referred to :

(1) *Hadley v. Baxendale*, (1854), 9 Exch. 341 ; 23 L.T.O.S. 69 ; 17 Digest 93, 101.

(2) *Portman v. Middleton*, (1858), 4 C.B.N.S. 322 ; *sub nom. Portman v. Nichol*, 31 L.T.O.S. 152 ; 17 Digest 112, 230.

- (3) *British Columbia, etc., Saw Mill Co. v. Nettleship*, (1868), L.R. 3 C.P. 499; 18 L.T. 604; 8 Digest 138, 905.
- (4) *Fletcher v. Tayleur*, (1855), 17 C.B. 21; 26 L.T.O.S. 60; 17 Digest 132, 393.
- (5) *Re Trent and Humber Co., Ex p. Cambrian Steam Packet Co.*, (1868), 4 Ch. App. 112; 19 L.T. 465; *varying*, L.R. 6 Eq. 396; 17 Digest 158, 595.
- (6) *Wilson v. General Iron Screw Colliery Co., Ltd.*, (1877), 37 L.T. 789; 17 Digest 98, 132. A
- (7) *Saint Line, Ltd. v. Richardsons, Westgarth & Co., Ltd.*, [1940] 2 K.B. 99; 163 L.T. 175; 2nd Digest Supp.
- (8) *Borries v. Hutchinson*, (1865), 18 C.B.N.S. 445; 5 New Rep. 281; 11 L.T. 771; 39 Digest 673, 2590.
- (9) *Gee v. Lancashire and Yorkshire Ry. Co.*, (1860), 6 H. & N. 211; 3 L.T. 328; 17 Digest 96, 118. B
- (10) *Cory v. Thames Ironworks Co.*, (1868), L.R. 3 Q.B. 181; 17 L.T. 495; 17 Digest 96, 115.
- (11) *Wertheim v. Chicoutimi Pulp Co.*, [1911] A.C. 301; 104 L.T. 226; 17 Digest 84, 33.
- (12) *Monarch Steamship Co., Ltd. v. A/B Karlshamns Oljefabrik*, [1949] 1 All E.R. 1. C

APPEAL by the plaintiffs against a decision of STREATFEILD, J., dated Oct. 15, 1948, and reported [1948] 2 All E.R. 806, limiting damages to £110 in respect of a breach of contract by the defendants.

The plaintiffs were a company of launderers and dyers who required a boiler for use in an extension of their business. They contracted to purchase a boiler from the defendants who employed the third party to dismantle and load the boiler on the plaintiffs' transport vehicle sent to collect it. In the course of dismantling the boiler was damaged, and delay resulted in delivery. STREATFEILD, J., held that the defendants were liable for damages for breach of contract notwithstanding that the delay arose from the fault of the third party, but that the plaintiffs were not entitled to recover as part of the damages any loss of profits resulting from the enforced delay in extending their business, such damages in his opinion being too remote. Against the second part of this judgment the plaintiffs now appealed, and the Court of Appeal allowed the appeal. D

Beney, K.C., and *John Davidson* for the plaintiffs.

Paull, K.C., and *A. J. Hodgson* for the defendants.

Caplan for the third party. E

Cur. adv. vult. F

Apr. 12. ASQUITH, L.J., read the following judgment of the court. This is an appeal by the plaintiffs against a judgment of STREATFEILD, J., in so far as that judgment limited the damages to £110 in respect of an alleged breach of contract by the defendants which is now uncontested. The breach of contract consisted in the delivery of a boiler sold by the defendants to the plaintiffs some twenty odd weeks after the time fixed by the contract for delivery. The short point is whether, in addition to the £110 awarded, the plaintiffs were entitled to claim in respect of loss of profits which they say they would have made if the boiler had been delivered punctually. G

The defendants are and were at all material times a limited company which described itself on its invoices as "Electrical and Mechanical Engineers and Manufacturers." They did not manufacture the boiler in question. They just happened to own it. The plaintiffs were at all materials times a limited company carrying on the business of laundrymen and dyers in the neighbourhood of Windsor. In January, 1946, the plaintiffs were minded to expand their H

business, and to that end required a boiler of much greater capacity than the boiler they then possessed, which was of a capacity of 1500-1600 lbs. evaporation per hour. Seeing an advertisement by the defendants on Jan. 17, 1946, of two boilers which appeared suitable (they were "vertical Cochran boilers of 8000 lbs. per hour capacity heavy steaming"), they negotiated for the purchase of one of them, and by Apr. 26, 1946, had concluded a contract for its purchase at a price of £2,150, loaded free on transport at Harpenden.

A Seeing that the issue is as to the measure of recoverable damages and the application of the rules in *Hadley v. Baxendale* (1), it is important to inquire what information the defendants possessed at the time when the contract was made as to such matters as the time at which, and the purpose for which, the plaintiffs required the boiler. The defendants knew before and at the time of the contract that the plaintiffs were laundrymen and dyers and required the boiler for purposes of their business as such. They also knew that the plaintiffs wanted the boiler for immediate use. On the latter point the correspondence is important. The contract was concluded by, and is contained in, a series of letters. In the earliest phases of the correspondence—that is, in letters of Jan. 31 and Feb. 1, 1946—which letters, as appears from their terms, followed a telephone call on the earlier date) the defendants undertook to make the earliest possible arrangements for the dismantling and removal of the boiler. The natural inference from this is that in the telephone conversation referred to the plaintiffs had conveyed to the defendants that they required the boiler urgently. Again, on Feb. 7 the plaintiffs write to the defendants: "We should appreciate your letting us know how quickly your people can dismantle it," and finally, on Apr. 26, in the concluding letter of the series by which the contract was made: "We are most anxious that this" (that is, the boiler) "should be put into use"—we call attention to this expression—"in the shortest possible space of time." Hence, up to and at the very moment when a concluded contract emerged, the plaintiffs were pressing on the defendants the need for expedition, and the last letter was a plain intimation that the boiler was wanted for immediate use. This is none the less so because when, later, the plaintiffs encountered delays in getting the necessary permits and licences, the exhortations to speed come from the other side, who wanted their money, which, in fact, they were paid in advance of delivery. The defendants knew the plaintiffs needed the boiler as soon as the delays should be overcome, and they knew by the beginning of June that such delays had by then, in fact, been overcome. The defendants did not know at the material time the precise role for which the boiler was cast in the plaintiffs' economy, *e.g.*, whether (as the fact was) it was to function in substitution for an existing boiler of inferior capacity, or in replacement of an existing boiler of equal capacity, or as an extra unit to be operated side by side with and in addition to any existing boiler. It has, indeed, been argued strenuously that, for all they knew, it might have been wanted as a "spare" or "stand-by," provided in advance to replace an existing boiler, when, perhaps some time hence, the latter should wear out, but such an intention to reserve it for future use seems quite inconsistent with the intention expressed in the letter of Apr. 26 to "put it into use in the shortest possible space of time." In this connection, certain admissions made in the course of the hearing are of vital importance. The defendants formally admitted what in their defence they had originally traversed, namely, the facts alleged in para. 2 of the statement of claim. That paragraph reads as follows:

"At the date of the contract hereinafter mentioned the defendants well knew as the fact was that the plaintiffs were launderers and dyers carrying on business at Windsor and required the said boiler for use in their said business and the said contract was made upon the basis that the said boiler was required for the said purpose."

On June 5, the plaintiffs, having heard that the boiler was ready, sent a lorry to Harpenden to take delivery. Mr. Lennard, a director of the plaintiff company, preceded the lorry in a car. He discovered on arrival that four days earlier the contractors employed by the defendants to dismantle the boiler had allowed it to fall on its side, receiving damage. Mr. Lennard declined to take delivery of the damaged boiler in its existing condition and insisted that the damage must be made good. He was, we think, justified in this attitude, since no similar article could be bought in the market. After a long wrangle, the defendants agreed to perform the necessary repairs, and, after further delay through the difficulty of finding a contractor who was free and able to perform them, completed the repairs by Oct. 28. Delivery was taken by the plaintiffs on Nov. 8 and the boiler was erected and working by early December. The plaintiffs claim, as part—the disputed part—of the damages, loss of the profits they would have earned if the machine had been delivered in early June instead of November. Evidence was led for the plaintiffs with the object of establishing that, if the boiler had been punctually delivered, then, during the twenty odd weeks between then and the time of actual delivery (1) they could have taken on a very large number of new customers in the course of their laundry business, the demand for laundry services at that time being insatiable—they did, in fact, take on extra staff in the expectation of its delivery—and (2) that they could and would have accepted a number of highly lucrative dyeing contracts for the Ministry of Supply. In the statement of claim, para. 10, the loss of profits under the first of these heads was quantified at £16 a week and under the second at £262 a week. The evidence, however, which promised to be voluminous, had not gone very far when counsel for the defendants submitted that in law no loss of profits was recoverable at all, and that to continue to hear evidence as to its *quantum* was mere waste of time. He suggested that the question of remoteness of damage under this head should be decided on the existing materials, including the admissions to which we have referred. The learned judge accepted counsel's submission, and on that basis awarded £110 damages under certain minor heads, but nothing in respect of loss of profits, which he held to be too remote. It is from that decision that the plaintiffs now appeal. It was a necessary consequence of the course which the case took that no evidence was given on behalf of the defendants, and only part of the evidence available to the plaintiffs. It should be observed parenthetically that the defendants had added as third party the contractors who, by dropping the boiler, so causing the injuries to it, prevented its delivery in early June and caused the defendants to break their contract. Those third party proceedings have been adjourned pending the hearing of the present appeal as between the plaintiffs and the defendants. The third party, nevertheless, was served with notice of appeal by the defendants and argument was heard for him at the hearing of the appeal.

The ground of the learned judge's decision, which we consider more fully later, may be summarised as follows. He took the view that the loss of profit claimed was due to special circumstances, and, therefore, recoverable, if at all, only under the second rule in *Hadley v. Baxendale* (1), and not recoverable in the present case because such special circumstances were not at the time of the contract communicated to the defendants. He also attached much significance to the fact that the object supplied was not a self-sufficient profit-making article, but part of a larger profit-making whole, and cited in this connection *Portman v. Middleton* (2) and *British Columbia, etc., Saw Mill Co. v. Nettleship* (3). Before commenting on the learned judge's reasoning, we must refer to some of the authorities. The authorities on recovery of loss of profits as a head of damage are not easy to reconcile. At one end of the scale stand cases where there has been non-delivery or delayed delivery of what is on the face of it obviously a profit-earning chattel, for instance, a merchant or passenger ship: see *Fletcher v. Tayleur* (4); *Re Trent and Humber Co., Ex*

p. Cambrian Steam Packet Co. (5); or some essential part of such a ship, for instance, a propeller, in *Wilson v. General Iron Screw Colliery Co.* (6), or engines, *Saint Line, Ltd. v. Richardsons, Westgarth & Co., Ltd.* (7). In such cases loss of profit has rarely been refused. A second and intermediate class of case in which loss of profit has often been awarded is where ordinary mercantile goods have been sold to a merchant with knowledge by the vendor that the purchaser wanted them for re-sale, at all events, where there was no market in which the purchaser could buy similar goods against the contract on the seller's default: see, for instance, *Borries v. Hutchinson* (8). At the other end of the scale are cases where the defendant is not a vendor of the goods, but a carrier: see, for instance, *Hadley v. Baxendale* (1) and *Gee v. Lancashire and Yorkshire Ry. Co.* (9). In such cases the courts have been slow to allow loss of profit as an item of damage. This was not, it would seem, because a different principle applies in such cases, but because the application of the same principle leads to different results. A carrier commonly knows less than a seller about the purposes for which the buyer or consignee needs the goods or about other "special circumstances" which may cause exceptional loss if due delivery is withheld.

Three of the authorities call for more detailed examination. First comes *Hadley v. Baxendale* (1) itself. Familiar though it is, we should first recall the memorable sentence of ALDERSON, B. (9 Exch. 354) in which the main principles laid down in this case are enshrined:

"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i.e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."

The limb of this sentence prefaced by "either" embodies the so-called "first" rule; that prefaced by "or" the "second." In considering the meaning and application of these rules it is essential to bear clearly in mind the facts on which *Hadley v. Baxendale* (1) proceeded. The headnote is definitely misleading in so far as it says that the defendants' clerk, who attended at the office, was told that the mill was stopped and that the shaft must be delivered immediately. The same allegation figures in the statement of facts which are said (*ibid.*, 344) to have "appeared" at the trial before CROMPTON, J. If the Court of Exchequer had accepted these facts as established, the court must, one would suppose, have decided the case the other way round—must, that is, have held the damage claimed was recoverable under the second rule, but it is reasonably plain from the judgment of ALDERSON, B., that the court rejected this evidence, for he says (*ibid.*, 355):

"... we find that the only circumstances here communicated by the plaintiffs to the defendants at the time the contract was made, were, that the article to be carried was the broken shaft of a mill, and that the plaintiffs were the millers of that mill."

It is on this basis of fact that he proceeds to ask:

"... how do these circumstances show reasonably that the profits of the mill must be stopped by an unreasonable delay in the delivery of the broken shaft by the carrier to the third person?"

British Columbia, etc., Saw Mill Co. v. Nettleship (3) annexes to the principle laid down in *Hadley v. Baxendale* (1) a rider to the effect that, where knowledge of special circumstances is relied on as enhancing the damages recoverable, that knowledge must have been brought home to the defendant at the time

of the contract and in such circumstances that the defendant impliedly undertook to bear any special loss referable to a breach in those special circumstances. The knowledge which was lacking in that case on the part of the defendant was knowledge that the particular box of machinery negligently lost by the defendant was one without which the rest of the machinery could not be put together and would, therefore, be useless. *Cory v. Thames Ironworks Co.* (10) —a case strongly relied on by the plaintiffs—presented the peculiarity that the parties contemplated respectively different profit-making uses of the chattel sold by the defendants to the plaintiff. It was the hull of a boom derrick and was delivered late. The plaintiffs were coal merchants, and the obvious use, and that to which the defendants believed it was to be put, was that of a coal store. The plaintiffs, on the other hand, the buyers, in fact intended to use it for transshipping coals from colliers to barges, a quite unprecedented use for a chattel of this kind, one quite unsuspected by the sellers, and one calculated to yield much higher profits. The case, accordingly, decides, *inter alia*, what is the measure of damages recoverable when the parties are not *ad idem* in their contemplation of the use for which the article is needed. It was decided that in such a case no loss was recoverable beyond what would have resulted if the intended use had been that reasonably within the contemplation of the defendants, which in that case was the "obvious" use. This special complicating factor, the divergence between the knowledge and contemplation of the parties respectively, has somewhat obscured the general importance of the decision, which is in effect that the facts of the case brought it within the first rule of *Hadley v. Baxendale* (1) and enabled the plaintiff to recover loss of such profits as would have arisen from the normal and obvious use of the article. The "natural consequence," said BLACKBURN, J. (L.R. 3 Q.B. 191), of not delivering the derrick was that £420 representing those normal profits was lost. COCKBURN, C.J., interposing during the argument (*ibid.*, 187), made the significant observation :

"No doubt, in order to recover damage arising from a special purpose the buyer must have communicated the special purpose to the seller ; but there is one thing which must always be in the knowledge of both parties, which is, that the thing is bought for the purpose of being in some way or other profitably applied."

This observation is apposite to the present case. These three cases have on many occasions been approved by the House of Lords without any material qualification.

What propositions applicable to the present case emerge from the authorities as a whole, including those analysed above ? We think they include the following : (1) It is well settled that the governing purpose of damages is to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights had been observed : *Wertheim v. Chicoutimi Pulp Co.* (11). This purpose, if relentlessly pursued, would provide him with a complete indemnity for all loss *de facto* resulting from a particular breach, however improbable, however unpredictable. This, in contract at least, is recognised as too harsh a rule. Hence, (2) : In cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach. (3) What was at that time reasonably foreseeable depends on the knowledge then possessed by the parties, or, at all events, by the party who later commits the breach. (4) For this purpose, knowledge "possessed" is of two kinds—one imputed, the other actual. Everyone, as a reasonable person, is taken to know the "ordinary course of things" and consequently what loss is liable to result from a breach of that ordinary course. This is the subject-matter of the "first rule" in *Hadley v. Baxendale* (1), but to this knowledge, which a contract-breaker is assumed to possess whether he actually

possesses it or not, there may have to be added in a particular case knowledge which he actually possesses of special circumstances outside the "ordinary course of things" of such a kind that a breach in those special circumstances would be liable to cause more loss. Such a case attracts the operation of the "second rule" so as to make additional loss also recoverable. (5) In order to make the contract-breaker liable under either rule it is not necessary that he should actually have asked himself what loss is liable to result from a breach. As has often been pointed out, parties at the time of contracting contemplate, not the breach of the contract, but its performance. It suffices that, if he had considered the question, he would as a reasonable man have concluded that the loss in question was liable to result: see certain observations of LORD DU PARCQ in *Monarch Steamship Co., Ltd. v. A/B Karlshamns Oljefrabriker* ([1949] 1 All E.R. 19). (6) Nor, finally, to make a particular loss recoverable, need it be proved that on a given state of knowledge the defendant could, as a reasonable man, foresee that a breach must necessarily result in that loss. It is enough if he could foresee it was likely so to result. It is enough, to borrow from the language of LORD DU PARCQ in the same case, if the loss (or some factor without which it would not have occurred) is a "serious possibility" or a "real danger." For short, we have used the word "liable" to result. Possibly the colloquialism "on the cards" indicates the shade of meaning with some approach to accuracy.

If these, indeed, are the principles applicable, what is the effect of their application to the facts of the present case? We have, at the beginning of this judgment, summarised the main relevant facts. The defendants were an engineering company supplying a boiler to a laundry. We reject the submission for the defendants that an engineering company knows no more than the plain man about boilers or the purposes to which they are commonly put by different classes of purchasers, including laundries. The defendant company were not, it is true, manufacturers of this boiler or dealers in boilers, but they gave a highly technical and comprehensive description of this boiler to the plaintiffs by letter of Jan. 19, 1946, and offered both to dismantle the boiler at Harpenden and to re-erect it on the plaintiffs' premises. Of the uses or purposes to which boilers are put, they would clearly know more than the uninstructed layman. Again, they knew they were supplying the boiler to a company carrying on the business of laundrymen and dyers, for use in that business. The obvious use of a boiler, in such a business, is surely to boil water for the purpose of washing or dyeing. A laundry might conceivably buy a boiler for some other purpose, for instance, to work radiators or warm bath water for the comfort of its employees or directors, or to use for research, or to exhibit in a museum. All these purposes are possible, but the first is the obvious purpose which, in the case of a laundry, leaps to the average eye. If the purpose then be to wash or dye, why does the company want to wash or dye, unless for purposes of business advantage, in which term we, for the purposes of the rest of this judgment, include maintenance or increase of profit or reduction of loss? We shall speak henceforward not of loss of profit, but of "loss of business." No commercial concern commonly purchases for the purposes of its business a very large and expensive structure like this—a boiler nineteen feet high and costing over £2,000—with any other motive, and no supplier, let alone an engineering company, which has promised delivery of such an article by a particular date with knowledge that it was to be put into use immediately on delivery, can reasonably contend that it could not foresee that loss of business (in the sense indicated above) would be liable to result to the purchaser from a long delay in the delivery thereof. The suggestion that, for all the supplier knew, the boiler might have been needed simply as a "stand-by," to be used in a possibly distant future, is gratuitous and was plainly negated by the terms of the letter of Apr. 26, 1946.

Since we are differing from a carefully reasoned judgment, we think it due to the learned judge to indicate the grounds of our dissent. In that judgment, after stressing the fact that the defendants were not manufacturers of this boiler or of any boilers (a fact which is indisputable), nor (what is disputable) people possessing any special knowledge not common to the general public of boilers or laundries as possible users thereof, he goes on to say ([1948] 2 All E.R. 809) :

"That is the general principle and I think that the principle running through the cases is that, if there is nothing unusual, if it is a normal user of the plant in question, it may well be that the parties must be taken to contemplate that a loss of profits may result from the non-delivery, or the delay in delivery, of the particular article. On the other hand, if there are—as I think there are here—special circumstances, I do not think that the defendants are liable for loss of profits unless the special circumstances were brought to their notice. In looking at the cases, I think there is a distinction between the supply of a part of the profit-making machine, as against the profit-making machine itself . . ."

Then, after referring to *Portman v. Middleton* (2) he continues (*ibid.*) :

"It is to be observed that, not only must the circumstances be known to the supplier or the carrier, but they must be such that the object must be taken to have been within the contemplation of both parties. I do not think that on the facts it can be said that it was within the contemplation of the suppliers that any delay in the delivery of this boiler was going to lead necessarily to loss of profits. There was nothing that I know of in the evidence to indicate how the boiler was to be used or whether delivery of it by a particular day would necessarily be vital to the earning of profits. I agree that it was no part of the contract and cannot be taken to have been the basis of the contract that the laundry would be unable to work if there was a delay in the delivery of the boiler, or that the laundry was extending its business or had any special contracts which could be fulfilled only by getting delivery of this boiler. In my view, therefore, this case falls within the second rule of *Hadley v. Baxendale* (1) under which the defendants would not be liable for the payment of damages for loss of profits unless there were evidence before the court—which there is not—that the special purpose of this boiler was drawn to their attention and that they contracted on the basis that delay in the delivery would make them liable to payment of loss of profits."

The answer to this reasoning has largely been anticipated in what has been said above, but we would wish to add, first, that the learned judge appears to infer that because certain "special circumstances" were, in his view, not "drawn to the notice of" the defendants, and, therefore, in his view, the operation of the "second rule" was excluded, *ergo*, nothing in respect of loss of business can be recovered under the "first rule." This inference is, in our view, no more justified in the present case than it was in *Cory v. Thames Ironworks Co.* (10). Secondly, while it is not wholly clear what were the "special circumstances" on the non-communication of which the learned judge relied, it would seem that they were or included the following :—(a) the "circumstance" that delay in delivering the boiler was going to lead "necessarily" to loss of profits, but the true criterion is surely not what was bound "necessarily" to result, but what was likely or liable to do so, and we think that it was amply conveyed to the defendants by what was communicated to them (plus what was patent without express communication) that delay in delivery was likely to lead to "loss of business"; (b) the "circumstance" that the plaintiffs needed the boiler "to extend their business." It was surely not necessary for the defendants to be specifically informed of this as a precondition of being liable for loss of business. Reasonable persons in the shoes

of the defendants must be taken to foresee, without any express intimation, that a laundry which, at a time when there was a famine of laundry facilities, was paying £2,000 odd for plant and intended at such a time to put such plant "into use" immediately, would be likely to suffer in pocket from five months' delay in delivery of the plant in question, whether they intended by means of it to extend their business, or merely to maintain it, or to reduce a loss ; (c) the "circumstance" that the plaintiffs had the assured expectation of special contracts, which they could only fulfil by securing punctual delivery of the boiler. Here, no doubt, the learned judge had in mind the particularly lucrative dyeing contracts to which the plaintiffs looked forward and which they mention in para. 10 of the statement of claim. We agree that in order that the plaintiffs should recover specifically and as such the profits expected on these contracts, the defendants would have had to know, at the time of their agreement with the plaintiffs, of the prospect and terms of such contracts. We also agree that they did not, in fact, know these things. It does not, however, follow that the plaintiffs are precluded from recovering some general (and perhaps conjectural) sum for loss of business in respect of dyeing contracts to be reasonably expected any more than in respect of laundering contracts to be reasonably expected. Thirdly, the other point on which STREATFEILD, J., largely based his judgment was that there is a critical difference between the measure of damages applicable when the defendant defaults in supplying a self-contained profit-earning whole and when he defaults in supplying a part of that whole. In our view, there is no intrinsic magic, in this connection, in the whole as against a part. The fact that a part only is involved is only significant in so far as it bears on the capacity of the supplier to foresee the consequences of non-delivery. If it is clear from the nature of the part (or the supplier of it is informed) that its non-delivery will have the same effect as non-delivery of the whole, his liability will be the same as if he had defaulted in delivering the whole. The cases of *Hadley v. Baxendale* (1), *British Columbia, etc. Saw Mill Co. v. Nettleship* (3) and *Portman v. Middleton* (2) which were so strongly relied on for the defence and by the learned judge, were all cases in which, through want of a part, catastrophic results ensued, in that a whole concern was paralysed or sterilised—a mill stopped, a complex of machinery unable to be assembled, a threshing machine unable to be delivered in time for the harvest, and, therefore, useless. In all three cases the defendants were absolved from liability to compensate the plaintiffs for the resulting loss of business, not because what they had failed to deliver was a part, but because there had been nothing to convey to them that want of that part would stultify the whole business of the person for whose benefit the part was contracted for. There is no resemblance between these cases and the present, in which, while there was no question of a total stoppage resulting from non-delivery, yet there were ample means of knowledge on the part of the defendants that business loss of some sort would be likely to result to the plaintiffs from the defendants' default in performing their contract.

We are, therefore, of opinion that the appeal should be allowed and the issue referred to an official referee as to what damage, if any, is recoverable in addition to the £110 awarded by the learned trial judge. The official referee would assess those damages in consonance with the findings in this judgment as to what the defendants knew or must be taken to have known at the material time, either party to be at liberty to call evidence as to the *quantum* of the damage in dispute.

Appeal allowed with costs. Costs on the issue of profit damages to be reserved to the official referee. No order as to third party costs of appeal.

Solicitors : *Kenneth Brown, Baker, Baker* (for the plaintiffs) ; *Braikenridge & Edwards*, agents for *Veale & Co.*, Bristol (for the defendants) ; *J. G. Bosman, Robinson & Co.* (for the third party).

[*Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.*]

ATTORNEY-GENERAL v. HUNTER.

[KING'S BENCH DIVISION (Morris, J.), March 22, 23, 24, 1949.]

Customs—Smuggling—Forfeiture of vessel—Vessel owned by foreign citizen—Vessel proceeding outside permitted limit of navigation—Vessel “having had on board prohibited spirits”—“Use in importation of prohibited goods”—Transshipment of prohibited goods outside territorial waters—Vessel found in British port—Customs Consolidation Act, 1876 (c. 36), ss. 169, 170, 179, 202—General Regulations of Board of Customs, dated Aug. 31, 1895, reg. 3.

The defendant, who claimed to be a naturalised American citizen, was the owner of a motor vessel, the Taku, of registered tonnage 17.81 gross, a decked boat. In conjunction with others he prepared a scheme for smuggling wines and spirits from the Continent to England without payment of customs duties. In pursuance of this scheme, the Taku, on the occasion in question, went from Portsmouth to Cherbourg, took on board a quantity of spirits, liqueurs and wines there, and returned from Cherbourg to a rendezvous at sea outside territorial waters where the cargo was transferred to a landing craft which went to a point on the English coast where her cargo was landed and transferred to a lorry. Meanwhile, the Taku had set off to return to the French coast, but, owing to engine trouble, she altered course and put in at Portsmouth where she was seized by Customs officers. The Attorney-General claimed forfeiture of the vessel under ss. 169, 170, 172, 179 and 202 of the Customs Consolidation Act, 1876.

By s. 169 of the Act of 1876, the Commissioners of Customs are empowered to make such regulations as they deem expedient in respect of vessels and boats of a certain size and reg. 3 of the General Regulations of the Board of Customs, dated Aug. 31, 1895, provides that decked boats and vessels not exceeding forty tons burden are limited to employment within a distance of twelve leagues seaward of the part of the English coast in question save under special licence of the commissioners under reg. 7. Note 1 to the regulations provides that they are not to be applicable to boats and vessels exclusively used as private yachts and not for hire. Section 170 of the Act provides: “Every ship or boat which shall be used or employed in any manner contrary to the regulations prescribed by the Commissioners of Customs shall be liable to forfeiture . . .” If reg. 3 applied to the Taku, she had been used contrary to reg. 3, because she had proceeded to Cherbourg, more than twelve leagues from the English coast, without special licence of the commissioners, but the defendant contended that his vessel was not liable to forfeiture under s. 170 as having infringed reg. 3, because the words “every ship or boat” must be construed as applying only to British vessels and not to vessels owned by foreigners. He further submitted that his vessel was used exclusively as a private yacht.

Section 179 of the Act provides: “If any ship or boat shall be found or discovered to have been within any port, bay, harbour, river, or creek of the United Kingdom or the Channel Islands, or within three leagues of the coast thereof if belonging wholly or in part to British subjects, or having half the persons on board subjects of Her Majesty, or within one league if not British, having . . . or having had on board . . . or conveying or having conveyed in any manner any spirits . . . which . . . are prohibited to be imported into the United Kingdom . . . every such ship or boat . . . shall be forfeited . . .” By s. 202: “All ships, boats . . . made use of in the importation, landing, removal, or conveyance of any uncustomed, prohibited, restricted, or other goods liable to forfeiture under the Customs Acts shall be forfeited . . .” The defendant contended that since the motor vessel transhipped the cargo outside territorial waters, these sections had no application.

HELD : (i) the words "every ship or boat" in s. 170 included vessels owned by a person who was not a British subject, and, therefore, the Taku was liable to forfeiture, she having been used in a manner contrary to regulations made under the section.

(ii) the note to the regulations made under s. 169 was not to be regarded as a part of the regulations, but only as an explanatory memorandum, but, in any event, at the material time the vessel was being used for smuggling and not exclusively as a private yacht.

(iii) the words "having had on board" in s. 179 meant "having had on board whether within or without territorial waters," and the Taku was shown to have had on board prohibited spirits and so was liable to forfeiture under the section.

A.-G. v. Schiers (1835) (2 Cr. M. & R. 286), *applied*.

(iv) the vessel had been made use of in the importation and landing of uncustomed, prohibited or restricted goods, within the meaning of s. 202, and was liable to forfeiture under that section also.

[FOR THE CUSTOMS CONSOLIDATION ACT, 1876, ss. 169, 170, 172, 179 and 202, see HALSBURY'S STATUTES, Vol. 16, pp. 334, 335, 336 and 343.]

Case referred to :

(1) *A.-G. v. Schiers*, (1835), 2 Cr. M. & R. 286 ; 1 Gale 223.

INFORMATION filed by the Attorney-General claiming forfeiture of a motor vessel, the Taku, and of a binnacle and compass used in the carrying of prohibited goods and seized by the Commissioners of Customs on Apr. 14, 1947.

A writ of appraisalment had been issued on Dec. 11, 1947, on the information of a Customs officer, and pursuant to that writ an indenture was made on Dec. 20, 1947, valuing and appraising the ship and goods as set out in the indenture. The court held that the ship, binnacle and compass were forfeited to His Majesty. The facts appear in the headnote.

H. L. Parker and *J. G. Foster* for the Attorney-General.

Thorp, K.C., and *Eric Myers* for the defendant.

MORRIS, J., stated the facts and continued : It is said on behalf of the Attorney-General that forfeiture of the Taku and of the binnacle and compass should take place under ss. 172, 179 and 202, and under ss. 169 and 170 of the Customs Consolidation Act, 1876, for the reason that the Taku is shown to have proceeded beyond the limits permitted to a vessel of her size, having regard to the regulations issued pursuant to s. 169. On behalf of the defendant it is said that he is an American citizen. A passport issued by the United States consulate in Southampton to him is produced and is relied on in support of that contention. It is said that, if he is, the Taku is not a British ship, and the regulations issued under s. 169 do not apply, and that, therefore, forfeiture under ss. 169 and 170 cannot be ordered. As regards ss. 172, 179 and 202, it is said that the evidence shows that the transfer of the liquor from the Taku to the landing craft took place more than one league from the British coast and that, therefore, nothing was done by the Taku within territorial waters which renders her liable to seizure. I think the evidence does support the view that the trans-shipment did take place more than a league from the coast.

The provisions of s. 169 of the Act give power to the commissioners to make such regulations as they deem expedient in respect of certain vessels, and the General Regulations of the Board of Customs, which were issued on Aug. 31, 1895, provide :

"3. Decked boats and vessels not exceeding forty tons burden shall be limited to a distance of four leagues seaward from that part of the coast of England which is between the North Foreland and Beachy Head, and to a distance of twelve leagues seaward from any other part of the coast of the

United Kingdom, except those part of the coasts of England and Ireland which lie opposite to each other . . . 5. Boats and vessels not exceeding forty tons burden belonging to the Channel Islands, shall be limited only northward of the said islands, but in that direction they shall not exceed a distance of four leagues from the Casquets . . . 7. No extension of the limits . . . assigned will be allowed in respect of any boats or vessels unless on special application from the owner or the owners thereof to the commissioners, setting forth the ground of such application, and the purposes and object thereof; whereupon if it shall appear to the satisfaction of the . . . commissioners, or to the collector, that the grounds of such application are reasonable, and that (having regard to the general character of the master and owners of such boats or vessels, and other special circumstances) any extension of the prescribed limits may properly be conceded, the said commissioners, or the collector, will exercise the power vested in them of granting special licences . . .”

No special licence was granted in respect of the Taku. At the end of the regulations are two notes. Note 1 provides :

“The foregoing regulations are not to be applicable to boats and vessels exclusively used as private yachts and not for hire, nor to boats or vessels *bona fide* employed in fishing and for no other purpose, nor to boats or vessels assisting ships in distress beyond the prescribed limits, provided it shall appear to the satisfaction of the commissioners of Her Majesty's Customs, or to the collector, that the said boats or vessels were so employed, and that the masters and owners are men of good character.”

It is submitted by counsel for the defendant that that note forms a part of the regulations. Counsel for the Attorney-General submits that it is not a part of the regulations, but is to be regarded as being by way of an explanatory memorandum showing the circumstances in which the commissioners would act, given certain conditions. Counsel for the defendant submits that, if the note applies as being a part of the regulations, the Taku comes within the words “vessels exclusively used as private yachts and not for hire.” He points to certain documents which have been produced on which the word “yacht” appears, and he submits that the Taku was a private yacht and that it was not for hire, and that, therefore, the regulations do not apply. That is a submission which he makes as a subsidiary one to his main submission that neither these regulations nor s. 169 applies save in the case of a British ship. My attention was also directed to a General Order of the Board of Customs, dated Oct. 21, 1901 (S.R. & O., 1901, No. 757), which cancelled reg. 6 of the regulations of Aug. 31, 1895, and provided that :

“ . . . for the future all vessels and boats not exceeding 100 tons burden, belonging to the Isle of Man, be governed generally by the regulations mentioned in so far as they relate to craft belonging to the mainland of Great Britain and Ireland.”

By s. 169 of the Act of 1876 : “The commissioners of Customs may from time to time . . . make such general regulations as they shall deem expedient in respect of vessels and boats” of a certain size. Counsel for the Attorney-General submits that, in the absence of a contrary indication, that section must apply territorially, and that, therefore, it applies to all vessels and boats within the jurisdiction. It is apparent from a consideration of many of the sections of this Act that in places the legislature is dealing with all ships and that in other places it is dealing only with British ships. For example, in s. 140 there is a reference to : “All trade by sea from any one part of the United Kingdom to any other part thereof” being “deemed to be a coasting trade,” and the section provides that “all ships while employed therein shall be deemed to be coasting ships.” Section 141 begins with the words : “Every foreign ship proceeding

either with cargo or passengers or in ballast . . .” I have just referred to the opening words of s. 169, and s. 170 begins with the words: “Every ship or boat . . .”, and goes on to enact that every such ship or boat:

“ . . . used or employed in any manner contrary to the regulations prescribed by the Commissioners of Customs shall be liable to forfeiture, unless the same shall have been specially licensed by the Commissioners of Customs to be so used or employed, as next hereinafter provided.”

A Section 175 refers to: “The owner of every ship belonging wholly or in part to any of Her Majesty’s subjects . . .”; and s. 176 speaks of:

B “The owner of every vessel or boat, whether decked, partially decked, or open, not being of the burden of one hundred tons, and not belonging to any ship, shall paint or cause to be painted upon the outside of the stern of such boat in white or yellow Roman letters, of not less than two inches in length, on a black ground, the name of the owner of the boat and the port or place to which she belongs, on pain of the forfeiture of such boat not so marked, wherever the same shall be found.”

C That section, in my judgment, is of interest because the legislature speaks of “every vessel or boat” and refers to a port or place to which a vessel belongs. Those words clearly indicate the port or place where the vessel is based, or where she is normally kept or is ordinarily to be found. They do not have reference to ownership. Then it has been pointed out in the course of the submissions that s. 179 refers both to ships belonging to Her Majesty’s subjects and to foreign ships. Section 180 begins with the words: “If any ship or boat D belonging wholly or in part to Her Majesty’s subjects . . .” Section 183 refers to “any ship or boat,” and s. 202 to: “All ships, boats, carriages, or other conveyances . . .”

A consideration of the various sections in this part of the Act shows that when Parliament is limiting the application of the Act to foreign ships or in any other way, it so provides. In s. 169 it refers to vessels and boats without E a limitation, and, therefore, in my judgment, the regulations made under that section have effect territorially and have such effect even if it is shown that the craft or vessel otherwise covered by the regulations was owned by someone not a British subject.

In regard to the point taken by counsel for the defendant about Note 1, in my judgment Note 1 is to be regarded, not as a part of the regulations, F but as being by way of an explanatory memorandum. If the note did apply, counsel has submitted that the Taku came within the words “exclusively used as private yachts and not for hire.” The Taku does not appear to have been on hire, but on the facts before me it would be quite unjustifiable, in my judgment, to hold that she was used exclusively as a private yacht. The G Taku was used, on the occasion when she went to Cherbourg, as part of a highly organised plan whereby, in order, presumably, that gain should be made, prohibited and uncustomed goods should be brought into this country. In my judgment, it would be a violation of common-sense to say that the Taku on those night adventures was being used exclusively as a private yacht. In reference to this part of the case it is said by counsel for the defendant that the Attorney-General ought not to be allowed to rely on the breach of the H regulations, because documents are in existence which appear to suggest that it was shown on a previous occasion that the Taku was going from Ramsgate to Boulogne. It is said that Boulogne would be at a distance from the British coast beyond that permitted, apart from licence, to the Taku, and my attention was directed to a clearance label issued on Aug. 14, 1946, at Ramsgate and to a document issued on July 25, 1946, also at Ramsgate, which is a document by which an officer of His Majesty’s Customs and Excise gave a bill of health to the Taku. The part of the document relied on is as follows:

"Whereas the vessel called the Yacht 44259 of London, whose master is Lieut. P. Steinmann, is about to sail from the port of Ramsgate on July 25, 1946, and from thence for Boulogne and other places beyond the seas, with five persons on board including the master, Now know ye that I, the said officer, do hereby make it known to all men, and pledge my faith thereunto, that at the time of granting these presents, no plague, epidemic, cholera, nor any dangerous or contagious disorder exists in the above port or neighbourhood."

I think I can take notice of the fact that there must be many departments of His Majesty's Customs and Excise, and it is an unreasonable assumption to say that because somebody, in the performance of his duties in July, 1946, said that there was no plague, epidemic or cholera in Ramsgate, he was recognising that the Taku had authority to go to Boulogne. Whoever gave that certificate was not under a duty to ask the defendant whether he had complied with the law. The defendant could not take that bill of health as being some kind of permission from the Customs and Excise to do that which he was not entitled to do without a licence. There is, in my judgment, no validity in the contention advanced on the basis of those documents. It is said that the Customs authorities knew that the Taku was going to France. When analysed, it appears that somebody, giving a bill of health, did so on a form in which it is said that the Taku is going to Boulogne, but that does not imply that he is saying "and you need not comply with any other regulations imposed by the Customs Act."

In my judgment, whether the defendant is or is not an American citizen, forfeiture is justifiable because of a breach of the regulations made under s. 169.

I pass now to s. 202. That provides, so far as its operative words are concerned :

"All ships, boats, carriages, or other conveyances, together with all horses and other animals and things made use of in the importation landing removal or conveyance of any uncustomed prohibited restricted or other goods liable to forfeiture under the Customs Acts shall be forfeited, and all ships, boats, goods, carriages, or other conveyances, together with all horses and other animals and things liable to forfeiture, and all persons liable to be detained for any offence under the Customs Acts, or any other Act whereby officers of Customs are authorised to seize or detain persons, goods, or other things, shall or may be seized or detained in any place either upon land or water by any of the following persons . . . and all ships, boats, goods, carriages, or other conveyances, together with all horses and other animals and things so seized, shall forthwith be delivered into the care of the collector or other proper officer of Customs at the nearest Customs House ; and the forfeiture of any ship, boat, carriage, animal, or other things shall be deemed to include the tackle, apparel and furniture thereof, and the forfeiture of any goods shall be deemed to include the package in which the same are found and all the contents thereof."

The binnacle and compass were clearly used on the landing craft, and were, therefore, used in the importation and landing of goods which have been shown to be prohibited and uncustomed goods. The arguments of counsel for the defendant on this part of the case cover the claims for forfeiture both under s. 179 and under s. 202. The operative words of s. 179 are these :

"If any ship or boat shall be found or discovered to have been within any port, bay, harbour, river, or creek, of the United Kingdom or the Channel Islands, or within three leagues of the coast thereof if belonging wholly or in part to British subjects, or having half the persons on board subjects of Her Majesty, or within one league if not British, having . . . or having had on board . . . or conveying or having conveyed in any manner any spirits . . . which . . . are prohibited to be imported into the United Kingdom . . .

every such ship or boat, together with any such spirits . . . shall be forfeited."

A Counsel for the defendant submits that, if the transshipment occurred more than one league from the British coast, s. 179 does not apply, and that on similar reasoning s. 202 also does not apply. It is said by counsel that the Taku transferred her cargo to another vessel outside territorial waters and beyond the one league from the coast mentioned in the section, and that the words in the section "having had on board" are not referable to a case where a ship comes within territorial waters without prohibited goods on board but has had them outside the limit, but only refer to a case where a vessel comes within the one league with the prohibited goods and then is either found with the goods on board or within the distance of one league having had the prohibited goods on board within one league. B Counsel also said that, in any event, when the Taku put into Portsmouth she did not come in as part of the voyage in the course of which the liquor had been transhipped, his ground for that contention being that the defendant said that the Taku had set course for Le Havre and had then changed course. In my judgment, that is not a valid contention. Even assuming that the Taku did start for Le Havre, this was clearly the same C voyage. Then counsel said that when the Taku, outside the limit of the league from the shore, was transshipping the liquor, she was not dealing with prohibited goods. In my judgment, one must look at the whole of the facts and one must have in mind that this was a planned adventure and that it was one part of the plan that at a particular point these goods intended to be landed on the English coast without paying duty should be transhipped. In my judgment, that D contention of counsel is not a valid one.

I now come to the main submission on this part of the case. This point came up for consideration in *Attorney-General v. Schiers* (1) in the Court of Exchequer. Counsel for the defendant submits that the words of LORD ABINGER, C.B., in giving the decision of the court, should be regarded as being *obiter* in reference to this matter. The section then in question was not s. 179 E of the Act of 1876, but s. 2 of the statute 3 and 4 Will. IV, c. 53. The wording of that section does not seem to me to differ in essentials, for present purposes, from the section that I am now considering, namely, s. 179. Section 2 of the older Act states :

F " . . . any such vessel or boat so found or discovered, having on board or in any manner attached thereto, or having had on board or in any manner attached thereto, or conveying or having conveyed in any manner, any spirits . . . "

In *Attorney-General v. Schiers* (1), the very point now raised was before the court. On the night of July 6, 1834, between twelve and one o'clock, certain Customs officers went on board a boat called *La Marie*, which was about G half a mile from the English shore. The officers found on the boat three French and two English sailors, without provisions or compass, and 71 casks of foreign spirits. Before they got to the shore they saw another boat, called the *Bien Aimé*, lying becalmed at a distance of three quarters of a mile from them and within half a mile of the shore. An officer went to that boat and when he boarded her he found there were marks of casks in the hold and a strong smell of spirits, H while the clothes of the boat's crew and other clear indications left no doubt that the boat first seized had taken contraband spirits from the *Bien Aimé*. The defendant's counsel contended that to support a condemnation under the statute on which the information was founded it must appear that the vessel had the prohibited goods actually on board within a league of the coast, and of that he contended there was no proof. The Chief Baron told the jury that, in his opinion, the vessel was liable to forfeiture if she unshipped the prohibited goods more than a league off the coast and afterwards came within that distance.

Then the matter was left to the jury who found a verdict for the Crown. The direction of the Chief Baron was of the essence of the case. The jury might have come to the conclusion that there was a transhipment beyond the league and that thereafter the *Bien Aimé* had come within territorial waters. It was obvious, therefore, that the jury must be told whether, if that was the view they formed on the facts, a forfeiture according to law should take place, and if the Chief Baron had wrongly directed the jury, a rule would have been granted. A
In the reserved judgment LORD ABINGER, C.B., said (2 Cr. M. & R. 288) :

“ In this case we delayed granting a rule until we had looked more fully into the statute. On looking into it we think there is no foundation for the distinction taken by *Mr. Jervis*. The provision which renders a vessel liable to forfeiture, having had contraband goods on board before entering the prohibited limits, is applicable only to the particular voyage in which she both discharges the goods and enters the prohibited limits. It cannot be supposed that the legislature contemplated anything so absurd as to provide against the case of a vessel having had prohibited goods on board somewhere or other twenty years before, and then coming, twenty years afterwards, within a league of the coast. The statute seems indeed to be directed against the very case of a vessel, having had goods on board in prohibited packages, discharging them before she enters the specified limits, and then following, to assist in the landing or receive back the crew. There will therefore be no rule.” B C

In my judgment, for the reasons I have given, that decision is directly in point in regard to the contention now raised, and, therefore, the words “ having had on board ” ought not, in my judgment, to be limited in the way suggested by counsel for the defendant who is, in effect, asking that the court should say that those words should be read as though they were “ having within the distance of one league had on board.” Parliament did not so enact. In my judgment, the provisions of ss. 179 and 202 are applicable to the facts of the present case. Under s. 202 it seems to me plain that the *Taku* was made use D E
of in the importation and landing of uncustomed, prohibited or restricted goods.

It is all the more plain that that is so because the court knows that this was a plan devised in England with reference to craft in England, one of which craft was to go over to the French coast and then return, and, which craft in fact, did return to Portsmouth Harbour. Those considerations are not in themselves conclusive in regard to this section, but they make it all the more plain, in my judgment, F
that this craft was “ made use of.” For these reasons the forfeiture is justifiable, whatever be the nationality of the defendant, and, therefore, I do not find it necessary to deal with that part of the case, and I declare and adjudge that the motor vessel and the binnacle and compass remain forfeited to His Majesty.

Declaration accordingly. G

Solicitors : *Sir Nazeby Harrington*, Solicitor for the Customs and Excise (for the Attorney-General) ; *S. Myers & Son* (for the defendant).

[Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.]

Re PRESS CAPS, LTD.

[COURT OF APPEAL (Somervell and Evershed, L.J.J., and Wynn-Parry, J.), April 8, 11, 1949.]

Company—Compulsory acquisition of shares—Scheme—Dissenting shareholder—Fairness of scheme—Stock Exchange values of shares—Companies Act, 1948 (c. 38), s. 209 (1) (6).

A The M.B. Co., Ltd., offered to acquire all the fully paid ordinary shares of P.C., Ltd., and to allot for every hundred 5s. ordinary shares in P.C., Ltd., seven £1 ordinary shares in the M.B. company. This scheme was based on a value of 7s. each for the ordinary shares of P.C., Ltd., being 9d. above the market value, and a value of £5 each for the shares of the M.B. company, the mean market quotation of which on the material date was £5 5s. There were 1,116 shareholders of P.C., Ltd., and all accepted the offer except one who applied under s. 209 (1) of the Companies Act, 1948, for an order that he was not bound to accept the offer.

B HELD: (i) it was not established on the facts that the scheme was unfair.

C (ii) it was right to take the Stock Exchange values of the shares at the material time as the basis of the terms of the transfer, and, therefore, the application must be refused.

Dictum of MAUGHAM, J., in Re Hoare & Co., Ltd. (1933) (150 L.T. 375), approved.

[AS TO POWER TO ACQUIRE SHARES OF A DISSENTING SHAREHOLDER, see HALSBURY, Hailsham Edn., Vol. 5, pp. 800, 801, para. 1373; and FOR CASES, see DIGEST Supp.]

Cases referred to:

(1) *Re Hoare & Co., Ltd.*, (1933) 150 L.T. 374; Digest Supp.

(2) *Re Evertite Locknuts, Ltd.*, [1945] 1 All E.R. 401; [1945] Ch. 220; 172 L.T. 378; 2nd Digest Supp.

E APPEAL by the Metal Box Co., Ltd. (the “transferee company”) from a decision of VAISEY, J., dated Jan. 18, 1949, declaring that a dissenting shareholder was not bound to accept an offer made by the Metal Box Co. to acquire his shares in Press Caps, Ltd. (the “transferor” company) under s. 209 (1) of the Companies Act, 1948. The Court of Appeal held that the shareholder had failed to show that the proposal was unfair and allowed the appeal. The facts appear in the judgment of SOMERVELL, L.J.

Upjohn, K.C., and *T. D. Divine* for the transferee company.

Raymond Jennings, K.C., and *Hesketh* for the dissenting shareholder.

G SOMERVELL, L.J.: This case turns on an originating summons taken out under s. 209 (1) of the Companies Act, 1948, which confers a power to acquire the shares of shareholders who dissent from a scheme by which one company desires to obtain the transfer to itself of the shares or a class of shares in another company. In its application to offers made before the Companies Act, 1948, was passed, certain amendments are made by sub-s. (6) which make s. 209 (1) read in precisely the same words as s. 155 (1) of the Companies Act, 1929, which was the section in operation at the time when the offer which we have to consider was made. The relevant parts of s. 155 (1) are as follows:

“Where a scheme or contract involving the transfer of shares or any class of shares in a company (in this section referred to as ‘the transferor company’) to another company, whether a company within the meaning of this Act or not (in this section referred to as ‘the transferee company’), has, within four months after the making of the offer in that behalf by the transferee company been approved by the holders of not less than nine-tenths in value of the shares affected, the transferee company may, at any

time within two months after the expiration of the said four months, give notice in the prescribed manner to any dissenting shareholder that it desires to acquire his shares, and where such a notice is given the transferee company shall, unless on an application made by the dissenting shareholder within one month from the date on which the notice was given the court thinks fit to order otherwise, be entitled and bound to acquire those shares on the terms on which under the scheme or contract the shares of the approving shareholders are to be transferred to the transferee company."

In the present case the Metal Box Co., the transferee company, put forward a scheme for acquiring the total shareholding of Press Caps, Ltd., the transferor company, the offer being contained in a document dated Dec. 10, 1947, in the following terms :

"The Metal Box Co., Ltd., offers to acquire from the respective holders thereof the 17,232 fully paid 10% cumulative participating preference shares of 5s. each and the 500,000 fully paid ordinary shares of 5s. each issued by Press Caps, Ltd., upon the following terms. (2) Ordinary shares. For every hundred fully paid ordinary shares of 5s. each held by the holder thereof in the undertaking of Press Caps, Ltd., the Metal Box Co., Ltd., is prepared to allot and issue to such holder in exchange therefor seven fully paid ordinary shares of £1 each in the undertaking of the Metal Box Co., Ltd. The exchange of shares in the proportion before mentioned is based on a value of 7s. each for the ordinary shares of Press Caps, Ltd., being ninepence above the estimated market value and a value of £5 each for the ordinary shares of the Metal Box Co., Ltd., the mean market quotation of which on Dec. 1, 1947, was £5 5s. 0d. The holders of the said preference and ordinary shares of Press Caps, Ltd., will be entitled to receive and retain all dividends of Press Caps, Ltd., in respect of the year ended June 30, 1947, declared at the 1947 annual general meeting."

As a result of that document, some 95.5 per cent. in number and 96.8 per cent. in value of the shareholding accepted the offer. There followed a notice to dissenting shareholders, informing them that, unless they assented, their shares would be compulsorily acquired. Some of them voluntarily accepted the offer, and other shares were compulsorily acquired without applying to the court under s. 155 (1) of the Act of 1929, but the present applicant, a dissenting shareholder, applied to the court under that part of the section which enables the court to order that their shares shall not be compulsorily acquired.

The case in which the broad general principle was laid down and was decided by MAUGHAM, J., in 1933 is *Re Hoare & Co., Ltd.* (1). That was an application of a similar kind in respect of a scheme. In the course of his judgment, MAUGHAM, J., after referring to the fact that an application of this kind can only come before the court when ninety per cent. or more of the shareholders have accepted the offer, said (150 L.T. 375) :

"Accordingly, without expressing a final opinion on the matter, because there may be special circumstances in special cases, I am unable to see that I have any right to order otherwise in such a case as I have before me, unless it is affirmatively established that, notwithstanding the views of a very large majority of shareholders, the scheme is unfair."

I accept that criterion and, therefore, I turn to the reasons which are submitted on behalf of the applicants for saying that the offer here is unfair. The main point made, which was dealt with by VAISEY, J., is based on the balance sheet of 1947 which has this item : "Freehold property—at cost, less depreciation, as at July 1, 1946, £29,708 17s. 0d." There is a small addition during the year, a sum of £458 is written off, and a figure of £29,349 13s. 6d. appears as the freehold property at cost, less depreciation. It is common ground that the value of that freehold property was a very much larger figure, and was actually in

the neighbourhood of £90,000. As I read the learned judge's judgment, it was because of that under-valuation that he made an order in favour of the applicant, and where I differ from the learned judge is that I cannot accept his view of the inference that should be drawn from this entry in the balance sheet. He says, and I think this is the key to the difference between the view I take and the view that he took :

A "If you find admitted so large a discrepancy as an under-valuation of the most important asset in the balance sheet of this company, an admitted under-valuation of no less than £60,000, I should have thought that threw a great deal of doubt on the appropriateness of the balance sheet as an estimate of value, and through that, therefore, it also threw doubt on the market prices of the shares."

B With respect, I cannot regard this figure in the balance sheet as a valuation. It does not purport to be. If, in making this offer, the Metal Box Co., Ltd., had said : "The freehold property of this company is worth to-day £30,000," all the strictures which the learned judge makes and all the conclusions which he draws would have had the greatest possible force, but this figure in the balance sheet in accordance with what is very common practice does not appear
C as a valuation of the property as at the date of the balance sheet, but is cost less depreciation. Therefore, it does not seem to me that there is anything misleading about it. That being so, the reasons which led the learned judge to the conclusion which he formed really go. It was said that certain expressions in his judgment suggested that he was applying what I may call a subjective test rather than an objective test, that is to say, whether the shareholder was
D being reasonable, or acting on a reasonable ground, in not wanting his shares purchased. The learned judge referred to the decision of MAUGHAM, J., but I do not think that the words which he relied on could really be taken out of the general setting of his judgment and repeated as the principle which he applied.

I am strengthened in that by a sentence from the judgment of VAISEY, J., in *Re Evertite Locknuts, Ltd.* (2), to which the learned judge himself referred,
E and in which he said ([1945] 1 All E.R. 403) :

"At the same time, if I were to accede to this present application, it seems to me that the whole matter would be left in a condition of quite intolerable uncertainty, and that it cannot be right that one shareholder owning one-seven-hundredth part of the shares affected by the proposal
F should be entitled to stand out against the decision of the 699/700ths of the share capital, merely because he has, as he thinks, been left somewhat in the dark in regard to the material facts."

In addition to the points to which I have referred, counsel for the transferee company also relied on these matters. He said that the valuation paid was more favourable, having regard to the Stock Exchange prices, than appeared
G in the offer. The offer referred to mean prices, whereas if you sought to sell a share in the transferor company you would get 5s. 9d. only. Therefore the 7s. was 1s. 3d. above the selling price ; and, with regard to the Metal Box Co., the five guineas again was the mean price, and if you sought to buy a share in the Metal Box Co. you would have to pay £5 7s. 6d. He also relied on the evidence of Mr. Ryan, a director of the respondent company who was cross-
H examined on his affidavit. Mr. Ryan said that the figure for patents and goodwill was an over-valuation, because the patents were running out and the position, at any rate as regards a considerable part of the business of Press Caps, Ltd., was that they were marketing articles manufactured for them by the Metal Box Co. That contract was running out shortly and it was a matter for the directors of the Metal Box Co. to consider whether they should or should not renew it. He also relied on the fact that the directors of Press Caps, Ltd., who at that time had no common director with the Metal Box Co.,

sent a letter which was enclosed with the offer, strongly recommending the offer: "Your directors have very carefully considered the offer and they are unanimous in their strong recommendation for its acceptance." No doubt could possibly be thrown on the *bona fides* of that recommendation. Counsel for the applicant pointed out that, as appears from the last paragraph of the document, the directors were getting compensation, some of which had been agreed and some of which was left outstanding, but I think counsel for the transferee company is entitled to rely on that as supporting the view that this was a fair offer. On these matters, therefore, the onus being on the applicant, he has not satisfied me that this offer was not a fair offer. I say that assuming that it has got to be fair to each individual shareholder, and each individual shareholder of small or moderately small parcels of shares. There is no evidence here that any one shareholder held a controlling interest.

Counsel for the applicant submitted that to take the Stock Exchange valuation was wrong, because s. 155 (1) refers to a scheme or contract in the singular. He said it contemplated a transaction other than that which, in fact, took place or would normally take place, but a transaction in which the shareholders as a body (no-one on this argument, having a controlling interest) were entitled to receive their proportions of what it might be assumed a purchaser would give for getting a controlling interest. I cannot myself see anything in the section which justifies that submission, but it is unnecessary to decide that point, because, assuming such a construction is possible, I am satisfied here that, having regard to the amount—some 25 per cent. or thereabouts—by which the sum offered was above the Stock Exchange relative buying and selling values, counsel for the applicant has failed to discharge the onus of showing that the offer was unfair, even on that assumed construction of the Act. There was no evidence which would enable the court to put any figure on what extra amount, in the case of a company of this kind and in the condition in which it was, would have been given by somebody getting control. If the contract to which Mr. Ryan referred was an important part of their business and was just running out, it might be very difficult to find anybody who would be willing to purchase a controlling interest.

Counsel's second submission was that in a case of this sort more detailed information should be given than was given here. I do not think that that submission helps him, partly, perhaps, because of the way in which I regard the item against which most complaint was made. It seems to me that if in the year 1947 someone sees a freehold property valued at cost, that is the plainest possible indication, unless there are some exceptional circumstances, that it will be worth in the market more than the figure that appears in the balance sheet, and if any of the people who received this offer were interested in following up the matter, a perusal of back balance sheets would show when the property was bought and what it cost. The broad relation between that figure and its valuation to-day would have been readily apprehended.

Counsel finally took the point that this is a matter of discretion and that we ought not to interfere with the learned judge's exercise of his discretion. That is an important consideration, but I think that it is a case in which it is right to come to a different conclusion, because I take a different view of the facts and the evidence on affidavit as it has been put before the court by the applicant. It is true there was the oral evidence of Mr. Ryan, but on that there is no difference and the learned judge did not refer to it in any detail, but I have come to the conclusion that the documents which have been put forward do not justify a conclusion that the offer was unfair. For these reasons, I think it is right that this court should allow the appeal and make the appropriate order on that basis.

EVERSHED, L.J. : I agree. This is a case in which an offer was made, pursuant to what is now s. 209 (1) of the Companies Act, 1948, to acquire

500,000 ordinary shares at 5s. from 1,116 holders. It is, of course, of the first importance to note that, of that 1,116, 1,115 have by now regarded the offer as one which they could fairly and properly accept. One has held out. In those circumstances, I regard as the appropriate guide to providing the answer to the application the language of MAUGHAM, J., which my brother has already read. In the light of that language, I, first of all, fail to find any such special circumstances in the present case as I think the learned judge had there in mind, with the result that, in my judgment, the onus on the single recusant is a heavy one. But counsel for the applicant has said that, nevertheless, in the end it is a matter for the discretion of the learned judge and that we ought not to disturb the exercise by him of his discretion. With the greatest respect to the learned judge, I do not think in this case that is a satisfactory answer, for I think that the learned judge took a view which was not justified on one particular matter in evidence, namely, the figure appearing in the Press Caps Co.'s last balance sheet as representing cost plus additions, less depreciation, of the freehold property. On the evidence it appeared that the property, in fact, is worth some three times the sum so arrived at in the balance sheet. I agree with what SOMERVELL, L.J., has said, that the figure in the balance sheet does not purport to be a valuation. I think, the learned judge misdirected himself by regarding it as being a valuation which was put to the shareholders as a relevant matter of fact for their consideration in determining whether or no to accept the offer. He was, therefore, led to conclude that that figure represented (and I use his own words) a gross under-valuation of the most important asset in the Press Cap Co.'s undertaking. Of course, one can well understand that, if a contract has been secured by some gross under-valuation on a material matter represented to the transferee, the court would be likely enough to say: "This contract is not one which I will enforce on an unwilling seller," but without repeating what has fallen from SOMERVELL, L.J., I venture to think that is not the right approach to this particular case. Indeed, counsel for the applicant has somewhat shifted his ground before this court, because the main burden of his argument has been that, in the circumstances of this case, to have taken as the basis of the offer the Stock Exchange valuations of the shares in the respective companies was unfair because this is an offer in which it is necessary, on the face of it, for the offeror to say: "I wish to acquire the entire shareholding of the transferor company," so that all the shareholders in that company are invited to join together in transferring to the transferee company the entire issued share capital and with it the control of the transferor company which that entire shareholding confers. Since, it is said, the Stock Exchange valuation neglects the element of control, it is in such a case not a fair approach or a fair basis for the offer. I would prefer to express no view whether in cases of this kind it is right that no element of control should be taken into account in making the offer, because in this case it seems to me the answer is provided in two ways—first, by a return to what I have already said, that since 1,115 shareholders out of 1,116 have accepted the offer, *prima facie* we should take it as fair and, to borrow the language of MAUGHAM, J., the court ought not to set up its own view of the fairness of the scheme in opposition to so very large a majority of the shareholders who are concerned, and, secondly, the figures do give a substantial, or, at least, by no means a negligible, addition to the price which would be arrived at by a simple calculation on Stock Exchange prices. I, therefore, think that counsel for the applicant, assuming in his favour that his premise is correct, fails to discharge the onus laid on him of showing that this scheme is not fair, and that the court, accordingly, ought to "order otherwise" within the terms of the section.

Counsel for the applicant invited the court to impose a greater stringency in the matter of disclosure on companies when an objector such as his client in the present case applies under the present section. The question of disclosure

of documents is not one which is directly raised in this case and I do not think it would be right for me or for the court in the present circumstances to express any view on that matter. I am satisfied that there is no such absence of disclosure in the present case as would justify the court in saying that counsel has discharged the onus of showing the scheme unfair. For those reasons, as well as those already given, I think the learned judge was in error, and I would, therefore, allow the appeal.

A

WYNN-PARRY, J. : I agree. I think, with respect, MAUGHAM, J., stated the correct test in *Re Hoare & Co., Ltd.* (1), namely, that where the statutory majority have accepted the offer, the onus must rest on the applicant to satisfy the court that the price offered is unfair. He says (150 L.T. 375) :

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"The other conclusion I draw is this, that again *prima facie* the court ought to regard the scheme as a fair one inasmuch as it seems to me impossible to suppose that the court, in the absence of very strong grounds, is to be entitled to set up its own view of the fairness of the scheme in opposition to so very large a majority of the shareholders who are concerned. Accordingly, without expressing a final opinion on the matter, because there may be special circumstances in special cases, I am unable to see that I have any right to order otherwise in such a case as I have before me, unless it is affirmatively established that, notwithstanding the views of a very large majority of the shareholders, the scheme is unfair."

VAISEY, J., accepted this test, but, with all respect, in my view he failed to apply it. He says :

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"... I think all I have to be satisfied is that there is a reasonable ground to suppose that these shares are being taken over at less than what the shareholder, at any rate, thinks is their proper price, and I have further, I think, to make up my mind that the shareholder's belief in the inadequacy of the price is one which is not a mere matter of doubt or speculation but is based upon some reason and some intelligible ground."

It is true that later the learned judge says :

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"I think all I should say is I take the view here that there was an inadequacy of price, which may be quite small, but, in my judgment, is not really a trifle,"

but, again, that is linked up with his view that the real test is what the shareholder says, because he continues and refers to something "which justifies this shareholder in saying : 'I will not be coerced. I will not have my shares expropriated. I will stand where I am. I know more about this property and the value of it than the other shareholders who have walked into this scheme like a flock of sheep.'"

H

In my view, he is substituting the view of the shareholder for the view of the court. A valuation is only an expression of opinion. It may be made on one of a number of bases, but the final test of what is the value of a thing is what it will fetch if sold. In some cases a sale has to take place, as one knows who exercises the administrative jurisdiction of the Chancery Division, but if there exists a market, as, for instance, the Stock Exchange in the case of shares in respect of which there is a quotation or in respect of which there is permission to deal, there may be no need to sell, and *prima facie* the Stock Exchange markings can be taken as a satisfactory indication of the value of the shares in question. For that reason alone it appears to me, with respect, that the view of MAUGHAM, J., as to where the onus lies under the section is justified. It, therefore, follows that to succeed the applicant must go behind the Stock Exchange prices, and that, undoubtedly, is a heavy task.

A It is alleged here that the balance sheet does not represent the true position. The learned judge seems to treat the balance sheet as containing a valuation of the freehold property. I do not so read it. The statement in the balance sheet does no more than accurately represent the state of the freehold property account in the books of the company. It is no more a valuation than the items: "Patents and goodwill—at cost less amounts written off—as at July 1, 1946, £45,113 5s. 0d." The evidence on that item satisfies me that there is ground for saying that that asset was not, at the date of the balance sheet, worth anything like £45,000. The result, therefore, is that if one has to write up the one item, one must write down the other. Thus, it seems to me that when one regards the balance sheet in the light of the evidence, it affords the applicant no sufficient ground for saying that he has discharged the onus which lies on him.

B It was argued by counsel for the applicant that VAISEY, J., had exercised his discretion and that we should not interfere with that exercise, but, as I have said, in my view, the learned judge misdirected himself because he treated the balance sheet as containing a valuation of the freehold property and, with all respect to him, I think that his whole judgment is coloured by this. In my view, the applicant has failed to discharge the admittedly heavy onus which lies on him. As regards counsel's argument on the question of control, I agree with what has been said by SOMERVELL, L.J., and I do not desire to add anything on that point. For these reasons, I agree that the appeal should be allowed.

D Solicitors: *Reynolds, Gorst & Porter* (for the transferee company); *Tyrrell Lewis & Co.* (for the dissenting shareholder).

Appeal allowed: no order as to costs.

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

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NAGY v. CO-OPERATIVE PRESS, LTD.

[COURT OF APPEAL (Somervell and Cohen, L.JJ.), April 13, 1949.]

F *Practice—Trial—Jury—Default in delivery of defence—Plaintiff's right to trial by jury—R.S.C., Ord. 27, r. 11—R.S.C., Ord. 30, r. 1 (a).*

G By R.S.C., Ord. 27, r. 11: "... if the defendant makes default in delivering a defence, the plaintiff may set down the action on motion for judgment, and such judgment shall be given as upon the statement of claim the court or a judge shall consider the plaintiff to be entitled." By R.S.C., Ord. 30, r. 1 (a): "Within seven days from the time when the pleadings shall be deemed to be closed, the plaintiff shall take out a summons for directions returnable in not less than seven days."

H In a libel action in which the plaintiff delivered a statement of claim claiming an injunction and damages, the defendants failed to deliver a defence. Instead of moving for judgment under R.S.C., Ord. 27, r. 11, the plaintiff took out a summons for directions and applied for the action to be tried by a judge and jury.

HELD: (i) R.S.C., Ord. 27, r. 11, was merely permissive and did not exclusively provide for the rights which a plaintiff might exercise where there was default in delivery of defence, and a plaintiff who was within the rule could exercise rights other than those which the rule gave him.

Morse v. Frost ([1927] 1 K.B. 231; 136 L.T. 299), *applied*.

(ii) where, through the fault of the defendant, the pleadings were not closed, R.S.C., Ord. 30, r. 1 (a), did not prevent the plaintiff from applying

for such directions as were appropriate to the position as it had arisen as the result of the defendant's inaction.

(iii) assuming that the plaintiff was not entitled to a summons for direction under R.S.C., Ord. 30, r. 1 (a), as the pleadings were not closed, nevertheless, as he was claiming damages and there was an issue outstanding, he was entitled to have his action set down for trial before a judge and jury and the court had inherent jurisdiction to make such an order.

[AS TO SUMMONS FOR DIRECTIONS, see HALSBURY, Hailsham Edn., Vol. 26, pp. 51, 52, paras. 81, 83.

FOR R.S.C., ORD. 27, r. 11, AND ORD. 30, r. 1 (a), see THE ANNUAL PRACTICE, 1948, pp. 476 and 512.]

Cases referred to :

(1) *Morse v. Frost*, [1927] 1 K.B. 231 ; 136 L.T. 299 ; Digest, Practice 547, 2079.

(2) *New Brunswick Ry. Co. v. British & French Trust Corp., Ltd.*, [1938] 4 All E.R. 747 ; [1939] A.C. 1 ; 160 L.T. 137 ; Digest Supp.

(3) *Henly v. Evening Standard*, (1942), Annual Practice, 1948, 639 n.

INTERLOCUTORY APPEAL by the defendants in a libel action from an order of BIRKETT, J., dated Mar. 18, 1949, confirming an order of Master O'Donnell, dated Feb. 28, 1949, that the action be tried by a judge and special jury.

The plaintiff delivered a statement of claim, claiming an injunction and damages, but the defendants failed to deliver a defence. The plaintiff thereupon took out a summons for directions, on which the order complained of was made. The defendants contended that the only step which the plaintiff could take in the circumstances was to move for judgment under R.S.C., Ord. 27, r. 11. The Court of Appeal now held that R.S.C., Ord. 27, r. 11, was merely permissive, and that the plaintiff was entitled to the order for which he applied. The facts appear in the judgment of SOMERVELL, L.J.

Pritt, K.C., and *John Thompson* for the defendants.

Quintin Hogg for the plaintiff.

SOMERVELL, L.J. : This interlocutory appeal arises in a libel action, and the parties to that action and the nature of the libel are irrelevant to the issue we have to decide. The point raised is one of importance and turns on the construction of certain Rules of the Supreme Court.

The plaintiff, in his statement of claim, claimed an injunction and damages. The defendants put in no defence. That brought the matter within R.S.C., Ord. 27, which deals with default of plea. It is common ground that the rule of R.S.C., Ord. 27, which is applicable is r. 11, which provides so far as is material :

" . . . if the defendant makes default in delivering a defence, the plaintiff may set down the action on motion for judgment, and such judgment shall be given as upon the statement of claim the court or a judge shall consider the plaintiff to be entitled."

The plaintiff did not proceed under that rule. He did not move for judgment, but he applied for directions to Master O'Donnell and asked that the action be tried in Middlesex by a judge and a special jury. Master O'Donnell made an order on those lines, and from that order the defendants appealed to BIRKETT, J. The learned judge dismissed the appeal, and the defendants now appeal to this court.

The first question is whether R.S.C., Ord. 27, r. 11, prescribes the only step which a plaintiff in an action covered by the rule can take when there is default in delivery of defence. That turns on the words, "the plaintiff may set down the action on motion for judgment." Counsel for the defendants submitted that the word "may" was used there because a plaintiff cannot be compelled to go on with

the proceedings which he has started. Counsel for the plaintiff submits that another course of procedure is open to the plaintiff, *viz.*, the course which he took here of applying for and obtaining an order for the trial of the action before a judge and jury. Although the rules at the time were different, I think that that issue is concluded in favour of counsel for the plaintiff by the decision of this court in *Morse v. Frost* (1). The issue arose there under R.S.C., Ord. 27, r. 4, which, as counsel for the defendants rightly pointed out, is in different terms. That rule deals with the case where the plaintiff's claim is for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and the defendant makes default in delivering his defence. It provides that :

" . . . the plaintiff may enter an interlocutory judgment against the defendant or defendants, and a writ of inquiry shall issue to assess the value of the goods, and the damages, or the damages only, as the case may be."

If the plaintiff proceeded under that part of the rule, he would, as I understand it, get an interlocutory judgment which would be what I may call an administrative matter. The rule, however, goes on :

" But the court or a judge may order that, instead of a writ of inquiry, the value and amount of damages, or either of them, shall be ascertained in any way which the court or judge may direct."

There are no such words as those final words in R.S.C., Ord. 27, r. 11, and, if the decision of the court in *Morse v. Frost* (1) had been based on the existence of those words in r. 4, it would not have covered 'the present case, but, as I read the judgments, it was not by that process of reasoning that the court arrived at their decision. What had happened there was that a plaintiff, being certainly within R.S.C., Ord. 27, r. 4, in the sense that he could have taken advantage of any rights which r. 4 gave him, d'd not do so, but gave notice for trial under R.S.C., Ord. 36, r. 11. That rule has been altered since then, and there were words at the end of it at that time which provided that notice of trial could be given at any time after the issues of fact were ready for trial. BANKES, L.J., in his judgment, said ([1927] 1 K.B. 234) :

" It is not necessary to decide whether Ord. 27, r. 13, gives the plaintiff the alternative right he claims, because I think Ord. 36, r. 11, does enable him to go before a judge and jury."

After reading the relevant part of that rule, he continued (*ibid.*) :

" In this case a statement of claim has been delivered, but there has been no defence ; so the plaintiff may, if he likes, enter an interlocutory judgment ; but he is not bound to do that, because, in my opinion, ' the issues of fact are ready for trial ' within the meaning of Ord. 36, r. 11. The statement of claim raises issues which are not disposed of. The amount of the damages is in issue, and so are the facts on which the special damages are founded. But even if no special damages were claimed there would still be an issue, because, although liability is admitted in the absence of a defence, the amount of damages is still in dispute. The plaintiff is therefore entitled to have the action set down for trial before a judge and a jury, and in my opinion it should be tried before a common jury."

ATKIN, L.J., said that he was of the same opinion, and added (*ibid.*, 235) :

" But where damages are at stake to the very considerable amount claimed in this action, the case may properly be tried before a judge and jury in open court."

SARGANT, L.J., agreed.

It seems to me that *Morse v. Frost* (1) clearly decided that, although one was within R.S.C., Ord. 27, r. 4, one had the right, under the rule dealing with

notices for trial, to give notice of trial, and that right was not derived from any of the later words which occur in r. 4 but do not occur in R.S.C., Ord. 27, r. 11, but existed because the plaintiff was not confined within r. 4. He could exercise rights other than those which that rule gave him. I think, therefore, that that decision applies and settles the first point, *viz.*, that R.S.C., Ord. 27, r. 11, does not exclusively provide for the rights which the plaintiff may exercise.

Counsel for the defendants next submits that the words on which the court proceeded in *Morse v. Frost* (1) in saying that the plaintiff could give notice of trial do not occur in the present R.S.C., Ord. 36, r. 11, or r. 11A. I agree that that is so, but I think that before one gets to that point it is necessary to consider R.S.C., Ord. 30, on which counsel for the defendants also bases an argument. He said that there was no jurisdiction in the master to hear an application by the plaintiff for a summons for directions because R.S.C., Ord. 30, r. 1 (a) says :

“ Within seven days from the time when the pleadings shall be deemed to be closed, the plaintiff shall take out a summons for directions returnable in not less than seven days.”

He submitted, and counsel for the plaintiff agreed, that the pleadings in these proceedings cannot be deemed to be closed, and counsel for the defendants submitted that the rule means that one cannot take out a summons for directions until the pleadings are deemed to be closed. I do not take that view. The rule does not say that, if, by the default of the defendant, the pleadings are not closed, the plaintiff cannot apply for a summons for such directions as are appropriate to the position as it has arisen as the result of the defendant's inaction. There are plain indications in *Morse v. Frost* (1) that a plaintiff who is claiming damages ought to be entitled, if he so desires, to have his action set down for trial before a judge and jury, and that is what I may call the general position in cases of this kind. On that construction it is not necessary to decide the point, but, if that construction were wrong, I would have come to the conclusion that, in the circumstances which have arisen here, the plaintiff would be entitled to take out, and the court would have jurisdiction to entertain, a summons which would not be, on this view, the summons for directions contemplated by R.S.C., Ord. 30, r. 1 (a), but a summons for trial by judge and jury, and that the court would have inherent jurisdiction to consider whether the plaintiff should be entitled to have the issue which was outstanding—as it clearly is here, and as it was in *Morse v. Frost* (1)—determined in that way.

That, I think, disposes of the issues that have been raised. It is agreed that, this action being a King's Bench action to be tried in London, we are not concerned with R.S.C., Ord. 36, r. 11. The order that is made on the summons provides for the time for setting down and—as I, at any rate, understand the position—the plaintiff can set down the case under the order, which I think he was entitled to apply for and to get, and no further matter remains outstanding for this court to deal with. I should, perhaps, add that counsel for the defendants said he was basing himself solely on the question whether an order could be made under the jurisdiction conferred by the rules. If there was jurisdiction to make such an order, he was not submitting or suggesting that he had any grounds on which he could ask this court to interfere with the discretion exercised by the learned judge. For these reasons in my opinion, the appeal must be dismissed.

COHEN, L.J. : I am of the same opinion. R.S.C., Ord. 27, r. 11, seems to me in its natural meaning to be permissive. I think the purpose of the rule was to provide a cheap method for the plaintiff to obtain in most cases the relief he seeks, but circumstances might well arise in which a real hardship would be inflicted on a plaintiff if he was compelled to proceed by a motion for judgment

and could not exercise the right which he would otherwise have of setting down the case for trial and having it come on for trial in the usual way. For instance, some of the relief he sought might be relief of a kind which it was not the practice of the Chancery Division to give on motion for judgment, such, *e.g.*, as a declaration as to the construction of a document: see *New Brunswick Ry. Co. v. British & French Trust Corpn., Ltd.* (2) *per* LORD MAUGHAM, L.C., and LORD A RUSSELL OF KILLOWEN. That case is a long way from the present matter, but it does seem to me to indicate that there may be circumstances in which real hardship would be inflicted on a plaintiff if he could not pursue the alternative remedy of setting down the case for trial in the usual way, and may explain why the word "may," which is deliberately permissive, has been used in the terms of R.S.C., Ord. 27, r. 11. I agree entirely with the reasons given by my B Lord for thinking that we are bound by authority to decide that R.S.C., Ord. 27, r. 11, is permissive in character and that either under the rule itself, if we accept the construction put forward by counsel for the plaintiff, or under R.S.C., Ord. 30, r. 1 (a), or under the inherent jurisdiction of the court, there was power to make the order which the master made and which BIRKETT, J., has confirmed in this case. I would add that some authority seems to me to be derived for C that view from *Henly v. Evening Standard* (3) which is referred to in the note to R.S.C., Ord. 36, r. 11, in *THE ANNUAL PRACTICE*, 1948, p. 639. For these reasons I agree that the appeal fails.

Appeal dismissed with costs.

Solicitors: *Church, Adams, Tatham & Co.* (for the defendants); *Jacobson, Ridley & Co.* (for the plaintiff).

D [Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

E LEACH v. UNITED DAIRIES, LTD.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Birkett and Lynskey, JJ.), April 26, 1949.]

F *Food and Drugs—Sale of unsound food—Prosecution—Limitation of time—Bottle of milk deposited with customer—Handed by customer to sanitary inspector—Sanitary inspector also sampling officer—Food and Drugs Act, 1938 (c. 56), s. 80 (1) (a).*

G On Sept. 13, 1948, the respondents, milk salesmen and distributors, left at a customer's house a bottle of milk which looked dirty. The customer called in the sanitary officer, who was also a sampling officer for the purposes of the Food and Drugs Act, 1938. He took the milk away and submitted it to the public analyst for examination, but he did not follow the procedure laid down by ss. 70 and 71 of the Act for dealing with samples. The milk was found to contain deleterious matter and on Nov. 12, 1948, an information was laid against the respondents charging them with an offence against s. 9 (1) of the Act in that they had unlawfully deposited at a house H for the purpose of sale milk intended, but unfit, for human consumption. It was contended by the respondents that a sample had been procured under the Act and, therefore, under proviso (a) to s. 80 (1), the prosecution should have been commenced within 28 days from the time when the sample was procured.

HELD: in seizing the bottle of milk the sanitary officer was acting as a sanitary officer and not as a sampling officer; and, therefore, the limitation of 28 days under proviso (a) to s. 80 (1) did not apply.

[FOR THE FOOD AND DRUGS ACT, 1938, ss. 9 (1) and 80 (1), see HALSBURY'S STATUTES, Vol. 31, pp. 258 and 303.]

CASE STATED by Surrey justices.

At a court of summary jurisdiction sitting at Mortlake on Dec. 7, 1948, an information was preferred by the appellant, the chief sanitary inspector of Barnes Borough Council, under the Food and Drugs Act, 1938, charging the respondents, a company engaged in the business of selling and delivering milk, with having, on Sept. 13, 1948, unlawfully deposited at a house for the purpose of sale a pint of milk which was intended for, but was unfit for, human consumption, contrary to s. 9 (1) of the Act. The justices stopped the case and dismissed the information on the ground that, under proviso (a) to s. 80 (1) of the Act, the information was out of time as it was laid (and the summons was issued) on Nov. 12, 1948, more than 28 days after the sample had been taken. On an appeal from the decision of the justices the Divisional Court now held that this was not a prosecution in respect of an article of which a sample had been procured, and, therefore, proviso (a) to s. 80 (1) did not apply, and, accordingly, they allowed the appeal and remitted the case to the justices to conclude the hearing. The facts appear in the judgment of LORD GODDARD, C.J.

Vernon Gattie for the appellant.

Scott Cairns, K.C., and *Ahern* for the respondents.

LORD GODDARD, C.J.: This is a Case stated by justices for Surrey sitting at Mortlake, before whom the respondents, United Dairies, Ltd., were summoned for that they :

"... did unlawfully deposit at 40, Suffolk Road, Barnes, for the purpose of sale certain food, namely, a pint of milk, which was intended for, but was unfit for, human consumption, contrary to the Food and Drugs Act, 1938, s. 9."

The justices dismissed the information without calling on the defence on the ground that the summons was not brought within 28 days as it should have been under proviso (a) to s. 80 (1) of the Act if it had been a case of a sampling officer taking a sample of food for analysis and then finding that it was not of the nature, substance or quality required, or had some other defect. The only question in this case was whether or not there was a "sample," and, in my opinion, the matter is really unarguable.

On Sept. 13, 1948, the respondents left at the house of one of their customers a bottle of milk which looked dirty. The customer rang up, not a sampling officer, but the sanitary inspector. It so happens that the sanitary inspector can also be a sampling officer for the purposes of the Food and Drugs Act, 1938. The sanitary inspector went to the house, and, seeing that the milk looked unfit for consumption, with the customer's consent he took it away. When it was analysed, it was found to contain deleterious matter. I refrain from saying anything about whether it was, in fact, fit for human consumption, because the justices stopped the case. It is said that the person who took the bottle of milk was a sampling officer taking a sample of food. He was nothing of the sort. He was a sanitary inspector and he did not take a sample, but seized the article of food which had been delivered to the customer. In those circumstances, if it was proved that the article of food that had been delivered to the customer was unfit for human consumption, no question about division of the sample into portions arises. If one takes the bulk, one is not taking a sample, and the person who took this milk was not purporting to act as a sampling officer. He was the sanitary inspector who was given by the purchaser an article which, the purchaser alleged, was unfit for human consumption. If, in those circumstances, the article was unfit for human consumption, under s. 80 (1) of the Act the offence could be prosecuted under the Summary Juris-

diction Acts, and the time limit under the Summary Jurisdiction Act, 1848, s. 11, is six months. Accordingly, the case must go back with an intimation that the limitation of 28 days, under proviso (a) to s. 80 (1), did not apply in this case and that the justices must conclude the hearing and come to a conclusion whether this bottle of milk was or was not unfit for human consumption.

- BIRKETT, J.:** I am of the same opinion. It is to be noted that this
- A prosecution was brought under the Food and Drugs Act, 1938, s. 9 (1). That is a governing factor of great importance in the consideration of the facts of the case. The charge was that the respondents did unlawfully deposit at a certain place for the purpose of sale food, to wit, a pint of milk. It so happened that, because of the manifest impurity of the milk which could be detected just by
- B by looking at it, the customer to whom it was delivered rang up the sanitary inspector at Barnes. He came and saw it and, as it was palpably impure from the point of view of appearance, he took the whole bottle away and in due course submitted it to the public analyst, who provided the certificate which has been incorporated in the Case. The whole point of this appeal lies in the fact that, by proviso (a) to s. 80 (1) of the Act of 1938, where a sample
- C has been procured under the Act no prosecution in respect of the article sampled shall be commenced after the expiration of 28 days from the time when the sample was procured, and counsel for the respondents said that that provision of the Act governed the whole situation. It was said that here a sample was procured and it was procured of the article sampled—which, I must confess, is a little difficult, but that is what was said—and, therefore, the provision with regard to 28 days comes into play. It is enough for me to say that, in
- D my view, no sample was taken, and, therefore, proviso (a) to s. 80 (1) has no application. It may be conceded that in a proper case the sanitary inspector may be deemed to be the sampling officer within the meaning of the Act of 1938, but I am satisfied that on this occasion he was acting, not as the sampling officer, but merely as an officer of the Barnes Borough Council who are responsible [under ss. 64 and 65 (2) of the Act] for enforcing s. 9 of the Act and seeing that
- E food which is to be sold to the public is not contaminated. This final word about it would seem to me to be very convincing. If, indeed, a sample had been taken in this case and the taking of the bottle of milk was to be so regarded, then the elaborate provisions [in ss. 70, 71] with regard to what happens when a sample is taken were wholly disregarded, and it seems to me, therefore, perfectly plain—and what I may term the common-sense view of the matter accords with
- F what I think is the law—that on the special facts of the case no sample was taken within the meaning of the Act. For these reasons I am of the opinion that the result of this case must be as my Lord has already announced.

LYNSKEY, J.: I agree.

- G *Appeal allowed with costs. Case remitted to the justices for the hearing to be concluded.*

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Llewelyn John*, Town Clerk, Barnes (for the appellant); *Scott & Son* (for the respondents).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

STUCHBERY & SON v. GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION, LTD.

[COURT OF APPEAL (Lord Greene, M.R., Asquith and Denning, L.J.J.), April 26, 27, 1949.]

Landlord and Tenant—Goodwill—Compensation—“Trade or business”—Solicitor—Agent for insurance companies and building societies—Relevant goodwill—Landlord and Tenant Act, 1927 (c. 36), ss. 4 (1), 17 (1).

A

By s. 4 (1) of the Landlord and Tenant Act, 1927: “The tenant of a holding to which this Part of this Act applies shall, if a claim for the purpose is made in the prescribed manner . . . be entitled, at the termination of the tenancy on quitting the holding, to be paid by his landlord compensation for goodwill if he proves to the satisfaction of the tribunal that by reason of the carrying on by him or his predecessors in title at the premises of a trade or business for a period of not less than five years goodwill has become attached to the premises by reason whereof the premises could be let at a higher rent than they would have realised had no such goodwill attached thereto.” Section 5 provides that, where it is shown that compensation under s. 4 to which the tenant would be entitled, would not compensate him for loss of goodwill, the tenant may, in lieu of claiming such compensation, serve a notice requiring a new lease of the premises. By s. 17 (1): “The holdings to which this Part of this Act applies are any premises held under a lease . . . and used wholly or partly for carrying on thereat any trade or business . . .”

B

C

The tenants, a firm of solicitors, besides conducting their considerable professional practice acted as agents for insurance companies and building societies. On an application by the tenants for compensation for goodwill or, alternatively, a new lease,

D

HELD: (i) the carrying on of a solicitor's business was not the carrying on of a “trade or business” within the meaning of ss. 4 (1) and 17 (1).

(ii) if it was shown that a trade or business in the statutory sense was carried on on the premises in addition to a profession, the only relevant goodwill for the purpose of the Act was that referable to the activities of the trade or business to the exclusion of goodwill, if any, attributable to the profession.

E

(iii) there being no evidence of any goodwill exclusively attaching to their trade or business activities, the tenants' claim failed.

F

[As to COMPENSATION FOR GOODWILL, see HALSBURY, Hailsham Edn., Vol. 20, pp. 294-297; and FOR CASES see DIGEST Supp.]

APPEAL by the landlords from an order of His Honour JUDGE RAWLINS, sitting at Windsor County Court, dated Oct. 6, 1948, granting the tenants a new lease of the premises in which they carried on the business of solicitors and incidental to that business acted as agents for insurance companies and building societies. The Court of Appeal, allowing the appeal, held that the business of solicitors was not a “trade or business” within the meaning of the Landlord and Tenant Act, 1927, ss. 4 (1) and 17 (1), and that, since no goodwill attached to the tenants' other activities, they were not entitled either to compensation or a new lease. The facts appear in the judgment of LORD GREENE, M.R.

G

F. H. Lawton for the landlords.

C. Duveen and *T. M. Figgis* for the tenants.

H

LORD GREENE, M.R.: This appeal arises out of an application made under the Landlord and Tenant Act, 1927, ss. 5 (1) and 4 (1), for the grant of a new lease or, alternatively, for compensation. The tenants are a firm of solicitors who carry on their profession both at Maidenhead and also at Nos. 15 and 16, Park Street, Windsor. No. 15 and No. 16 each has a separate entrance.

The Windsor business started as an off-shoot of the Maidenhead business and has now become the more lucrative part of the business. The application relates only to No. 15. No. 16, which comprises the larger part of their offices, is held under a lease which still has seventeen years to run. The approaching termination of the tenancy of the tenants' offices at No. 15 led them to apply under the Landlord and Tenant Act, 1927, for the relief which I have mentioned,

A which is limited to that part of their offices. The tenants carry on the profession of solicitors on both parts of their premises. What I may call the strictly solicitors' business—I use that word without prejudice—forms the larger part of their activities and produces far the larger part of their profits. In connection with that business, they also have other activities. They act as agents for insurance companies and building societies. The tenants' application was referred to a referee under the Act and he reported to the county court judge. B When the matter came before the judge, he accepted the report in some respects, and, as a result of the conclusions to which he came, he made an order under which the tenants obtained the right to a new lease of No. 15.

There are certain questions that arise on this appeal and it is necessary to draw a distinction between them. The compensation for which the Act provides C is compensation in respect of what is called goodwill. Where it is shown that the tenant is entitled to compensation, he may also get, if the circumstances warrant it and the requirements laid down in the Act are complied with, instead of compensation an order entitling him to a new lease of the premises. The referee had before him, therefore, first, the question whether there was carried on on the premises, No. 15, what the Act describes as “a trade or D business,” because it is only in respect of “trades or businesses” that the Act comes into operation. The referee came to the conclusion that the tenants were carrying on a trade or business, but his finding was based on the fact that, of the actual activities carried on by them at No. 15, part was referable to what can properly be described as “a business,” namely, insurance and building society work. It was in reference to those activities alone that the referee held that the E tenants carried on a trade or business, and that conclusion was affirmed by the county court judge. The other crucial matter was whether or not there was the necessary goodwill, as required by the statute, which would entitle the tenants to make their claim for a new lease or, alternatively, compensation. That issue the referee found against the tenants, but the county court judge took a different view and found that the necessary goodwill was established. Those two issues F must be kept distinct, for, when the findings both of the referee and of the county court judge are examined, it will be found that the first question is very largely a question of fact. The second issue, on the other hand, calls for the solution of a problem of law, namely, what is the relevant goodwill which the Act requires to be established in such a case as the present. The report of the referee, the judgment of the judge, the argument of counsel for the tenants, and the evidence, G were all directed to the question what would be the relevant goodwill in circumstances such as these.

Counsel for the landlords submits that the referee and the judge misdirected themselves in law in holding that it was right to take into account the goodwill of the tenants' business of solicitors as such. That, he said, was based on a wrong construction of the Act. It was, however, argued by counsel for the H tenants that, if a trade or business, as distinct from a profession, is being carried on on certain premises, and it appears that the tenants carry on a profession in addition to the trade or business, then it is sufficient, to establish goodwill, to point to the goodwill attaching to the professional activities without the necessity of any reference to the trade or business activities. Counsel's first argument was that, on the true construction of this Act, the phrase “trade or business” includes a profession such as that of a solicitor. That must depend on the true construction of the document in which it is used and according to

its context, and, whereas in some contexts the phrase "business" would, no doubt, include the carrying on of a profession like that of a solicitor, in other contexts such a profession equally clearly is excluded. Therefore, what we have to discover is not some abstract meaning, but the meaning of the phrase "trade or business" when used in the context of this Act.

The Landlord and Tenant Act, 1927, has as its preamble :

"An Act to provide for the payment of compensation for improvements and goodwill to tenants of premises used for business purposes, or the grant of a new lease in lieu thereof ; and to amend the law of landlord and tenant."

Section 1 of the Act lays down the principle that, in the circumstances mentioned there, the tenant of what is called "a holding to which this Part of this Act applies" is entitled to obtain compensation for improvement which he has made on the demised property. Section 4, provides :

"(1) The tenant of a holding to which this Part of this Act applies shall, if a claim for the purpose is made in the prescribed manner (i) in the case of a tenancy terminated by notice, within one month after the service of the notice on the tenant ; and (ii) in any other case, not more than 36 nor less than twelve months before the termination of the tenancy ; be entitled, at the termination of the tenancy on quitting the holding, to be paid by his landlord compensation for goodwill if he proves to the satisfaction of the tribunal that by reason of the carrying on by him or his predecessors in title at the premises of a trade or business for a period of not less than five years goodwill has become attached to the premises by reason whereof the premises could be let at a higher rent than they would have realised had no such goodwill attached thereto."

There follows a proviso which limits the amount of the compensation to such addition to the value of the holding as was the direct result of the carrying on of the trade or business.

That section relates to compensation in the circumstances mentioned, and the circumstances in which the relevant goodwill is to arise are very strictly and carefully circumscribed. The goodwill in question must be proved by the tenant to have arisen by reason of the carrying on of a trade or business and by reason of it the premises must be capable of being let at a higher rent. The mischief at which these provisions of the Act were aimed, and it is also true of the provisions which deal with compensation for improvements, was the acquisition by the landlord through the activities of the tenant, either by the tenant's improving the property or by his creating a goodwill therein, of the benefit of these improvements or goodwill when the lease came to an end. It was obviously thought by the legislature to be unjust that the landlord should obtain that type of unearned increment on the termination of a lease, and there have been, no doubt, cases where crafty landlords, observing that a tenant had created a very good business and had acquired a goodwill adherent to the premises in that way, deliberately brought the lease to an end or declined to renew it in order to secure the benefit of the increased value to himself.

Section 4 (1) (d) provides :

"The tribunal shall, in determining the amount of compensation for goodwill . . . (ii) disregard any value which is attributable exclusively to the situation of the premises."

Moreover, the very definition of "goodwill" appears to me to exclude the relevance of any personal goodwill attributable to the fact that the business which is said to have attracted the goodwill was being carried on, and owed its prosperity to, the personal qualifications of the person carrying it on. I say that because the Act is contemplating something that will adhere to the premises and will not cease or follow the tenant when he leaves the premises.

Section 5 deals with applications for the grant of a new lease and it applies where it is shown that compensation under s. 4 would not compensate the tenant for the loss of goodwill which he would suffer if he removes to and carries on his trade or business in other premises. In such a case he is entitled, in lieu of claiming compensation, to serve a notice requiring a new lease of the premises, and by sub-s. (2) :

- A "Where such a notice is served the tribunal . . . may, if it considers that the grant of a new tenancy is in all the circumstances reasonable, order the grant of a new tenancy for such period (being a term of years absolute) not exceeding fourteen years and on such terms as the tribunal may determine to be proper . . ."

Sub-section (3) provides :

- B "Where the tenant is the applicant, the grant of a new lease under this section shall not be deemed to be reasonable (a) unless the tenant proves that he is a suitable tenant and that he would be entitled to compensation under the last foregoing section . . ."

- C The matters, therefore, which have to be established in order to qualify the tenant for a new lease are, to begin with, those which would qualify him to compensation, and that throws him back, in considering whether or not he is entitled to a new lease, to the question : Is he or is he not entitled to compensation ? I now come to s. 17. The initial importance of this section is this. As I have pointed out, s. 1, dealing with improvements, and s. 4, dealing with goodwill, relate to cases where the applicant is the tenant of a holding to which this Part of the Act applies. That makes it necessary to show what are the holdings to which this Part of the Act applies, and that is provided in s. 17 (1) in these words :

"The holdings to which this Part of this Act applies are any premises held under a lease . . . and used wholly or partly for carrying on thereat any trade or business . . ."

- E Therefore, before the tenant can have any status to make a claim he has to show that he is the tenant of a holding within that definition, and that definition includes the qualification that the premises must be used wholly or partly for carrying on thereat a trade or business. Counsel for the tenants suggested that the only use of this section was to define a holding and it was not intended to be a definition of a tenant, but that seems to me to be an argument which is not maintainable for the reason that, before the tenant can have a *locus standi* to make an application, he must allege and prove he is the tenant of a holding, and, unless he can show that the holding of which he is a tenant comes within the definition of s. 17 (1), his application does not begin to get on its feet.

The next part of that section which I need read is part of sub-s. (3) :

- G "For the purposes of this section, premises shall not be deemed to be premises used for carrying on thereat a trade or business (a) by reason of their being used for the purpose of carrying on thereat any profession . . . Provided that, so far as this Part of this Act relates to improvements, premises regularly used for carrying on a profession shall be deemed to be premises used for carrying on a trade or business."

- H Then by sub-s. (4) :

"In the case of premises used partly for purposes of a trade or business and partly for other purposes, this Part of this Act shall apply to improvements only if and so far as they are improvements in relation to the trade or business."

I have said that the meaning of the phrase "trade or business" must depend on the particular context in which that expression is found, and, to my mind,

if there is anything that the language of this section shows beyond any possibility of question, it is that the legislature is contemplating a distinct and important difference between a trade or business and a profession. It is left to the tribunal to say whether a particular activity falls within one category or another. In all cases where it is essential for the administration of the Act to decide whether an activity falls into one or the other category, that is a task which the tribunal has to perform, and, although there may be difficult cases, in general any person with a reasonable knowledge of affairs would not have much difficulty in saying what the legislature intended in regard to some particular activity. In a case where the context shows a distinction between a trade or business, on the one hand, and a profession, on the other, I should think it would require a very bold man to say that a solicitors' practice is to be put into the "trade or business" class and excluded from the professional class. It is quite clear from the context that the legislature is not contemplating that a particular activity would be in both. Therefore, in most cases people would be able to answer the question whether a particular activity fell within the professional class or within the trade or business class. It appears to me to be very reasonable that the legislature should have drawn the distinction, which I shall show it has drawn, between professions and trades or businesses, for the reason that to many minds the conception of a profession excludes altogether the idea of a goodwill adherent to premises which will be annexed by the landlord of the premises when the professional man's tenancy comes to an end. A professional man is selected for employment by reason of his professional skill. His position is not like that of the keeper of a shop where a trade or business is carried on. I am not saying there may not be things which can properly be called a profession where something in the nature of an adherent goodwill can be found, but in the case of a solicitors' profession I should have thought the very idea of a goodwill adherent to the premises, as distinct from the goodwill of the firm carrying on the profession, would be a novel one which the legislature could scarcely have contemplated. I have no difficulty in coming to the conclusion that the carrying on of this solicitors' business is not the carrying on of a trade or business within the meaning of that phrase in this Act of Parliament.

The greatest stress was laid on the second argument. It was to this effect. Assuming that "trade or business" does not include a profession, yet, if you find that something which may properly be called a trade or business is carried on on the premises as well as a profession, then, in ascertaining whether or not there is such a goodwill as the Act contemplates as entitling the tenant to compensation or a new lease, one is entitled to bring into account any goodwill which is shown to be adherent to the premises although it arises from the carrying on of the profession. In other words, once you have established that the activities carried on comprise a trade or business, then, if you can show that a goodwill has attached to the premises by reason of any of those activities, even if it is referable to the professional side of them, that is enough. With all respect to that argument, I do not accept it. It seems to have been the argument which was accepted by the referee and it is, undoubtedly, the argument on which the judgment of the learned county court judge is based. The contrary view is that where it is shown that a trade or business in the statutory sense is carried on and that a profession is also carried on, the only relevant goodwill for the purpose of the Act is the goodwill referable to the activities comprised within the trade or business to the exclusion of such goodwill, if any, as may be attributable to the carrying on of the profession.

The submission of counsel for the landlords on the first of the two points which I mentioned as being found in the report and the judgment under review was that, on the evidence, it was not open to the county court judge to find that the activities in connection with the insurance and building society agencies, constituted the carrying on of a trade or business because they

were merely small minor matters incidental to the carrying on of a solicitors' business, the sort of activities which many solicitors carry on as an off-shoot of their strictly professional business. We took the view that it was not desirable to examine that submission until we had considered the basis of the judgment on the second point to see whether there was a misdirection in law by the learned judge as to the finding of goodwill. On the assumption that the first of the points I have mentioned is in counsel for the tenants'

- A favour, and assuming that the evidence was sufficient to support a finding that a separate severable trade or business, as distinct from the profession of a solicitor, was being carried on by the tenants on the premises, counsel's argument was that, once that is established, it becomes irrelevant to look for an adherent goodwill referable only to the activities which are properly described as a trade or business and it is sufficient to show goodwill generally
- B without showing that to any extent it flows from the trade or business activity as distinct from the profession. I do not propose to go through the referee's finding or the judge's judgment where that is dealt with. I think I am doing no injustice to either of them if I say that they accepted that argument. The only evidence before the referee, so far as it related to goodwill, related to the
- C goodwill of the solicitors' part of the business, or, perhaps, goodwill relating to the whole of their activities without any attempt to refer any goodwill to that part of their activities properly (as I assume) described as the carrying on of a trade or business. It is pointed out that, on the true construction of s. 17 (1), the holdings to which the Act applies include premises used wholly or partly for carrying on thereat any trade or business. What that appears to mean is this. Once you have shown that a trade or business has been carried
- D on on the premises, you are not to have your claim for compensation or a new lease defeated by having it pointed out to you that, in addition to the trade or business, you are doing something else there. A very common class of case is where you have a shop and dwelling rooms over it. It is not to be said that a tenant is not entitled to compensation when the lease of his shop comes to an end merely because the demised premises include the dwelling rooms.
- E The language is wide enough to cover the case where, in addition to a trade or business, the tenant carries on a profession, and, on the assumption on which I am acting, namely, that the non-solicitor activities carried on are properly called a trade or business, this is one of such cases.

The next stage which was taken by the judge and which was put forward by counsel for the tenants is one which I cannot accept. It related to what it is possible to include as relevant goodwill, once you get, so to speak, a mixture, partly trade or business and partly a profession. It is possible, it is said, to lump them both together, and, once you can find as a result of those combined activities there is a goodwill, then you can give the relief which the Act allows without establishing that there is a goodwill referable to the trade or business, and the trade or business alone. I will again read s. 17 (3) :

- G "For the purposes of this section, premises shall not be deemed to be premises used for carrying on thereat a trade or business (a) by reason of their being used for the purpose of carrying on thereat any profession."

That seems to me to have a double effect. First of all, if what you are doing is carrying on a profession and nothing else, you cannot use that fact to establish

H the necessary proposition that you are carrying on a trade or business. It also means that you must not use the fact that you are carrying on a profession to assist you in your necessary and vital assertion that you are carrying on a trade or business, and it is to be observed that it is only in respect of the carrying on of a trade or business that relevant goodwill arises. When you look back at s. 4 (1), what has to be proved to the satisfaction of the tribunal is that, by reason of the carrying on by the tenant of a trade or business, goodwill has become attached to the premises. I ask myself: How is that to be applied in a case

where the tenant is carrying on two activities—one a trade or business and the other a profession? How can he show what the section requires him to show, namely, that, by reason of the carrying on of a trade or business, goodwill has become attached to the premises, otherwise than by proper evidence on which a court and the judge of fact can, so to speak, dissect his activities and ascertain what adherent goodwill is referable to the trade or business as distinct from adherent goodwill, if any, referable to the profession? It seems to me it flies in the teeth of the very language of s. 4 to introduce into the goodwill which you are seeking a goodwill attributable to anything but the carrying on of a trade or business. The proviso to s. 17 (3) appears to carry that argument home if it was necessary to rely on it, but I do not think it is:

“Provided that, so far as this Part of this Act relates to improvements, premises regularly used for carrying on a profession shall be deemed to be premises used for carrying on a trade or business.”

That makes it clear that, although the carrying on of a profession is excluded from the Act for all relevant purposes, yet it is brought into the Act by the proviso for the sole purpose of compensation for improvements to the premises and it extends to the tenant whether or not he carries on a trade or business in addition to his profession. Although he may have premises solely used for carrying on a profession, it would appear that the proviso entitles him to claim compensation for improvements which he makes. If he is carrying on a mixed activity and makes an improvement—perhaps solely for the purpose of his profession—he still would be entitled to claim for it, but the very fact that it is necessary to include a reference to the carrying on of a profession for the purpose only of dealing with improvements appears to add force to the argument that the profession must not be brought in when ascertaining compensation for the loss of goodwill or considering the grant of a new lease. In my opinion, therefore, the county court judge, in basing his judgment on the view that there was an adherent goodwill referable, at any rate, to the solicitors' part of the profession without attempting to discover whether or not there was any adherent goodwill referable to the non-solicitors' part of the business, namely, the insurance and so forth, misdirected himself in law and his finding cannot stand.

That, however, does not dispose of this appeal. Counsel for the tenants says that, if he is wrong in this contention, we ought not to ascertain what the true finding of fact was on the right basis of law, but our proper course would be to send the matter back for a new trial with a direction as to the true proposition of law on which the finding of fact should be based. We took the view that that argument would probably be sound if, on an examination of the evidence, there was evidence on which the judge, if he had properly directed his mind to the question of fact whether there was an adherent goodwill referable to the trade or business alone, could have so found. In such circumstances, I think, it would be a case for a new trial because it would raise a question of fact proper to be decided by the county court judge and no one else. On the other hand, we took the view that, if the evidence was such that it would not in law have been open to the county court judge to have found the existence of such a limited adherent goodwill, then we ought not to send the matter back because, obviously, if he had properly come to such a conclusion of fact when there was no evidence to support it, an appeal to this court would have resulted in the setting aside of his judgment. Counsel ingeniously argued that on a second attempt he might be able to do better in the matter of evidence, but I do not think that that argument ought to prevail. When the case was heard, the tenants presumably brought forward their best case and their best evidence. If the evidence which they brought forward would not have supported in law the necessary finding of fact, they would have failed, and to accede to counsel's argument would be, in effect, to give him two shots. In deciding whether or not we ought to grant a new trial, we ought to examine the evidence as it was given in the court below

and see whether on that evidence it would have been permissible in law for the county court judge to have come to the necessary finding of fact. We have been through the relevant parts of the evidence and they entirely failed to establish any such severable and recognisable goodwill attributable alone to what I am assuming are the trade or business activities as distinct from the professional activities. In my opinion, the attempt that the tenants have made to get the benefit of this Act breaks down both on the facts and on the law. The appeal

A must be allowed.

ASQUITH, L.J. : I agree.

DENNING, L.J. : It is plain that the use of premises for professional purposes is not sufficient to found a claim for compensation or a new lease. The reason is obvious. The goodwill of the partners of a professional firm does not, as a rule, adhere to the premises on which they carry on their practice. It depends on their own personal qualities, on their reputation with their clients, and their name and connections. It does not depend on their precise address. In a few cases where the situation comes into it—as in the case of a solicitor who has offices opposite a police court—there may be a goodwill attached to the premises, but it is exclusively attributable to the situation of the premises. It was, no doubt, for reasons such as these that the legislature expressly excluded premises used for professional purposes from claims on the ground of goodwill. Of course, if on part of the premises a professional man carried on a separate trade or business, distinct from his profession, and in respect of that he had built up a separate adherent goodwill, he could claim compensation or a new lease on that account, but nothing of that kind appears here. It was suggested that the firm had a separate trade or business as agents for a building society, but, even assuming that they had, there was no evidence that there was any goodwill attaching to the premises on that account. An attempt was made to make up the deficiency by bringing in the goodwill of the solicitors as such, but that is not permissible. The only relevant goodwill is the adherent goodwill of the separate trade or business, and there was no evidence of any such goodwill. I agree, therefore, that the appeal should be allowed.

Appeal allowed with costs in both courts. Application for a new lease or for compensation for goodwill dismissed.

Solicitors : *Kenneth Brown, Baker, Baker* (for the landlords) ; *T. W. Stuchbery & Son*, Windsor (for the tenants).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

F

G TOWER CABINET CO., LTD. v. INGRAM.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Birkett and Lynskey, JJ.), April 27, 28, 1949.]

Partnership—Partner—Person “holding out”—Debts incurred after dissolution—Liability of retiring partner—Unauthorised use of retiring partner's name—Partnership Act, 1890 (c. 39), ss. 14 (1), 36 (1), (3).

H The Partnership Act, 1890, s. 14, provides : “ (1) Every one who by words spoken or written or by conduct represents himself, or who knowingly suffers himself to be represented, as a partner in a particular firm, is liable as a partner to any one who has on the faith of any such representation given credit to the firm, whether the representation has or has not been made or communicated to the person so giving credit by or with the knowledge of the apparent partner making the representation or suffering it to be made.” Section 36 of the Act provides : “ (1) Where a person deals with a firm

after a change in its constitution he is entitled to treat all apparent members of the old firm as still being members of the firm until he has notice of the change. . . . (3) The estate of a partner who . . . not having been known to the person dealing with the firm to be a partner, retires from the firm, is not liable for partnership debts contracted after the date of the . . . retirement . . .

On Apr. 22, 1947, a partnership between C. and I. carrying on business as household furnishers under the name "Merry's" was dissolved by agreement, C. continuing the business under the same name and undertaking to pay I. £3,000 as his share of the partnership. I. gave notice of the dissolution to the firm's bankers and arranged with C. to notify it to those persons who dealt with Merry's, but he did not advertise it, or procure an advertisement of it, in the LONDON GAZETTE. C. procured new notepaper for the purposes of the business, omitting I.'s name from the heading. In Jan., 1948, S., a representative of the T. Co., which had not previously had dealings with Merry's, obtained an order from the new firm of that name, and this order, in breach of the arrangement made with I. and without his knowledge or authority, was confirmed by C. by a letter on headed notepaper which had been in use by the partnership before the dissolution and bore I.'s name as well as C.'s name. On an application by the T. Co. for the issue of execution against I. on a judgment obtained against Merry's for the price of the goods supplied pursuant to the order obtained by S. :

HELD : (i) I. had not represented himself or knowingly suffered himself to be represented as a partner in Merry's within s. 14 of the Act of 1890 and his negligence or carelessness in not seeing that all the notepaper of the partnership firm had been destroyed when he left the business did not bring him within the terms of that section.

(ii) the words "apparent members" in s. 36 (1) referred to persons who appeared to be members to the person dealing with the firm, and, as the T. Co. had no knowledge of I.'s connection with Merry's except by the unauthorised use of notepaper bearing I.'s name after the dissolution, they were not entitled by s. 36 (1) to treat I. as a partner.

Farrar v. Definne, (1843) (1 Car. & Kir. 580; 2 L.T.O.S. 401), considered.

(iii) I. was not known to the T. Co. as a partner before the date of the dissolution of the partnership, and, therefore, under s. 36 (3) he was not liable for debts contracted with the T. Co. after that date.

[AS TO THE LIABILITY OF A RETIRED PARTNER FOR DEBTS INCURRED SUBSEQUENT TO RETIREMENT, see HALSBURY, Hailsham Edn., Vol. 24, pp. 436-438, paras. 841, 842; and FOR CASES, see DIGEST, Vol. 36, pp. 379-384, Nos. 560-571.

FOR THE PARTNERSHIP ACT, 1890, ss. 14 (1) and 36 (1) and (3), see HALSBURY'S STATUTES, Vol. 12, pp. 535 and 545.]

Case referred to :

(1) *Farrar v. Definne*, (1843), 1 Car. & Kir. 580; subsequent proceedings, (1844), 2 L.T.O.S. 401; 36 Digest 382, 579.

APPEAL from a decision of a master on the trial of an issue under R.S.C., Ord. 48, r. 8.

The respondents, the Tower Cabinet Co., Ltd., obtained judgment against a firm called "Merry's," and applied for leave to issue execution under Ord. 48, r. 8, against the appellant, S. G. Ingram, as a member of the firm. The appellant disputed liability and it was directed that the issue of liability be tried by a master. Master Grundy held the appellant liable, and the appellant now appealed under Ord. 54, r. 22A, to the Divisional Court, who reversed the decision. The facts appear in the judgment of LYNKEY, J.

J. F. Donaldson for the appellant, Ingram.

Behrens for the respondents, the Tower Cabinet Co., Ltd.

LORD GODDARD, C.J.: LYNSKEY, J., will give the first judgment.

LYNSKEY, J.: The respondent company, the Tower Cabinet Co., Ltd., claimed from Merry's, who in the writ were described as "sued as a firm," the sum of £323 17s. for the price of six suites of furniture sold and delivered.

- A Judgment was obtained, and the company then sought to render a Mr. S. G. Ingram liable for the debts of Merry's. They alleged that he was liable, first, under s. 14, and, secondly, under s. 36, of the Partnership Act, 1890. The matter was referred for trial before Master Grundy, the issue being whether Mr. Ingram had represented himself to be, or knowingly suffered himself to be represented to be, a partner under s. 14, or was liable under the provisions of s. 36 as a partner.

The facts found by the learned master were that in January, 1946, Mr. A. H. Christmas and Mr. Ingram commenced together to carry on business in partnership as household furnishers under the name of Merry's at Silver street, Edmonton. The partnership was registered under the Registration of Business Names Act, 1916, as being carried on by Mr. Christmas and Mr. Ingram. That partnership subsisted until Apr. 22, 1947, on which date the parties agreed to dissolve it. The master was satisfied that there was a dissolution of this partnership in April, 1947, and that Mr. Ingram had given notice to the firm's bankers that he had ceased to be a partner in the business carried on in the name of Merry's. From then until some time in May, 1948, Mr. Ingram had no connection with the partnership except that Mr. Christmas had agreed to pay

- C him for his share of the partnership a sum of some £3,000, and by May, 1948, about £1,000 had been paid by instalments. Mr. Ingram was not professionally represented at the time of the dissolution. He arranged with Mr. Christmas to notify those dealing with the firm that he (Mr. Ingram) had ceased to be connected with it, but he did not advertise or procure the advertisement in the LONDON GAZETTE of the fact that he had ceased to be a member of the firm.
- E After his cessation of membership, new notepaper was printed for use in the future business of the firm. While Mr. Ingram had been a partner, the notepaper had been headed "Merry's" and thereunder had borne the names: "A. H. Christmas and S. G. Ingram," indicating that they were both partners. After the dissolution the name "Merry's" appeared on the new notepaper, and "A. H. Christmas, Director," apparently as being the person responsible for
- F the running of the business.

In January, 1948, Mr. Christmas, or Merry's, were approached by the Tower Cabinet Company through their representative, a Mr. Harold Selbey, who obtained an order for six suites of furniture. He reported the order to one of the directors of the company, Mr. Jack Smead, who telephoned to Merry's and asked for a director in order to secure confirmation of the order. It is not

- G clear to whom he spoke. In pursuance of that conversation, a letter was written in the form of an order, and dated Jan. 5, 1947, in mistake for Jan. 5, 1948. That order form read: "Merry's, A. H. Christmas, S. G. Ingram. Household Furnishers. To Tower Cabinet Co., Ltd. Please supply six light bedroom suites . . . 168 units on delivery." It was signed by Mr. Christmas as the manager. That order or confirmation was given on the notepaper which had
- H been the notepaper of the firm at the time when Mr. Ingram was a member, but Mr. Christmas had no authority from Mr. Ingram to use it, and in using it he was acting in direct conflict with the arrangement that he had made with Mr. Ingram that he should notify people that Mr. Ingram was no longer interested in the firm.

In May, 1948, Mr. Ingram was worried about the state of the business, and he came to try and see if he could resuscitate it in order to salvage his share in the previous partnership. He seems to have put some £300 into the business,

and to have endeavoured to take control again. A letter was written by Mr. Christmas to the company in May, 1948, saying :

“ Dear Sirs, I wish to advise you that as from today I am no longer connected with the above business. Mr. S. G. Ingram is now sole proprietor and responsible for all outstanding debts. Yours faithfully, (signed) A. H. Christmas.”

According to the evidence of Mr. Ingram, that letter was written without his knowledge and without his authority and he had no idea it was being sent, but it is not of any great materiality from the point of view of the questions which we have to decide in this case. It is clear on the master's finding that in January and February, 1948, when the goods were ordered and delivered Mr. Ingram was not in fact a partner in this business. The question is whether the company are able to make him liable as a partner by reason of the provisions of the Partnership Act, 1890, dealing either with holding out or with failure to give notice when a partnership has ceased and credit has been given to the partnership firm as if the outgoing partner were still a partner.

Section 14 of the Act of 1890 provides :

“(1) Every one who by words spoken or written or by conduct represents himself, or who knowingly suffers himself to be represented, as a partner in a particular firm, is liable as a partner to any one who has on the faith of any such representation given credit to the firm, whether the representation has or has not been made or communicated to the person so giving credit by or with the knowledge of the apparent partner making the representation or suffering it to be made.”

Before the company can succeed in making Mr. Ingram liable under this section, they have to satisfy the court that Mr. Ingram, by words spoken or written or by conduct, represented himself as a partner. There is no evidence of that. Alternatively, they must prove that he knowingly suffered himself to be represented as a partner. The only evidence of Mr. Ingram's having knowingly suffered himself to be so represented is that the order was given by Mr. Christmas on notepaper which contained Mr. Ingram's name. That would amount to a representation by Mr. Christmas that Mr. Ingram was still a partner in the firm, but on the evidence and the master's finding that representation was made by Mr. Christmas without Mr. Ingram's knowledge and without his authority. That being the finding of fact, which is not challenged, it is impossible to say that Mr. Ingram knowingly suffered himself to be so represented. The words are “ knowingly suffers ”—not being negligent or careless in not seeing that all the notepaper had been destroyed when he left.

The company also rely on s. 36 which provides :

“(1) Where a person deals with a firm after a change in its constitution he is entitled to treat all apparent members of the old firm as still being members of the firm until he has notice of the change. (2) An advertisement in the LONDON GAZETTE as to a firm whose principal place of business is in England or Wales, in the EDINBURGH GAZETTE as to a firm whose principal place of business is in Scotland, and in the DUBLIN GAZETTE as to a firm whose principal place of business is in Ireland, shall be notice as to persons who had not dealings with the firm before the date of the dissolution or change so advertised. (3) The estate of a partner who dies, or who becomes bankrupt, or of a partner who, not having been known to the person dealing with the firm to be a partner, retires from the firm, is not liable for partnership debts contracted after the date of the death, bankruptcy, or retirement respectively.”

It is really on the construction of those three sub-sections of that section that this case turns. That section has not been the subject of construction, so far as we have been informed, by any court. It is said by counsel for the company

that sub-s. (1) deals with the case in which it appears to the world that a man is still a partner in a firm and notice must be given before his liability as a retiring partner can cease. Secondly, he says that sub-s. (2) equally applies to the position of a partner when it is apparent to the world that he was a partner.

Referring to the old authority of *Farrar v. Deftinne* (1), counsel for the company says that the distinction has to be drawn between what are described by CRESSWELL, J., in that case as notorious partners of the partnership and partners who are "profoundly secret" members of the partnership. Counsel says that this section, being in a codifying Act, re-enacts the law as it existed in 1843 and later. It should be noticed that even in *Farrar's* case (1) CRESSWELL, J., laid considerable emphasis on the question of actual notice. He said (1 Car. & Kir. 580):

"Todd and the defendant were once in partnership, but they have not been so since the year 1837. The plaintiff dealt with the firm during the partnership, and he continued to do so afterwards; and the question is, whether the defendant is liable in respect of such subsequent dealings now that the partnership is dissolved. The law stands thus: If there had been a notorious partnership, but no notice had been given of the dissolution thereof, the defendant would have been liable. If there had been a general notice, that would have been sufficient for all but actual customers; these, however, must have had some kind of actual notice. If the partnership had remained profoundly secret, the defendant could not have been affected by transactions which took place after he had retired; but if the partnership had become known to any person or persons, he would be in the same situation, as to all such persons, as if the existence of the partnership had been notorious. The question for you, therefore, is, was this partnership actually known to the plaintiff, either by general report, or by direct communication? Because, if it were, and he did not know, either from notice of the fact, or from surmise, that the dissolution had taken place, you must infer that he still dealt on the faith of the partnership, and the defendant will therefore be liable."

It is said by counsel for the company, who seeks to adopt this judgment in his favour, that s. 36 (1) and (2) are dealing with what are described in the judgment as "notorious" partnerships, and sub-s. (3) is dealing with cases of "profoundly secret" partnerships. Looking at the Act itself, I find difficulty in adopting that suggested construction. The words of sub-s. (1) are:

"Where a person deals with a firm after a change in its constitution he is entitled to treat all apparent members of the old firm as still being members of the firm until he has notice of the change."

The point depends, in my view, on what is the meaning in sub-s. (1) of "apparent members." Apparent to whom? Does it mean apparent to the whole world, or notorious, or does it mean apparent to the particular person with whom the section is dealing? In my reading of that sub-section, "apparent members" means persons who appear to be members to the person who is dealing with the firm, and they may be apparent either by the fact that the customer has had dealings with them before, or because of the use of their names on the notepaper, or from some sign outside the door, or because the customer has had some indirect information about them. Both sub-s. (1) and sub-s. (2), in my view, deal with cases where they are apparent members.

Sub-section (3) again deals with the particular individual. It does not deal with the public at large. Its words are, to my mind, simple and obvious. It does not deal merely with questions of apparent members or non-apparent members. It applies the test: ". . . a partner who, not having been known to the person dealing with the firm to be a partner . . ." Whether he was to

other people an apparent partner, or whether he was a dormant partner, the words seem to me to be equally applicable. If the person dealing with the firm did not know that the particular partner was a partner, and if that partner retired, then, as from the date of his retirement, he ceases to be liable for further debts contracted by the firm with that person. The fact that later the person dealing with the firm may discover he was a partner seems to me to be irrelevant, because the date from which the sub-section operates is the date of the dissolution. If the person who subsequently deals with the firm had no knowledge prior to the dissolution that the retiring partner was a partner, then sub-s. (3) comes into operation, and, in effect, relieves the person retiring from liability.

It is said by counsel for the company that the company did know that Mr. Ingram was a partner because the order for the goods contained a statement to the effect, or, apparently, to the effect, that he was a partner of the firm. In my view, that document, which only came into existence in January, 1948, was, no doubt, a representation by Mr. Christmas that Mr. Ingram was a partner at that particular date. That representation was untrue. He was not a partner at that date, and it seems to me one cannot draw the inference that that gave the company knowledge that, in fact, Mr. Ingram had been a partner prior to the date of his dissolution of the partnership in April, 1947. Even if it did give such notice, in my view, the section had already commenced to operate, and it would not avail, subject to s. 14 dealing with holding out, to render Mr. Ingram liable.

The result is that, in my view, the learned master was not correct in his view of the effect of the sub-section or of the decision which he quoted. In my view, it is established that the company had no knowledge that Mr. Ingram was a partner prior to the date of the dissolution. That being so, Mr. Ingram is brought directly within the words of sub-s. (3), and is, therefore, under no liability to the company in respect of the debts subsequently incurred by Mr. Christmas at a time when he was not a partner. This appeal ought to be allowed.

LORD GODDARD, C.J. : I agree. I need only add that, in my opinion, the words "all apparent members" in s. 36 (1) mean all members apparent to the person dealing with the firm. Secondly, I think sub-s. (3) exactly applies to the facts of this case, and I can see no good reason for holding that it only applies to the case of a dormant partner. I think that the Act, which is a codifying Act, intends in this section to incorporate the law, except with regard to the notice in the LONDON GAZETTE, which was new, laid down by CRESSWELL, J., in *Farrar v. Deffinne* (1), to which my brother has referred, or, at any rate, to adopt the statement of law which he there lays down when he told the jury that the question for them was: "Was this partnership actually known to the plaintiffs, either by general report, or by direct communication?" I feel convinced that the true construction to put on this section is that there must be actual knowledge which may be acquired either because of the fact that it is notorious, or because it has been directly communicated, but it is not enough to say that other people knew. The fact may be so notorious that a jury would be justified in finding that the person did know a certain fact, but it does not follow because other people know it that he knew it. I think what CRESSWELL, J., meant in that case was that the jury must be satisfied that there was actual knowledge, which might be gained from either one of two sources.

BIRKETT, J. : I agree.

Appeal allowed. Appellant to have the costs of the appeal. No order as to the costs below.

Solicitors: *Windsor & Co.* (for the appellant, Mr. Ingram); *Aukin, Courts & Co.* (for the respondents, the company).

[Reported by F. A. AMIES, Esq.,- Barrister-at-Law.]

BAREFOOT v. CLARKE.

[COURT OF APPEAL (Somervell and Evershed, L.JJ., and Wynn-Parry, J.),
April 12, 1949.]

*Debt—Committal—Need of evidence as to means—Debtors Act, 1869 (c. 62),
s. 5 (2).*

A Section 5 of the Debtors Act, 1869, provides : " Subject to the provisions hereinafter mentioned, and to the prescribed rules, any court may commit to prison for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt or instalment of any debt due from him in pursuance of any order or judgment of that or any other competent court. Provided . . . (2) That such jurisdiction shall only be exercised where it is proved to the satisfaction of the court that the person making default either has or has had since the date of the order or judgment the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects, to pay the same."

B On Oct. 20, 1948, judgment was entered against the debtor in the county court for £20 and costs, but nothing was paid under that order. The judgment creditor thereupon took out a judgment summons. At the hearing of the summons in Dec., 1948, the debtor stated that she was without means and that her husband would not pay the debt. The court disbelieved the debtor's evidence, and, acting on the assumption that she would be allowed some money by her husband to spend on herself apart from money for necessities, made a committal order, providing that the order was to be suspended so long as the debtor paid instalments of £2 every 28 days.

C HELD : committal was a punishment for the proved offence of dishonestly using for other purposes funds which a debtor had available to meet either instalments of or, where no instalment order had been made, the total judgment debt ; in the present case, there was no evidence that the debtor had or had had means to pay the instalments ordered ; and, therefore, the order ought to be set aside.

D *Dictum of LUXMOORE, J., in Re Judgment Debtor (51 T.L.R. 525), applied.*

[AS TO COMMITTAL FOR NON-PAYMENT OF JUDGMENT DEBTS, see HALSBURY, Hailsham Edn., Vol. 2, pp. 448-450, paras. 615-619 ; and FOR CASES, see **F** DIGEST, Vol. 5, pp. 1032-1043, Nos. 8436-8514.]

Cases referred to :

- (1) *Re Judgment Debtor*, (1935), 51 T.L.R. 524 ; Digest Supp.
(2) *R. v. Brompton County Court Judge*, (1886), 18 Q.B.D. 213 ; 51 J.P. 547 ;
sub nom., Reeves v. Fowle, 55 L.T. 663 ; *reversd. on other grounds, sub nom., Stonor v. Fowle*, (1887), 13 App. Cas. 20 ; 5 Digest 1038, 8484.

G APPEAL by the debtor against a committal order made by His Honour JUDGE HURST, sitting at Reading County Court, dated Dec. 16, 1948. The learned judge, having previously given the judgment creditor judgment for £20 and costs, made a committal order on the first application of the creditor under a judgment summons issued some two months later. He directed, however, that the order should not be put into force if the debt was paid by instalments of £2 every four weeks. The Court of Appeal allowed the debtor's appeal. **H** The facts appear in the judgment of SOMERVELL, L.J.

Finer for the creditor.

Behrens for the debtor.

SOMERVELL, L.J. : This is an appeal from a committal order made on a judgment summons by His Honour JUDGE HURST whereby it was directed that

the debtor should be committed to prison for 14 days, but that the said order should not be put into force if the sum of £32 1s. 4d. were paid into court by instalments of £2 every 28 days, the first of such payments to be made on Jan. 16, 1949.

The parties lived in adjoining houses, and the debtor was found to have trespassed and released two budgerigars, the property of the judgment creditor. On Oct. 20, 1948, judgment was given in favour of the creditor for £20 and costs of £11 0s. 4d. On Dec. 16 a judgment summons was taken out, and it came before the learned county court judge who made the order which is appealed against relating to £32 1s. 4d., the original judgment debt and the costs plus a guinea in respect of the costs of the judgment summons. A note made by the judge after the hearing reads :

"I took no notes on the hearing of the judgment summons, and I gave no reason at the time for making the order. I was satisfied that at the previous trial, the defendant [debtor] had deliberately not told the truth when giving evidence. On the hearing of the judgment summons, when the debtor stated that she had no means and that her husband was not interested, I thought from her demeanour that she did not intend to pay the debt and I was not prepared to accept what she said. I assumed that normally she would be given something by her husband to spend upon herself apart from money for necessities, and I, therefore, thought it right in all the circumstances to make an order against her."

This is the type of matter in which this court will not interfere with the county court judge unless it is satisfied that he has not applied the right principle of law. In a matter of this kind I would always assume in a county court judge's favour that he was having proper regard to what had happened at the trial and what he had got to know of the parties, and that it would be unnecessary for him to set out in full and in detail every fact which he took into account in coming to the conclusion that he was satisfied under s. 5 of the Debtors Act, 1869, that the debtor had the means to pay.

The leading case on the construction of that section is *Re Judgment Debtor* (1), the judgment in which of LUXMOORE, J., has always been accepted as stating the principles which all courts should apply in cases under the section. The first point which is made in that judgment is that it is unusual to make a committal order on the first judgment summons, or except in respect of default on an instalment order. The learned judge said (51 T.L.R. 525) :

"It is the fact, however, that (as LORD ESHER, M.R., stated in *R. v. Judge of Brompton County Court* (2) (18 Q.B.D. 217), the section does not enable the judgment creditor to ask merely for an instalment order. Before the judge can make an instalment order he must have before him an application for committal. It is accordingly the practice of the court always to require evidence of means to be filed on a judgment summons, and not to make a committal order on the first application (save in the most exceptional cases : see *per* LORD ESHER, M.R., in *R. v. Brompton County Court Judge* (2)), but to give the debtor an opportunity of meeting the judgment by paying instalments adjusted according to his means."

It was common ground between counsel that this is the normal practice in the county court and that the committal order made by the learned judge in the present case on the first application, no previous instalment order having been made, was unusual. The fact that he did make a committal order on the first occasion shows that he took, and, no doubt, rightly took, an adverse view of the debtor and her attitude, but the position when the matter came before the judge was that laid down in a later passage in the judgment of LUXMOORE, J. (*ibid.*), when he said :

“ Accordingly, before making a committal order it is essential (see the observations of LORD HERSCHELL in *Stoner v. Fowle* (2) (13 App. Cas. 30)) that the court should satisfy itself that, in respect of the sums for which the committal order is to issue, it can truly be said that since the respective due dates the debtor has had the means of paying them available, but has neglected to use those means for the purpose of paying them. It is obvious that the debtor’s future prospects of payment have no bearing on this question . . . Since the committal is a punishment for the proved offence of dishonestly using for other purposes funds which the debtor had available to meet the unpaid instalments, there is, *prima facie*, no reason why it should not issue forthwith.”

A

B

Those passages refer to instalments, but the principle applies in a case like the present where there has been no previous instalment order.

C

D

Reading the learned judge’s notes, I am driven to the conclusion that he did not address his mind to the question : “ Am I satisfied that the defendant has dishonestly appropriated to other purposes £32, today or prior to this date since the judgment, in the eight weeks that have elapsed since the order was made ? ” The last sentence in his note makes that plain, because what he was relying on and was entitled to rely on was that the debtor got money from her husband from time to time, and the amount which he assumed she would have available for meeting the judgment debt was indicated by his order that she was to pay £2 a month. If that was the extent of her means, that would only have produced some £4 in the two months that had elapsed since the date of the judgment. For these reasons, I have come to the conclusion that the learned judge did not apply the law laid down in the judgment of LUXMOORE, J., and that the appeal should be allowed.

E

F

EVERSHED, L.J. : I agree. I am not unmindful of the circumstances in which learned judges of the county court have to deliver judgment on judgment summonses, but, nevertheless, this is a case in which the judgment creditor elected to invoke the jurisdiction of the Debtors Act, 1869, in order to recover her judgment. The liberty of the subject is at stake, and we are bound to look with strictness at all that has been done on the summons. I do not desire to repeat what has already fallen from my Lord. The order made being unusual in its character, I cannot accept that the learned judge applied his mind to the point which is essential in these cases, as laid down by LUXMOORE, J. The result is that I agree that the appeal should be allowed.

WYNN-PARRY, J. : I agree that this appeal, which has in it no merits, must succeed.

Appeal allowed with costs.

G

Solicitors : Norton, Rose, Greenwell & Co., agents for Collins, Dryland & Co., Reading (for the creditor) ; Church, Adams, Tatham & Co., agents for Sarjeant, Brown & Co., Reading (for the debtor).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

Re ROBERTSON (*deceased*). PUBLIC TRUSTEE *v.* ROBERTSON.

[CHANCERY DIVISION (Vaisey, J.), April 13, 1949.]

Costs—Taxation—Payment by trustee according to published and accepted scale—Shorthand writers' fees—Allowance on taxation.

A
B
C
A matter came before UTHWATT, J., by way of originating summons issued by the Public Trustee as trustee of the will of R., and was heard by him on Oct. 12, 24 and 30, 1945. On Oct. 30, 1945, it was ordered, *inter alia*, "that it be referred to the taxing master to tax as between solicitor and client the costs of the plaintiff and of the defendants of the application including in the costs of the plaintiff the costs of taking a shorthand note of the judgment and of one copy of the transcript thereof." The costs were ordered to be paid out of the estate in the matter of which the application had been made. The charge made by the shorthand writers for attendance on the three days of the hearing and for the shorthand note and the transcript of the judgment was £7 13s. 0d., which was paid by the Public Trustee. On taxation, the taxing master allowed only £5 12s. 0d. The amount £7 13s. 0d. was arrived at with reference to the shorthand writers' published scale of charges, which had shortly before been revised and had been published as the proper charges as from July 1, 1945. The revised scale had been submitted to the Council of the Law Society before publication, and no question had been raised by the council.

D
HELD: while it might in some cases be proper for a special bargain to be made with the shorthand writer, in the present case the full amount of £7 13s. ought to have been allowed because the Public Trustee could not do otherwise than pay the recognised charge which he had properly undertaken to pay.

[AS TO AMOUNT AND ALLOWANCE OF COSTS, see HALSBURY, Hailsham Edn., Vol. 26, pp. 100-103, paras. 189-193; and FOR CASES, see DIGEST, Practice and Procedure, pp. 926-958, Nos. 4688-4980.]

SUMMONS to review taxation.

F
The applicant, the Public Trustee, had paid the charges of shorthand writers for attendance at the hearing of a matter in the High Court, for taking notes of the judgment, and for a transcript thereof, according to the published and accepted scale, but on taxation the full amount of the charges was not allowed. VAISEY, J., sent the matter back to the taxing master to vary his certificate, with an intimation that the full amount should have been allowed. The facts appear in the judgment.

Gray, K.C., and F. B. Alcock in support of the summons.

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VAISEY, J.: The item to which I have to direct my attention is a disbursement of £7 13s. 0d. for the charges of the shorthand writers in respect of which only £5 12s. 0d. has been allowed, a difference of £2 1s. 0d. The action was instituted by originating summons issued on Feb. 13, 1945, which raised certain questions of construction arising out of the will and codicil of the testatrix, Agnes Williamina Duff Robertson. The Public Trustee, as executor of the will, was the plaintiff and the defendants were various beneficiaries thereunder. The matter came before UTHWATT, J., on Oct. 12, 24 and 30, 1945, and on the last day an order was made by the learned judge in which it was (among other things) ordered:

"... that it be referred to the taxing master to tax as between solicitor and client the costs of the plaintiff and of the defendants of the application including in the costs of the plaintiff the costs of taking a shorthand note of the judgment and of one copy of the transcript thereof."

It was finally ordered that such costs, when taxed, be retained and paid by the plaintiff out of the testatrix's estate. On April 17, 1946, the taxing master made his certificate. The costs of the plaintiff were taxed at a total sum of £130 *ls. 10d.*, and the costs of the defendants (as to which no question arises) at various amounts. Included in the £130 *ls. 10d.* is the sum of £5 *12s. 0d.*, part of a sum of £7 *13s. 0d.* paid to the shorthand writers for their charges.

- A In his answers to the plaintiffs' objections the taxing master refers to the fact that the Institute of Shorthand Writers published a new schedule in various legal papers, which he describes, I think a little contemptuously, as something in the nature of an increase of fee by proclamation. There is one point in his observations which seems to me to be of major importance and may possibly afford a solution to the difficulty which has now arisen. The taxing master
- B states, as to the second of the three days to which I have referred, that is Oct. 24, 1945, that the parties attended and were told that the judge was sitting in the Court of Appeal, the case stood over, and the parties went away. On that point either the taxing master was misinformed or he misunderstood the information which had been supplied to him, because I now have a transcript of the hearing before UTHWATT, J., on Oct. 24, 1945, which makes it perfectly plain
- C that it is a complete misdescription of what occurred to say that "the case stood over and the parties went away," the insinuation being that there was no sitting in court at all on that day. The master allowed the sum of £5 *12s. 0d.*, which he considered a fair and adequate figure, being two attendance fees of £2 *2s. 0d.* each, and £1 *8s. 0d.* for the transcript. As far as I can understand the matter, it seems to me that on the scale adopted
- D by the taxing master for the purposes of this charge, he would, if he had known the facts, have allowed three attendance fees of £2 *2s. 0d.* each and £1 *8s. 0d.* for the transcript, which would have brought the amount to *1s.* more than the £7 *13s. 0d.* claimed.

- The matter of disbursements in a bill of costs seems to me to be one of considerable difficulty. I must always remember that I have no right to interfere
- E with the taxing master's discretion on a mere matter of *quantum*. But let me suppose a parallel case of the law stationers having announced that they would not copy documents except at a certain rate per folio. What is an unfortunate plaintiff, or other party, or solicitor, to do? He has to procure, in the case supposed, the services of a law stationer, and, although he may think that the law stationers are asking too much, he has really no option but to pay
- F the recognised and appropriate charges. If it be the fact that the charges which have been made in this case by the shorthand writers are according to a recognised scale, what is the plaintiff or other party to do if he requires a shorthand note to be taken of his case and a transcript made? It is very difficult for him to question the propriety of a charge properly made, and if it be the fact that a contractual obligation is imposed on the Public Trustee in this case to pay
- G the advertised, recognised and, if you like (following the expression of the taxing master) the proclaimed charges of the shorthand writers, whatever he may think of their propriety, it seems to me he is in a dilemma. He wants a note taken, and he wants a transcript, and he goes to people who can take the note and who can transcribe the note. Unless he makes a special bargain (the negotiation of which, even if it had been successful, might have added greatly
- H to the costs of the application) I should have thought that he was bound to pay the recognised charge. If that is so, it seems to me that it would be wrong to disallow it on taxation. I must not be taken to be holding, or suggesting, that any and every disbursement by an executor or trustee, however extravagant and improvident, is necessarily and, as it were, automatically to be passed and allowed on taxation, but the disallowance of a disbursement by an executor or trustee (and, particularly, in the case of the Public Trustee) is, in my judgment, a very serious step to take, amounting in fact to a finding that a breach of

trust has been attempted. In this case, for example, the effect of the disallowance is, and I think must be, that the Public Trustee has paid away the sum of £2 ls. 0d. improperly and that he must be surcharged accordingly for that amount, with what result to himself and to the estate of his testatrix it is very difficult to appreciate.

Was the disbursement of £7 13s. 0d. in the circumstances proper or improper? Was it reasonable? Was it fair? Or was it extravagant and improvident, made recklessly and without regard to the obligations of an executor to preserve and protect the estate of the testatrix? To answer this question I must examine, not at length, the principle on which the shorthand writers' account was prepared. The position is explained to me in an affidavit sworn by Mr. Herbert George Wilde, the effect of which I may summarise as follows. He states that he is a member of the council of the Institute of Shorthand Writers and has been a member of it for 40 years, having three times been its president. No one can dispute or doubt for one moment the extent and completeness of Mr. Wilde's knowledge of the position. He tells me how the institute was registered under the Companies Acts, some 50 years ago, and that the institute has worked in conjunction with the Association of Official Shorthand Writers, another body which, as an association, was formed in 1937 by arrangement with the Lord Chancellor's Department to undertake official shorthand writing in witness actions. He tells me that the memorandum of association of that body confines itself to that particular work. The work of shorthand writers consists of "official work" and "non-official work." The official work he describes as being of two classes. The fees for the official work have always been fixed by arrangement between the institute, on the one hand, and His Majesty's Treasury, on the other. Then he tells me:

"The fees paid for non-official work are a matter for agreement by the party employing the shorthand writer, but the institute has for many years had a published scale of fees for non-official work which is binding on its members and represents the rates at which they are prepared to undertake non-official work. The fees set out in that scale have always been accepted by clients of members of the institute and have always been allowed on taxation."

He goes into the particulars of the scale which is charged, and he draws attention to the fact that the non-official scale was submitted for comment to the Law Society. The Council of the Law Society considered it, and, as is shown by some exhibited correspondence, the council had no question to raise in regard to it. Thereafter, the scale was published in the usual legal publications. Nobody can doubt that it was brought to the notice of the profession. Although, no doubt, it is always open to anyone who engages the services of a shorthand writer for non-official work to make some special bargain with regard to payment, I think it is fairly obvious that what may be colloquially termed "under-cutting" by any particular shorthand writer would probably be contrary to his obligations to his profession and would not be entertained.

That being the position, I see no objection to what the taxing master has called the "proclamation." It seems to me the only way in which any one who desires to sell his wares, be they the expert transcribing of possibly inaudible observations which are made in court, or whether it be the provision of sheets of foolscap or bottles of ink, the best thing is to tell everybody, as plainly as they can be told, by advertisement or otherwise: "If you want this particular service of this particular profession, this is what you will be expected to pay." The scale here, having been well known for nearly four years, is, I should have thought, the scale which, whether exorbitant or not—and I am not suggesting for one moment that it is exorbitant—people must pay if they want the services to which the scale refers. I do not see what the Public Trustee or a solicitor could do, having ordered the notes to be taken, but pay according

to that scale. If the result of this disallowance is to oblige the Public Trustee or a solicitor to defray this surplus out of his own or somebody else's pocket, I think the results are extremely distressing. It seems to me that the non-official scale has been so advertised and brought to the notice of the profession, and has been so generally accepted, that it must be taken to be a contractual charge recoverable by the shorthand writer for his services, apart from any special bargain. In the present case I cannot think that the charge of £7 13s. 0d. is otherwise than one which should be accepted. I ought not to exclude the possibility of cases arising in which there has been an unreasonably slavish adherence to the scale or to say that the discretion of the taxing master is not fully exercisable to check a real case of abuse. It might, for instance, be argued that it was the duty of the trustee or executor, as the case may be, to attempt to make a special bargain in a particular case, but the same consideration must apply to other disbursements. It might in some circumstances be right to surcharge an executor who had paid too much for the foolscap paper, or pens and ink, which he had procured for the purpose of carrying out his duties.

While I have no material before me to show whether the opinion of the taxing master that the increase in the fees charged by shorthand writers is too much, or is putting too heavy a burden on litigants and others, is well founded, I base my decision on the fact that this was really a contractual charge which the Public Trustee was bound to pay because he had no choice. I think the result of it is that the deduction of £2 1s. 0d. was not justified and the matter ought to go back to the taxing master to vary his certificate with that intimation.

Order accordingly. No order as to costs of this application.

Solicitors: *Thompson, Quarrell & Megaw.*

[*Reported by H. McL. MORRISON, Esq., Barrister-at-Law.*]

Re BIRKIN (*deceased*). HEALD v. MILLERSHIP AND OTHERS.

[CHANCERY DIVISION (Harman, J.), May 5, 1949.]

Will—"All nephews and nieces of my late sister L."—*Intention of gift to children of L.*

By his will, which was in his own handwriting, a testator gave legacies of £200 each to the children of his sister M., the children of his sister G., and the children of his deceased brother A. The testator then provided: "Also I give to the following £100 each free of duty . . . All nephews and nieces of my late sister L." After one charitable legacy, a legacy to each of his two executors and trustees, and certain other legacies to strangers in blood, the residue of his estate was given to his wife and three children equally. At the date of his will there were living the testator's wife and three children, his sister M. and her three children, his sister G. and her two children, the five children of his deceased brother A., his brother F. who had no children, and the five children of his deceased sister L. He also had a half-sister C. who had two children.

HELD: having regard to the will as a whole and to the evidence as to the state of the family at the date of the will, the court was entitled to infer that the word "children" had been omitted from the clause designating the legatees by reference to L. and to read it as making bequests to "all nephews and nieces children of my late sister L."

Re Smith ([1947] 2 All E.R. 708; [1948] Ch. 49), *applied*.

[AS TO EVIDENCE TO AID CONSTRUCTION APART FROM IDENTIFICATION, see HALSBURY, Hailsham Edn., Vol. 34, pp. 181-183, paras. 231-234; and FOR CASES, see DIGEST, Vol. 44, pp. 614-627, Nos. 4409-5479.]

Cases referred to:

(1) *Re Smith*, [1947] 2 All E.R. 708; [1948] Ch. 49.

- (2) *Sweeting v. Prideaux*, (1876), 2 Ch.D. 413; 34 L.T. 240; 44 Digest 1258, 10864.
- (3) *Re Wroe*, (1896), 74 L.T. 302; 44 Digest 597, 4227.
- (4) *Perrin v. Morgan*, [1943] 1 All E.R. 187; [1943] A.C. 399; 168 L.T. 177; 2nd Digest Supp.

ADJOURNED SUMMONS to determine the true construction of a bequest to "all nephews and nieces of my late sister L." HARMAN, J., held that the bequest should be read as a gift to the children of L. The facts appear in the judgment.

Rawlence for the plaintiff, one of the executors of the will of Joseph Birkin, deceased.

Tonge for the first, fifth, seventh and eighth defendants, a child of L., and residuary legatees.

Duffy for the second, third, fourth and sixth defendants, a nephew of L., infant children of the testator's half-sister C., and a son of the testator.

HARMAN, J. : When Joseph Birkin, the testator, made his will on Aug. 21, 1946, his wife and three children were living. He had five brothers and sisters, three of whom were living. The first, Millicent, was married to a man named Baxendale and had three children; the second, Gertrude, was married to a man named Watson and had two children; the third, Arthur, was then dead, but he had been married and had had five children; the fourth, Frederick, had no legitimate issue; and the fifth, Elizabeth, was then dead, but she had been married to a man named Millership and had been survived by five children. The testator also had a half-sister Cassandra, very much younger than his own brothers and sisters, who was married to a man named Harrison, and had two children born in the present decade. All the children of the testator's brothers and sisters, and those of his half-sister, were living at the date of the will.

The testator wrote his will with his own hand, and he appointed his son, Joseph William Birkin, and a Mr. Heald to be executors and trustees. He gave each of them £300, and his will continued :

"I give the following pecuniary legacies namely To my nephews in America Ronald and Eric sons of my sister Millicent (Mrs. Baxendale) and Lilian my niece sister to Ronald and Eric now residing in Chicago To my nephews George and Herbert Watson sons of my sister Mrs. G. E. Watson now residing in Schenectady U.S. To my nephews Frank William Philip and Arthur and niece Hilda sons and daughter of my late brother Arthur Birkin . . . To my brother Frederick Birkin the sum of £200 each free of duty."

Therefore, he had dealt with all the children of Mrs. Baxendale, all the children of Mrs. Watson, and all the children of Arthur, and with Frederick, who had no children. There remained unbenefited the children of Elizabeth and of the half-sister, Mrs. Harrison. The will continues in these terms: "Also I give to the following £100 each free of duty . . . All nephews and nieces of my late sister Lizzie (Mrs. Millership)." There is no mention of his half-sister, Mrs. Harrison. He then bequeaths a charitable legacy after the death of his daughter Edith, and specifically devises a house. He gives the residue to his trustees on trust for sale, and bequeaths it in equal shares to his wife and his three children. He died in 1947 and his will has been duly proved.

The question before me is as to the meaning of the words: "Also I give to the following £100 each free of duty . . . All nephews and nieces of my late sister Lizzie." When one considers the circumstances, it is borne in on the mind as a matter of necessary implication that the testator cannot have meant by those words what they appear to say. I decline to believe that when a man intends to benefit his own children he describes them as the nephews and nieces of his late sister. Nor do I believe that the testator, having given

£200 each to the children of all his brothers and sisters except Lizzie, when he says "Also" and gives an extra £100 intends to benefit the same nephews and nieces over again. Thirdly, it seems to me ridiculous to suppose that he mentioned his late sister Lizzie merely to give a benefit to her nephews and nieces which he denied to her children. I feel convinced that he was meaning by this bequest to benefit the children of his late sister Lizzie.

- A That would be effective if one word is added so that the provision reads in this way: "All nephews and nieces children of my late sister Lizzie." That makes the bequest congruous with all the bequests to nephews and nieces of £200 which preceded it, because they are described as sons or daughters of a brother or late brother or of a sister. It is true that he does not mention the children of his sister, Lizzie, by name. Instead of that he puts the word
- B "all." That only means, in my view, that he was uncertain of the names of the children of his dead sister Lizzie, and, instead of naming them and risking being wrong, he said "all." There were five of them, and he may well have been uncertain how many there were and what their names were.

The difficulty I feel is that, if I add this word "children," I shall not only be conferring benefit on the children of Elizabeth, but I shall also be cutting out the two infant children of the half-sister Cassandra.

- C I say nothing about cutting out the other nephews and nieces of Elizabeth, because either they are his own children who receive the residue or they have already received £200, and it is, I think, not to be supposed that he intended to give them another £100, so they would not be disappointed of anything to which they could reasonably look. The infant children of his half-sister have much more reason to feel aggrieved, and it is submitted to me with a great deal of cogency by counsel for those interested in setting up the literal construction of the will, that where I find a gift which on the face of it is plain and unambiguous, a gift to a class whose members there is no difficulty in ascertaining, I am not entitled, because of the testator's circumstances, to ignore the words of the will, and by looking outside it to extrinsic circumstances, or, as counsel says (and this seems to me to be much more material) looking to other parts of the will, to find another meaning inconsistent with the words. Counsel argues that members of the class must not be dispossessed, however much one may think that they were not intended to take or that others were intended to take. By so doing, it is said I am, not construing the testator's will but making a new one for him, and that cannot be the function of the Court of Chancery.
- F I agree that I am not entitled to write a new will for the testator. On the other hand, I am entitled to look at the whole of the will which he has written. So, also, I am entitled to know his circumstances and those of his family and those named as beneficiaries at the time when he made his will. That is the kind of extrinsic evidence which is always admissible in construing a will, because no will can be construed without it. If, looking at the whole will and those
- G extrinsic circumstances, I am convinced that A is intended and that B is not, I conceive that, as a matter of construction, I am entitled to read the words rather as they should be than as they are, not in order to make a new will for the testator, but to make his will as I think he intended it, although for some reason some words have dropped out. I do not want to speculate how or why. There are various reasons why it might have been so. Counsel says
- H that this will, taken literally, is not so absurd as it seems to me to be, but I do not accept that submission. I feel no doubt that the testator could not have penned the words with the intention which they appear to bear. It is not a matter so much for cases, it is a question of principle. This has been recently discussed by VAISEY, J., at considerable length in *Re Smith* (1) where the learned judge took a step bolder than that which I am taking, for in that case there was a doubt, not whether the testatrix intended to benefit her husband, but what benefit she intended to confer on him. The learned judge was con-

vinced that the husband was intended to take an absolute interest, and he so held, although there was no express gift of that kind in the will. It is true that there the judge was dealing only as between the husband and the next of kin. He was not defeating members of a class which on the face of the will was intended to take, but in principle I can see no difference between the two matters. In practice the inference that I draw is more easily drawn than the one which VAISEY, J., drew, because there can be no doubt what the interest intended to be given is, namely, a legacy of £100. In *HAWKINS ON WILLS*, 3rd ed., pp. 3-6, the whole of the law on this subject is summed up. I adopt the principles on which VAISEY, J., relied in *Re Smith* (1), and I hold that I am entitled to infer that the word "children" has been omitted by mistake and by implication to read it back into the will.

Order accordingly. Costs of all parties as between solicitor and client to be taxed and paid out of the estate in due course of administration.

Solicitors: *Taylor, Jelf & Co.*, agents for *Hopkin & Son*, Mansfield, for all parties.

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

Re THOMAS (deceased). DAVIES AND OTHERS v. DAVIES AND ANOTHER.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Barnard, J.), March 10, 1949.]

Probate—County court—Jurisdiction—Power to pronounce for validity of will—County Courts Act, 1934 (c. 53), ss. 60 (1), 61.

By s. 60 (1) of the County Courts Act, 1934, where on an application for a grant or revocation of probate, the registrar is satisfied that the personal estate of the deceased is under £200 and the real estate does not exceed £300 "the judge of the county court having jurisdiction in the place of abode of the deceased shall have the jurisdiction of the High Court in respect of any contentious matter arising in connection with the said grant or revocation."

The plaintiffs, as residuary legatees under a will dated May 5, 1943, claimed a pronouncement for that will as against a will purported to have been executed by the testatrix on Aug. 26, 1944, in which the two defendants were named, the one as executor and the other as residuary legatee. At the date of her death the testatrix, whose personal and real estate did not exceed the limits laid down by s. 60 (1), had a place of abode in A. and the parties applied for the action to be tried in the A. county court. The registrar, being doubtful whether a county court had power to pronounce for the validity of a will, referred the matter to the judge.

HELD: provided the requirements of s. 60 (1) as to the value of the estate and the place of abode were satisfied, the county court had jurisdiction, and the case should be transferred to A. county court.

[AS TO JURISDICTION OF COUNTY COURT IN PROBATE MATTERS, see HALSBURY, Hailsham Edn., Vol. 8, pp. 433, 434, para. 928 and 1948 Supp.]

Cases referred to:

- (1) *Dunn v. Dunn*, (1860), 1 Sw. & Tr. 521; 2 L.T. 24.
- (2) *Norris v. Allen*, (1862), 2 Sw. & Tr. 601; 1 New Rep. 34; 7 L.T. 338; 27 J.P. 9; 23 Digest 121, 1183.
- (3) *Zealley v. Veryard*, (1866), L.R. 1 P. & D. 195; 14 L.T. 769; 30 J.P. 663; 23 Digest 81, 698.

PROCEDURE SUMMONS to determine whether the county court of the area in which the testatrix was residing at the date of her death had jurisdiction to

try certain issues arising out of her testamentary dispositions. BARNARD, J., held that the county court had such jurisdiction and directed that the cause be transferred accordingly.

J. E. N. Russell for the plaintiffs, residuary legatees under the first will.

Simon for the defendants, the executors and the residuary legatee under the second will.

A BARNARD, J.: This summons which has been adjourned into court arises out of a probate action concerning the testamentary dispositions of Rachel Thomas, deceased. The personal estate of the testatrix is under £200 and the real estate does not exceed £300. When the testatrix died she had a place of abode within the jurisdiction of the county court of Aberdare, and both the plaintiffs and the defendants desire that the action should be tried in the county court at Aberdare.

The only difficulty with regard to this being done arises from a passage in TRISTRAM & COOTE'S PROBATE PRACTICE, 19th ed., p. 95, which reads as follows :

“ A county court judge has no power to pronounce for the force and validity of a will by decree ; he can only order a grant of representation to issue, or to be revoked (County Courts Act, 1934).”

C It is not inappropriate to look at some later pages in which the jurisdiction of county courts is referred to. At p. 575, where the learned authors are dealing with “ place of trial,” one finds set out the position, where the trial is, first, in Middlesex, secondly, at assizes, and, thirdly, in the county court. Again, at p. 585 dealing with “ notice of trial,” the learned authors refer to the requirements for entry for trial, first, in London, then in Manchester and Liverpool, thirdly, at other assizes, and fourthly, in the county court, and under the heading “ County Court ” there is the following passage :

“ The procedure in probate actions transferred to the county court will be found set out in the County Court Rules, 1936, Ord. 36.”

E It seems to me that the learned authors of this edition are speaking with two voices.

There can be no doubt that when the Court of Probate came into existence under the Court of Probate Act, 1857, which was followed by the amending Court of Probate Act, 1858, the county court had jurisdiction in all probate matters limited only by the size of the deceased's estate and by the deceased having a place of abode within the jurisdiction of the county court which was to deal with the probate matter. That was the position up to 1925 when the Supreme Court of Judicature (Consolidation) Act was passed. To give an example of that, it is only necessary to refer to one or two cases. In *Dunn v. Dunn* (1) the headnote is :

G “ Where, in a probate cause, the county court has jurisdiction, the court may, though application be made in behalf of all the parties to the cause for it to be tried at the assizes, still, in its discretion, direct it to be tried in the county court.”

It is clear that the validity of a will was in dispute there and that the will was being attacked on the ground that it was not the will of the deceased, that it was not duly executed, and that the deceased was not of sound mind at the time of its execution. SIR C. CRESSWELL, on an application to direct the issue to be tried at assizes, stated (1 Sw. & Tr. 521) :

“ The personal property may not amount to more than £200. If so, the cause would properly come under the jurisdiction of the county court . . . Although the parties may apply for a cause to be tried at the assizes, I may still consider it a proper one to send to the county court. Before I make any order, an affidavit must be brought in, showing the amount of the deceased's personal property.”

It so turned out in that case when the affidavit was brought in that the estate was above the amount which gave the county court jurisdiction and so the matter was sent to the assizes. There is another decision of SIR C. CRESSWELL in *Norris v. Allen* (2), the headnote of which is :

"When the judge of the Court of Probate is satisfied that the county court has jurisdiction, he will direct a cause to be tried before the judge of a county court having jurisdiction, and will also direct the papers in the cause to be transmitted to the county court for the purposes of the suit ; but he will give no directions as to the mode in which the cause shall be tried. It will be for the judge of the county court to decide whether the cause shall be tried before him with or without a jury."

In that case the plaintiff was propounding a codicil and the defendant, who was a legatee under the will and adversely affected by the codicil, pleaded several matters on which issue was joined. SIR C. CRESSWELL, in a short judgment, stated (2 Sw. & Tr. 602) :

"You should apply to the judge of the county court to direct the mode in which the cause is to be tried. I cannot give directions for the cause to be tried in any particular manner. I shall only direct that it be tried before the judge of the county court of Northamptonshire, and leave him to decide whether it shall be tried with or without a jury ; and I will also direct the papers in the cause to be transmitted to the county court."

It is necessary to see how the relevant sections of the Court of Probate Acts, 1857 and 1858, were affected by the Judicature Act, 1925. The Judicature Act, 1925, was in substance a consolidating Act and s. 150, provisos (a) and (b), substantially replace s. 59 of the Court of Probate Act, 1857, and s. 10 of the Court of Probate Act, 1858. The vital words one has to look at which clothe the county court with jurisdiction are to be found at the end of s. 10 of the Act of 1858 :

". . . the judge of the county court having jurisdiction in the place in which the deceased had at the time of his or her death a fixed place of abode shall have the contentious jurisdiction and authority of the Court of Probate in respect of questions as to the grant and revocation of probate of the will or letters of administration of the effects of such deceased person, in case there be any contention in relation thereto."

Those words are replaced by these in s. 150 (b) of the Judicature Act, 1925 :

". . . the judge of the county court having jurisdiction in the place of abode of the deceased shall have the jurisdiction of the High Court in respect of any contentious matter arising in connection with the said grant or revocation."

I can see no difference whatsoever in the meaning of those two passages. I am satisfied that, if the legislature in 1925—and this equally applies when I come to deal with the County Courts Act, 1934—had any intention of depriving the county court of the jurisdiction which it had possessed during all those years, it would have said so specifically. In point of fact there is no difference in the two sections except merely in the way in which they are worded, the Judicature Act, 1925, putting the matter a little more concisely.

The County Courts Act, 1934, s. 60 (1) and s. 61, replaced provisos (a) and (b) of s. 150 of the Judicature Act, 1925. Section 60 (1) of the Act of 1934 is word for word the same as s. 150 (b) of the Judicature Act of 1925. If there is any doubt as to what the word "contentious" means, and I assume that it meant the same in 1858 as it did in 1925 and 1934 and as it does to-day, it is shown clearly by the judgment of SIR JAMES WILDE in *Zealley v. Veryard* (3). As counsel for the defendants pointed out, this was only one example of a probate

action which was undoubtedly tried by the county court, but SIR JAMES WILDE says (L.R. 1 P.D. 197) :

- A “ In cases within the jurisdiction of a county court, it is competent to the party applying for a grant, or for the revocation of a grant, to go at once to the county court, or if the suit has been commenced in this court, to apply under s. 59 [of the Court of Probate Act, 1857] to have the cause sent to the county court and where ‘ it is shown to the Court of Probate that the state of the property and the place of the abode of the deceased were such as to give contentious jurisdiction to the judge of a county court, the Court of Probate may send the cause to such county court, and the judge thereof shall proceed thereon as if such application and cause had been made to and arisen in his court in the first instance ’ ”
- B I do not think that the position is any different to-day, owing to the passing of the Judicature Act, 1925, and the County Courts Act, 1934, from what it was in 1857 when the Court of Probate came into existence. I have no doubt that, provided the cause comes within the statute from the point of view of the value of the estate and the place of abode of the deceased, the county court has jurisdiction. It is very right and proper that it should have jurisdiction to deal with estates of small value. It would be putting an intolerable burden on the parties concerned with such estates to compel them to litigate in the High Court. I shall, therefore, make an order directing this cause to be transferred to the county court at Aberdare and the necessary papers in the cause to be sent to the judge of that court.

Order accordingly.

- D Solicitors : *Theodore Goddard & Co.*, agents for *Wm. Thomas & Williams*, Aberdare (for the plaintiffs) ; *Rider, Heaton, Meredith & Mills*, agents for *Marchant, Harries & Co.*, Aberdare (for the defendants).

[*Reported by R. HENDRY WHITE, ESQ., Barrister-at-Law.*]

E

SAMPSON'S EXECUTORS v. NOTTINGHAM COUNTY COUNCIL.

- F [KING'S BENCH DIVISION (Lord Goddard, C.J., Birkett and Lynskey, JJ.), April 28, 29, 1949.)

Acquisition of Land—Compensation—Acquisition after passing of Town and Country Planning Act, 1947, but before appointed day—Agricultural land—No other permitted user practicable—Permanent restriction of development—Town and Country Planning Act, 1947 (c. 51), ss. 51 (1), (2), 55 (1), (2), (3).

- G By a compulsory purchase order a local authority was authorised to acquire a piece of land forming part of a field owned by the claimants who claimed £124 as the value of the land in fee simple. At all material times the land was used for agricultural purposes, and it could not practicably have been put to any other use covered by sched. III to the Town and Country Planning Act, 1947. The value of the land for agricultural purposes ascertained by reference to prices current immediately before Jan. 7, 1947, was £17. Before Aug. 6, 1947, the date of the Royal Assent to the Act of 1947, the land had a substantial building value for development as part of a potential building estate, and would have sold readily in the anticipation that planning permission for the development of it and the adjoining land of the claimants would not be indefinitely refused. At the rear of the land, though not immediately contiguous thereto, were a few
- H

good class houses, the amenities of which might have been affected if the land was built on. The notice to treat was served on Feb. 27, 1948, after the passing of the Act, but before its coming into force, and, therefore, the compensation for the land had to be assessed in accordance with the provisions of s. 55 of the Act. The local authority contended that the value of the land could not exceed its value for agricultural purposes devoid of any building value, *viz.*, £17. The claimants contended that it was legitimate to have regard to the price that would have been obtained in the open market at the date of the notice to treat, subject to the necessity for obtaining permission to develop under the Act, but on the assumption that such permission would not be indefinitely withheld, and, alternatively, that the "amenity" value of the land should be taken into account.

HELD : (i) the value of the land must be fixed on the assumption that there was a permanent restriction prohibiting the carrying on of any development other than development of the classes specified in sched. III.

(ii) as the land could not practicably be put to any use permitted by sched. III, no compensation was payable in respect of "amenity" or "inducement" value.

(iii) therefore, the claimants were entitled to an award of £17 only.

[FOR THE TOWN AND COUNTRY PLANNING ACT, 1947, ss. 51 (1), (2), 55 (1), (2), (3), see HALSBURY'S STATUTES, Vol. 40, pp. 288, 293, 294.]

CASE STATED by an official arbitrator appointed under the Acquisition of Land (Assessment of Compensation) Act, 1919, s. 1 (1), for the opinion of the High Court as to the principles on which the value, subject to the provisions of s. 55 of the Town and Country Planning Act, 1947, of certain land which had been compulsorily acquired by Nottinghamshire County Council should be fixed for purposes of compensation. The facts appear in the headnote and the judgment of LORD GODDARD, C.J.

C. N. Shawcross, K.C., and *Lord Vaughan* for the claimants, the executors of *Walter Sampson*, deceased, and owners of the land.

Rowe, K.C., and *Squibb* for the local authority.

LORD GODDARD, C.J. : This is a Special Case stated by an arbitrator who was sitting to value a piece of land in the county of Nottingham which is the subject of a compulsory purchase order made by the Nottinghamshire County Council and confirmed by the Minister of Town and Country Planning. The council desire to acquire the site in question for the purpose of erecting an extension to a school. The compensation has to be assessed under the Acquisition of Land (Assessment of Compensation) Act, 1919, which provides in s. 2 (2) :

"The value of land shall, subject as hereinafter provided, be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realise . . ."

Since that Act was passed there have been several Acts dealing with town and country planning, and the assessment of compensation has now to be made by the arbitrator with due regard to the provisions of the Town and Country Planning Act, 1947.

Section 12, which is in Pt. III of the Act of 1947, provides that :

"(1) Subject to the provisions of this section and to the following provisions of this Act, permission shall be required under this Part of this Act in respect of any development of land which is carried out after the appointed day."

The appointed day is July 1, 1948. The Act received the Royal Assent on Aug. 6, 1947, the Bill having been introduced into Parliament in January, 1947. That has a certain bearing on this case because provision is made by

s. 55 (2) that for certain purposes regard shall be had to January, 1947, because otherwise people might, between the time when the Bill was first introduced into Parliament and that when the Act came into force, have changed the use of their land so that it should acquire an enhanced value. By s. 12 (2) "development" under the Act means :

- A " . . . the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land."

In other words, any change in the use of the land is regarded as development. Before any land can now be developed permission must be obtained from the appropriate authority. Section 51, which deals with compensation for compulsory acquisition after the appointed day, provides that :

- B " (1) Any compensation payable in respect of the compulsory acquisition of an interest in land by a government department or a local or public authority within the meaning of the Acquisition of Land (Assessment of Compensation) Act, 1919, in pursuance of a notice to treat served on or after the appointed day . . . shall be assessed in accordance with the provisions of that Act as modified by the provisions of this and the three next following sections."
- C

These sections modify the power of the arbitrator to give what a willing seller would obtain in the market irrespective of the provisions of the Act of 1947. Sub-s. (2) provides that :

- D " The value of any such interest shall be ascertained on the assumption that planning permission would be granted under Pt. III of this Act for development of any class specified in sched. III to this Act, but would not be so granted for any other development."

Provision had to be made for the state of affairs which arises in the present case where compulsory acquisition was sought after the passing of the Act in 1947, but before July 1, 1948, when the Act came into force. It is provided in s. 55 that :

- E " (1) Subject to the provisions of this section, the foregoing provisions of this Part of this Act shall apply in relation to land compulsorily acquired in pursuance of a notice to treat served after the passing of this Act and before the appointed day as they apply in relation to land compulsorily acquired in pursuance of a notice to treat served after the appointed day ; and sub-ss. (3) and (4) of s. 53 of this Act shall apply in relation to land acquired by agreement in pursuance of a contract made after the passing of this Act as they apply in relation to land acquired by agreement in pursuance of a contract made after the appointed day."
- F

Then sub-s. (2), which is the most material sub-section, reads as follows :

- G " The value of any interest in land which is compulsorily acquired as aforesaid shall be ascertained by reference to prices current immediately before Jan. 7, 1947, and for that purpose the interest shall be deemed to have been subsisting immediately before that day subject to all incidents to which it is subject on the date of the notice to treat, and the land shall be deemed to have been immediately before the said seventh day of January in the same state as it is at the date of the notice to treat."
- H

Sub-section (3) of s. 55 provides :

" Sub-sections (2) to (6) of s. 51 of this Act shall not apply to any interest in land which is compulsorily acquired as aforesaid, but in calculating the value of any such interest it shall be assumed that the land was, at the time of the notice to treat, subject to a permanent restriction prohibiting the carrying out thereon of any development other than development of

the classes specified in sched. III to this Act ; and for the purposes of this provision, s. 12 of this Act and the said sched. III shall have effect as if for the references therein to the appointed day there were substituted references to the date of the notice to treat."

As the notice to treat in this case was given on Feb. 27, 1948, the arbitrator has to assess the compensation having regard to the provisions of s. 55. Counsel for the claimants contended that we ought to distinguish between sub-s. (3) of s. 55 and sub-s. (2) of s. 51. Sub-section (2) of s. 51 contains two long provisos. The draughtsman might well have said : The provisos to sub-s. (2) of s. 51 shall not apply. He said the whole sub-section shall not apply, and then went on to say what principle is to be used in calculating the value of the land :

" . . . in calculating the value of any such interest it shall be assumed that the land was, at the time of the notice to treat, subject to a permanent restriction prohibiting the carrying out thereon of any development other than development of the classes specified in sched. III to this Act."

Schedule III is immaterial for the purposes of this case. We are asked to read the words " permanent restriction " as having some sort of an indefinite, temporary, meaning. It is clear that what the section means is that the value of the land must be fixed on the assumption that development will not be permitted. It is to be a permanent restriction, and, if there is a permanent restriction on the development of the land, no development can ever take place. That is the first thing which must be borne in mind. The further provision of s. 55 (3) :

" . . . s. 12 of this Act and the said sched. III shall have effect as if for the references therein to the appointed day there were substituted references to the date of the notice to treat,"

seems to me to mean no more and no less than that land in respect of which notice to treat has been served cannot be developed without permission after the date of the notice to treat. That restriction is permanent. If the use of the land has been altered between Jan. 7, 1947, and the date of the notice to treat, the arbitrator has then to calculate what the value of the land would have been on Jan. 7, 1947, if used in the way in which it was being used at the time of the notice to treat. The land in the present case was used at that time for agricultural purposes, and the arbitrator has found that the value of the land for agricultural purposes, ascertained by reference to the prices current immediately before Jan. 7, 1947, was agreed at £17. That being so, it seems to me that the sections to which I have referred show that the utmost compensation that can be paid, subject to one matter which I will mention, is £17. That is the agricultural value of the land, and the policy of the Act is that a person who is selling land is not to obtain any increased value which the land might bear because it is what is sometimes called " ripe for development " or may become ripe for development. He may only obtain the value of the land having regard to the use to which it was being put and on the basis that that use will always be made of it. Therefore, I have no doubt that we should answer the first question submitted to us by the arbitrator : " Whether I should as a matter of law award to the claimants the sum of £17," in the affirmative.

It is also argued by counsel for the claimants as a subsidiary point that it would be legitimate " to increase the sum of £17 above referred to by such additional sum as might be paid by the owner of a contiguous or neighbouring property in order to secure control and prevent development of the said land." The plan, which has been made part of the Case, shows that there are some houses in the neighbourhood and there is also the proposed site of a picture palace which was to be erected close-by. Counsel contends that in January, 1947, an adjoining owner—one of the owners of these houses or the proprietor

of the cinema—might have been willing to pay some additional sum to get control of the land because it might be an advantage to him. The arbitrator, with regard to that, has found that :

“At all material times the said land was being used for agricultural purposes. It could not practicably have been put to any other use covered by sched. III to the Town and Country Planning Act, 1947. There are no buildings thereon.”

A

It is plain that, as this land is subject to the permanent restriction in the sense I have described, it must remain as agricultural land. It is said that this land might be brought within the curtilage of a dwelling-house because a dwelling-house might be put up on adjacent land under permission and then this land could be brought within the curtilage of that dwelling-house. I think that that

B

is a fallacy, because once the land, which is at present agricultural land, is brought within the curtilage of a dwelling-house so that it becomes part of the dwelling-house, its use is altered and that is prohibited by s. 12 of the Act. Therefore, the arbitrator should not add anything to the value of the land on this ground. For these reasons, the Case will go back to the arbitrator with the intimations I have mentioned.

C

BIRKETT, J. : I agree.

LYNSKEY, J. : I agree. I would only like to add that by s. 12 (1) any development of land without permission is prohibited, subject to the proviso in sub-s. (2) setting out a number of operations which can take place in relation to land which do not come within the definition of the word “development.”

D

They only apply to particular types of works including, in one case, alterations in the use of buildings or land within the curtilage of a dwelling house for any purpose incidental to the enjoyment of the dwelling-house.

I entirely agree with my Lord as to the interpretation of s. 55 which, by sub-s. (2), provides that the land must be valued at prices current immediately before Jan. 7, 1947, but subject to the assumption that it was in the condition and subject to incidents that were in being at the date of the notice to treat. Sub-section (3) provides that :

E

“Sub-sections (2) to (6) of s. 51 of this Act shall not apply to any interest in land which is compulsorily acquired as aforesaid, but in calculating the value of any such interest it shall be assumed that the land was, at the time of the notice to treat, subject to a permanent restriction prohibiting the carrying out thereon of any development other than development of the classes specified in sched. III to this Act.”

F

I agree that the land must be valued on the assumption that at the material time there is a permanent restriction prohibiting the carrying on of any development. This being agricultural land, it must be valued on the basis that it is

G

used for agricultural purposes, and an alteration in the use of the land itself, or any building on the land, will not be allowed by those having authority to give permission for such development under the Act.

I want to make it clear that I am not deciding that the subsidiary point taken by counsel must in all cases be ignored. It seems to me that in construing s. 55 (3) one has to have regard to the impossibility of development within the

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terms of the Act other than development of the classes specified in sched. III. I can imagine cases where there would be a possibility of development of the class specified in sched. III that might render it highly desirable to adjacent owners of similar agricultural land and it might well be that when the land came to be valued it would have a value in excess of its purely agricultural value. It might have an amenity value or, sometimes, what is called an inducement value, and, if such facts existed in the circumstances of the present case, I would be inclined to say that the valuer would have to take notice of it.

The arbitrator, however, has found as a fact that the land could not practicably have been put to any use permitted by sched. III to the Town and Country Planning Act, 1947, and, in view of that finding of fact, this contention of counsel for the claimants fails.

LORD GODDARD, C.J. : In dealing with this last point, I meant to confine myself immediately to the facts of this case, and not to give any opinion as to what might happen if any other point is brought up when the facts are different. I quite agree with the observations of LYNKEY, J., on this point. A

Case remitted to arbitrator with intimation that award should be limited to £17. Costs to be dealt with by arbitrator.

Solicitors : *Johnson Weatherall & Sturt*, agents for *Acton, Simpson & Hanson*, Nottingham (for the claimants) ; *Sharpe, Pritchard & Co.*, agents for *K. Tweedale Meaby*, clerk to the county council, Nottingham (for the local authority). B

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

BALL AND ANOTHER v. LONDON COUNTY COUNCIL.

[COURT OF APPEAL (Tucker, Evershed and Singleton, L.JJ.), April 26, 27, 28, 1949.]

Negligence—Landlord—Liability—Gratuitous installation of domestic boiler—Boiler in dangerous condition—Tenant's daughter injured by explosion. D

In 1940, the landlords of a dwelling-house, during the tenancy thereof by B., installed gratuitously in the house a new domestic boiler to replace an old one. In February, 1947, owing to the fact that the water system in the house had frozen and that the boiler had not been fitted with a safety valve, the boiler exploded when B.'s daughter, C., had lit it, and C. was seriously injured. According to the evidence, it was the normal practice to fit safety valves on boilers, but there was no hard and fast rule in the matter. In an action by C. against the landlords claiming damages for negligence, STABLE, J., found as a fact that the boiler, as installed, was dangerous, and that its condition was known, or capable of being known, to the landlords. On appeal, E

HELD : (i) where a landlord, at the request of a tenant, entered into premises after they were let to carry out an operation, whether or not it was done gratuitously, the fact that he was the landlord did not absolve him from the duties which would otherwise attach to a contractor, or builder, or any other person called to carry out operations on the premises. F

(ii) although the work of installing the boiler had been negligently done, the boiler was not in the category of things which the law regarded as dangerous *per se* so as to impose a special degree of duty on those who fitted it, and, therefore, the landlords were not liable to strangers for their negligence in installing the boiler and C. had no cause of action. G

Malone v. Laskey ([1907] 2 K.B. 141 ; 97 L.T. 324), followed.

Observations of SINGLETON, L.J., on the desirability of installing safety valves to domestic boilers. H

Decision of STABLE, J., ([1948] 2 All E.R. 917), reversed.

[AS TO LIABILITY OF LANDLORD FOR NEGLIGENCE, see HALSBURY, Hailsham Edn., Vol. 23, pp. 596-600, paras. 846-850 ; and FOR CASES, see DIGEST, Vol. 36, pp. 35-49, Nos. 206-306.]

Cases referred to :

(1) *Malone v. Laskey*, [1907] 2 K.B. 141 ; 97 L.T. 324 ; 31 Digest 347, 4894.

- (2) *Parry v. Smith*, (1879), 4 C.P.D. 325; 41 L.T. 93; 43 J.P. 801; 36 Digest 57, 356.
- (3) *Dominion Natural Gas Co., Ltd. v. Collins and Perkins*, [1909] A.C. 640; 101 L.T. 359; 36 Digest 28, 142.
- (4) *Dixon v. Bell*, (1816), 5 M. & S. 198; 1 Stark. 287; 36 Digest 57, 354.
- (5) *Thomas v. Winchester*, (1852), 6 N.Y.R. 397.
- A (6) *Hodge & Sons v. Anglo-American Oil Co.*, (1922), 12 Ll. L. Rep. 183; Digest Supp.
- (7) *Donoghue v. Stevenson*, [1932] A.C. 562; 147 L.T. 281; Digest Supp.
- (8) *Glasgow Corpn. v. Muir*, [1943] 2 All E.R. 44; [1943] A.C. 448; 169 L.T. 53; 107 J.P. 140; 2nd Digest Supp.
- (9) *Wray v. Essex County Council*, [1936] 3 All E.R. 97; 155 L.T. 494; Digest Supp.
- B (10) *Bottomley v. Bannister*, [1932] 1 K.B. 458; 146 L.T. 68; Digest Supp.
- (11) *Davis v. Foots*, [1939] 4 All E.R. 4; [1940] 1 K.B. 116; 2nd Digest Supp.

APPEAL by the defendants, the London County Council, the landlords of a dwelling-house, from a judgment of STABLE, J., dated Nov. 3, 1948, and reported [1948] 2 All E.R. 917, awarding damages to the plaintiff, Miss Ball, a daughter of the tenant, for personal injuries suffered by her as the result of the explosion of a domestic boiler which had been installed in the house by the defendants. The boiler, which was installed during the tenancy, was not fitted with a safety valve, and the explosion occurred when Miss Ball tried to light a fire during very cold weather. STABLE, J., found as a fact that the boiler was in a dangerous condition and that its condition was, or should have been, known to the defendants, and he held them liable in negligence to the plaintiffs, Miss Ball and the tenant, Mrs. Ball. The defendants appealed from this decision, but only pursued the appeal in respect of the order in regard to Miss Ball. The Court of Appeal now allowed the appeal on the ground that the boiler was not in the category of things which were dangerous *per se* so as to impose on the defendants a liability to strangers, and, therefore, Miss Ball had no cause of action. The facts appear in the judgments of TUCKER and SINGLETON, L.JJ.

Russell Vick, K.C., and Roderic Bowen for the defendants.
Sutton, K.C., and C. A. Morgan Blake for the plaintiffs.

TUCKER, L.J. : This is an appeal from a judgment of STABLE, J., in which he awarded to the first plaintiff, Mrs. Ball, the sum of five guineas and £888 18s. 2d., to the second plaintiff, Miss Ball.

F Mrs. Ball was the tenant of premises, No. 47, Woodberry Grove, Manor House, N.4, which had been demised to her and her husband as joint tenants. At the material time she was the sole surviving tenant, and the London County Council were her landlords. There was no written tenancy agreement between the parties, and it is common ground that the defendants were under no liability to Mrs. Ball for the repair of the premises. In or about 1940 the G defendants, as alleged in the statement of claim,

" . . . without any contractual or statutory obligation so to do, with the consent of the first-named plaintiff and her husband . . . entered upon the said premises and installed in the kitchen thereof an ' Ideal ' boiler and connected the same to the hot water system of the house for the purpose of heating water."

H Then it is alleged :

" In carrying out the said installation the defendants their servants or agents owed a duty to the first-named plaintiff, the members of her family, and all persons entering and being or likely to enter and be within the said kitchen to carry out the same in a proper and workman-like manner and so to instal the said boiler that it would be as safe for the said purpose as reasonable skill and care could make it."

The statement of claim then alleges breaches of that duty and consequential damage to the plaintiffs. All went well with the boiler after it had been installed until Feb. 23, 1947, when at 10.30 a.m. it exploded with the result that Miss Ball suffered injuries.

It is clear from the evidence that the boiler, which was a small "Ideal" boiler used for domestic purposes, had been installed without a safety valve. The reason why it exploded was that, in the severe weather of February, 1947, the water system of the house had frozen up. The fuel supplies were low, and Miss Ball had unwisely—I do not say negligently but in the circumstances, unwisely—attempted to light up the boiler when the pipes in the house were frozen up. The result was that, owing to the absence of a safety valve, the boiler exploded. I think the evidence showed that, in those circumstances, that was a highly probable event, and that, had there been a safety valve, it might not have happened—heat might have thawed the pipes and an explosion might have been avoided. As to the necessity or the desirability of having safety valves, there was some, but not very much, conflict of evidence. Mr. De Groot, the expert witness called for the plaintiffs, said this in chief:

"Q.—Is there anything very extraordinary about it, or would you call it an ordinary domestic hot water system? A.—It is an ordinary domestic hot water system, with one serious omission. Q.—And what is that? A.—And that is the fixing of a safety valve to the boiler itself. Q.—What is the common practice in England with regard to the fixing of safety valves on domestic boilers for heating domestic hot water supplies? A.—It is the usual precautionary measure that is taken."

In cross-examination it was put to him:

"Q.—I do not want to get you involved in questions with other engineers, but I put it to you, quite definitely, that there is no hard and fast rule about there being a safety valve to a boiler of this size in a house? A.—My only answer to that is that some local authorities insist on a safety valve being applied on any type of domestic boiler. There is no hard and fast rule. Q.—There is no hard and fast rule? A.—There is no hard and fast rule. Q.—And it is left to the discretion of the people who put the boiler in as to whether a safety valve is there or not? A.—It is usually left to the fitters themselves. Q.—It is left to the discretion of the fitters? A.—Yes. Q.—With regard to your view after the event, that a safety valve might have stopped this explosion, equally it might not? A.—Well, my view is that almost certainly it would have stopped the explosion."

Mr. Hutson, a chartered surveyor in the employ of the defendants, was called by them. He was asked:

"Q.—Do you express your view as to whether a safety valve was necessary with a boiler of that size or not? A.—I would say that a safety valve is not necessary for a boiler of this size. It is a low pressure boiler with the open expansion pipe that the other witness has referred to. Q.—Does that open expansion pipe lead out of the hot water tank and discharge over the cold water tank? A.—That is so. Q.—That is all inside the house? A.—Yes. Q.—What sort of defect would there have to be in the general pipe system before there would be any excessive pressure? A.—A blockage would be necessary in the flow in the return pipes from the boiler to the hot water tank."

In cross-examination there was put to him the following passage from FOWLER ON DOMESTIC HEATING BOILERS:

"Causes of boiler explosions. By stoppages in the pipes due to freezing of the water, by other taps or valves fixed on the circulation pipes, and by stoppages due to incrustation. To minimise explosions every boiler should be

fitted with a small reliable safety valve fixed directly on the boiler by the flow-pipe connections protruding a short distance beneath the top of the boiler, and leaving a space for the accumulation of air."

He was then asked :

A "Q.—As an architect, do you agree or disagree with what Mr. Fowler says in what I understand is a standard work ? A.—I agree with his opinion.
A Q.—You agree with what he says ? A.—Yes, except that there is this. He speaks of the safety valve mounted on the boiler. Safety valves are sometimes mounted some distance from the boiler."

B Mr. Bright was also called on behalf of the defendants. He is a Master of Arts, took the mechanical science tripos at Cambridge, and is an associate member of the Institute of Electrical Engineers and of the Institute of Heating and Ventilating Engineers. He was asked this :

C "Q.—Would you tell my Lord and the members of the jury what your opinion is with regard to the necessity, in an installation of this kind, of having a safety valve ? A.—In small installations of this kind where there are two pipes, flow and return, both of which are capable of relieving any pressure, one through the expansion pipe and one through the hot water tank and again out through the expansion pipe, a safety valve is not necessary."

In cross-examination it was put to him as follows :

D "Q.—I think we are agreed about this, that, if by fitting stop valves at any point in the hot water system you seal the boiler off from the expansion pipe or the intake pipe, or both, it is essential to have a safety valve ? A.—If you are sealing them both, yes. Q.—If both exits are sealed off by frost, is it not equally essential to have a safety valve ? A.—There should either be a safety valve or the fire should not be alight. Q.—So, if there is any likelihood of the sealing off of the pipes by frost and the likelihood
E of somebody lighting a fire, a safety valve is an essential precaution. Is that what you are saying ? A.—I would say yes. Q.—It is customary, is it not, to fit safety valves to domestic boilers ? It is a normal thing, is it not ? A.—Close to the boiler."

F In re-examination he made it clear that the practice is very often to fit the safety valve a little way along the pipes and not actually on the boiler itself. We were told, and I think it was agreed, that in fact this type of boiler is supplied without a safety valve because it is required to put dishes and so forth on it, but it is possible to purchase a safety valve to use in connection with it.

G I have referred to that evidence in some detail because I think ultimately it is on that evidence that we have to decide, as a matter of law, whether this boiler, as fitted in 1940, was what is called in law a dangerous thing, so as to impose on the person who fits it or erects it a special and peculiar duty to persons other than those with whom he is in contract or at whose request he is performing the work. As the learned judge stated in his judgment ([1948] 2 All E.R. 918) and as is conceded by counsel for the plaintiffs, the authorities show that, if a house, before it is let to a tenant or sold to a purchaser, is already defective to such an extent as to be a danger to the tenant and his family, or
H to the purchaser, the landlord or vendor is absolved from liability. He is not under any duty in law resulting from the defective condition of the premises which he sells or lets. That position is so even if he is himself the person who has put the house into that condition and has knowledge of the dangerous condition in which it is. It follows that, if he is not under any obligation to the lessee or purchaser, equally he is not under any obligation to a stranger who happens to be visiting the premises. In those circumstances it is not necessary to refer to the authorities as a result of which that proposition of

law finally emerges. But, says counsel for the plaintiffs, there is no authority which establishes that, once a landlord has let premises or has sold them, if thereafter he goes into those premises at the request of the tenant or the purchaser, the mere fact that he happens to be the landlord or the vendor absolves him from the duties which would otherwise attach to a contractor or builder or any other person who is called in to carry out operations on the premises. I am prepared to accept that as a correct statement of law. There is certainly no authority for the proposition that the immunity which attaches to a landlord as a result of the condition of the premises before a lease continues as some sort of magic protection to him at all times subsequent to the lease. I think, therefore, that it is necessary to look at the actions of the defendants in the present case without having regard to the fact that they happen to have been the landlords, and to see what their duties are, treating them merely as persons who came in, gratuitously it may be, but none the less at the request of the tenant, to carry out an operation on the premises.

With regard to that, one authority, *Malone v. Laskey* (1), which is binding on this court, was not before the learned trial judge. In that case the defendants were the trustees of a building society who were the owners of certain premises which were let to a tenant and also the owners of the adjoining premises. The plaintiff was the wife of the manager of a company, Witherby & Co., to whom the tenant had sub-let the premises, and at all material times the plaintiff resided on the premises with her husband. The defendants erected and placed on their adjoining premises large engines and plant for the purpose of generating electricity to light their property, and it was alleged that they worked the engines and machinery in such a manner as to constitute a nuisance to the occupiers of the adjoining property; that, by reason of the vibration, the premises in which the plaintiff resided were shaken, and that, in particular, a water tank fixed in the lavatory was rendered unsafe and dangerous to persons using the same; that, in consequence of complaints made by the plaintiff's husband and other occupiers of the premises, the defendants from time to time sent workmen to repair the damage and make the premises safe for habitation; and that the defendants through their workmen executed the repairs in a negligent and improper manner and in such a way as to leave the tank in a dangerous and improper condition for those using the lavatory. Those facts were proved, and that, as a result of the position in which the tank had been left in the lavatory, the plaintiff suffered damage. It is to be observed that counsel for the plaintiff in that case on appeal argued with regard to negligence as follows ([1907] 2 K.B. 146):

"... a heavy article like a bracket, placed at a considerable height above the floor, is a dangerous thing if insecurely fixed, and persons who, like the defendants, place such an article in such a position and neglect to make it secure are responsible for any injury occasioned in consequence to persons whose coming in the ordinary course of things into proximity to the article so placed they ought to have contemplated."

He then quoted certain authorities. Counsel for the defendants, in his reply, put the matter in this way (*ibid.*, 148):

"There are only three classes of case in which the courts have laid down that, apart from any contractual obligation, such an action will lie, and they all turn upon the existence of a duty on the part of the person sought to be made liable. The first is where the act committed amounts to a public nuisance, which is a breach of duty alike to the public and to the person who sustains a particular injury from it. The second is where something that has been called a 'noxious thing' is left in a position in which an unknown person may come in contact with it; the thing so left must, however, fall within the class of noxious things. The third class is where

a person, having the control of premises, invites another to come upon the premises."

Those having been the arguments submitted to the court, it was held that the plaintiff could not recover because the defendants owed no duty to her. It is clear from the judgments that the court must have rejected the contention of counsel for the plaintiff that a cistern put in this position could be classified as a noxious thing or dangerous thing, the handling of which by the defendants would impose on them an added obligation to take care. FLETCHER MOULTON, L.J., in giving his judgment, said (*ibid.*, 154) :

"There was no obligation upon the defendants to do any repairs to the premises, nor was any suggestion to that effect made at the trial. The repairs to the cistern which they in fact did were done by them gratuitously. However, in order to test the plaintiff's case, I will suppose that the defendants did the repairs for reward to them from Witherby & Co. There would then be a contractual relationship between Witherby & Co. and the defendants, and the latter would be bound to exercise reasonable care to see that the work was properly done. If the work was done negligently, the defendants would be liable to Witherby & Co. for the damage done to them by the negligence or done to others under circumstances which involved a liability on the part of Witherby & Co. But that would be purely a liability on the part of the defendants to Witherby & Co., for no rights can be acquired under a contract except by parties to the contract, except in certain special cases having no bearing on the matters before us."

KENNEDY, L.J., stated that he felt more doubt about the question than the other members of the court had felt. None the less, he said, at the end of his judgment (*ibid.*, 156) :

"I accept the finding that the result of the acts of the defendants' servants was to leave the premises in a dangerous condition, and I feel some doubt upon what certainly appears to me to be a difficult point upon that finding. Upon the whole, however, I am unable to dissent from the argument presented to us by [counsel for the defendants] that, assuming the findings of fact to be correct, the case cannot be brought within the class of cases where the defendants' liability depends upon his continuing control of the premises, for here the defendants had none in fact ; if the plaintiff had written a letter of complaint to the defendants, Witherby & Co. might well have refused to allow the defendants to come in to do the repairs in premises to which they (the defendants) had no right of entry. Neither does the case come within the class of case where there is something noxious or dangerous forming part of a building, which amounts to a public nuisance. I feel compelled to hold that no cause of action has been in point of law established . . ."

I think that *Malone v. Laskey* (1), which is binding on us and has never been overruled, prevents the plaintiff, Miss Ball, from succeeding in this action unless she can show—what the plaintiffs failed to show in that case—that the boiler was dangerous or noxious, or that the part of the premises where the boiler was installed was thereby rendered dangerous or noxious, within the meaning of those words in the cases which have decided that articles of that kind impose on persons installing them a high degree of duty. That kind of case is, I think, exemplified clearly in *Parry v. Smith* (2) and *Dominion Natural Gas Co., Ltd. v. Collins and Perkins* (3). The headnote in *Parry v. Smith* (2) is :

"The defendant, a gas-fitter, was employed by the plaintiff's master to repair a gas-meter upon his premises, and for the purpose of doing so took away the meter and in lieu of it made a temporary connection by means of a flexible tube between the inlet pipe and the pipe communicating with the house. The plaintiff having gone in the ordinary performance

of his duty with a light into the cellar where the meter had been, gas, which had escaped by reason of the insufficiency of the connecting tube, exploded and injured him. The jury found that the work had been negligently done, and that the injury to the plaintiff proceeded entirely from such negligence, *Held*, that the defendant was liable."

LOPES, J., in giving his judgment, said (4 C.P.D. 327) :

"It was contended by [counsel for the plaintiff] that the action would lie, because the defendant knew he was dealing with gas, a thing highly dangerous in itself unless great care and caution were used in its management; that the plaintiff's right of action was founded, not on contract, but on the duty which attaches to the use or dealing with a thing in its nature highly dangerous and likely to cause damage, unless managed with great care and caution. I think the plaintiff's right of action is founded on a duty which I believe attaches in every case where a person is using or is dealing with a highly dangerous thing, which, unless managed with the greatest care, is calculated to cause injury to bystanders. To support such a right of action, there need be no privity between the party injured and him by whose breach of duty the injury is caused, nor any fraud, misrepresentation, or concealment; nor need what is done by the defendant amount to a public nuisance. It is a misfeasance independent of contract."

In *Dominion Natural Gas Co., Ltd. v. Collins and Perkins* (3), LORD DUNEDIN, dealing with the case of the gas company, who were one of the defendants in the action, said ([1909] A.C. 646) :

"To come now to the position of the gas company. The gas company were not occupiers of the premises on which the accident happened. Further, there being no relation of contract between the company and the plaintiffs, the plaintiffs cannot appeal to any defect in the machine supplied by the defendants which might constitute breach of contract. There may be, however, in the case of any one performing an operation, or setting up and installing a machine, a relationship of duty. What that duty is will vary according to the subject-matter of the things involved. It has, however, again and again been held that in the case of articles dangerous in themselves, such as loaded firearms, poisons, explosives, and other things *ejusdem generis*, there is a peculiar duty to take precaution imposed upon those who send forth or instal such articles when it is necessarily the case that other parties will come within their proximity. The duty being to take precaution, it is no excuse to say that the accident would not have happened unless some other agency than that of the defendant had intermeddled with the matter. A loaded gun will not go off unless some one pulls the trigger, a poison is innocuous unless some one takes it, gas will not explode unless it is mixed with air and then a light is set to it. Yet the cases of *Dixon v. Bell* (4), *Thomas v. Winchester* (5), and *Parry v. Smith* (2) are all illustrations of liability enforced. On the other hand, if the proximate cause of the accident is not the negligence of the defendant, but the conscious act of another volition, then he will not be liable."

I think that those are the principles which we have to apply to the present case, treating the defendants as ordinary contractors and not as landlords. It is clear that, if this boiler, as constructed, is a dangerous or noxious thing within the meaning of those words of LORD DUNEDIN, then the defendants would be liable to strangers who might be contemplated as likely to visit the house, notwithstanding that the defendants had no contract with those persons and notwithstanding that the defendants' contractual obligations as between themselves and the tenant might be defined by the contract and be limited in their nature.

What is, or is not, a dangerous thing is an extremely difficult matter to decide. The difficulty which has been felt about this by learned judges is referred to, and some of their expressions of opinion are very conveniently summarised, in SALMOND ON TORTS, 10th ed., p. 570, where the well-known observations of SCRUTTON, L.J., in *Hodge & Sons v. Anglo-American Oil Co.* (6) are cited, where he said (12 Ll. L. Rep. 187) :

A “ ‘ Personally, I do not understand the difference between a thing dangerous in itself, as poison, and a thing not dangerous as a class, but by negligent construction dangerous as a particular thing. The latter, if anything, seems the more dangerous of the two ; it is a wolf in sheep’s clothing instead of an obvious wolf.’ ”

SALMOND ON TORTS (*ibid.*) then contains a reference to the language of LORD

B ATKIN ([1932] A.C. 595) in *Donoghue v. Stevenson* (7) :

“ LORD ATKIN regarded ‘ the distinction as an unnatural one so far as it is used to serve as a logical differentiation by which to distinguish the existence or non-existence of a legal right ’.”

The learned author goes on to observe :

C “ But all the members of the House in *Donoghue v. Stevenson* (7) appear to have agreed that the distinction, whether natural or not, is accepted in English law.”

He then states that LORD WRIGHT in *Glasgow Corpn. v. Muir* (8) ([1943] 2 All E.R. 52), gave illustrations of the category of dangerous things, such as a savage animal and a performance on a flying trapeze, and, in *Wray v. Essex*

D *County Council* (9) ([1936] 3 All E.R. 101), LORD WRIGHT :

“ . . . defined an inherently dangerous thing as ‘ something which if left, may at any moment, and under modern circumstances, cause damage,’ and said (*ibid.*, 102) ‘ that a naked sword or a hatchet or a loaded gun or an explosive are clearly inherently dangerous, that is to say, they cannot be handled without a serious risk ’.”

E I do not propose to embark on the perilous course of attempting to define what is, or is not, a dangerous thing, nor do I think any of the learned Lords referred to in SALMOND ON TORTS, 10th ed., p. 570, were endeavouring to do so. I think it may often be very difficult to draw the line, but in the present case we are dealing with an ordinary domestic apparatus, and, according to the evidence, the practice differs with regard to the supply of these boilers with or without safety valves. That the provision of a safety valve is desirable and to be recommended is beyond dispute. That a boiler without a safety valve may be regarded as unsatisfactory is also clear from the evidence, and the learned judge so found. That, however, does not, in my view, put it into the category of things which are dangerous *per se*, and impose this extended liability on defendants in the position of the London County Council. It was a thing which operated without mishap for some seven years in the ordinary course of normal working. It was not as if it was something which had been supplied in such a condition that, directly steam was generated, there was bound to be an explosion. In the ordinary, normal way the steam was carried off. What caused the explosion were two very unusual circumstances—first, the very severe winter, and, secondly, the ill-advised action of Miss Ball in lighting this boiler when the pipes were frozen. I cannot myself think that a boiler so installed comes within the category of dangerous things with which the courts have dealt in the past. I do not think the case was framed in that way. In the careful pleading to which I have already referred the case was not put on that basis at all. The duty was alleged to be that :

H “ In carrying out the said installation the defendants their servants or agents owed a duty to the first-named plaintiff, the members of her family

and all persons entering and being or likely to enter and be within the said kitchen to carry out the same in a proper and workmanlike manner and so to instal the said boiler that it would be as safe for the said purpose as reasonable skill and care could make it."

I think that the plaintiffs have to prove a much higher duty than that, and that they have failed to do so.

It is necessary to refer shortly to the learned judge's judgment, in which he dealt with this matter in some detail and with care. Putting himself in the position of the jury, who had previously been discharged by consent, STABLE, J., asked himself this question: "Was the boiler as installed by the London County Council dangerous?" and he answered that: "Yes." Then he asked himself: "Was that condition either known, or such as by the exercise of reasonable skill and care would have been known, to the London County Council?" and he answered that: "Yes." Then he absolved Miss Ball from negligence and found in her favour. He dealt with the authorities, and, finally, he came to *Bottomley v. Bannister* (10). There he relied on this observation of GREER, L.J., ([1932] 1 K.B. 478):

"The result is unsatisfactory, because in the present case, if the landlord, instead of doing the work himself before he sold the house, had done it afterwards as a contractor to Mr. Bottomley, he would have been liable if there were sufficient evidence that it was negligence on his part to have installed the Halliday boiler without a flue."

STABLE, J., then said ([1948] 2 All E.R. 919):

"He [GREER, L.J.] proceeds to deal with the facts and the evidence in in that case. The learned LORD JUSTICE there says that, had the landlord done the work after the commencement of the tenancy as a contractor, he would have been liable if there had been sufficient evidence that there was negligence on his part in installing the boiler without a flue. In my judgment, that principle applies even though the boiler was put in gratuitously without extra charge, and the duty arises, as I think GREER, L.J., clearly indicates it does, on the law of tort and not of contract. It is a duty that is owed to the persons who, in the ordinary course of human life, would use the things."

The criticism which I venture to make on that is that I think the position, as envisaged by GREER, L.J., was of a landlord coming in and doing work negligently after the sale or after the lease, which would, no doubt, impose a contractual liability on him to the tenant who had called him in. If GREER, L.J., was intending to say, as I do not think he was, that in the carrying out of that contract the landlord would owe a duty to strangers who happened to be injured by the negligent performance of that contract, he would have been saying something which was contrary to the decision in *Malone v. Laskey* (1). The matter has to be carried a stage further. A stranger can only recover if the operation is in connection with something which is a dangerous thing in itself. STABLE, J., does not appear to me in his judgment to have directed his mind to the question, which is a question of law, whether on the evidence given in this case this particular boiler comes into the category of things which the law regards as dangerous *per se*. For these reasons I have arrived at a different conclusion, and would allow this appeal.

It is only necessary to add that the whole of this argument has been confined to the claim of Miss Ball. As to the five guineas awarded to Mrs. Ball, counsel for the defendants, without in any way admitting that any liability is owed by the defendants to her, has not desired, having regard to the smallness of the sum in question, to argue that point, and has been content to confine his appeal to the case of Miss Ball.

EVERSHED, L.J. : I have come to the same conclusion, though I confess that I do so with some regret, feeling, as is natural enough, no little sympathy for the unfortunate Miss Ball who suffered serious injury as a result of work which, as the judge found, and, therefore, we must hold, was negligently done. As my Lord observed, we are concerned only with the case of Miss Ball. Counsel for the defendants has accepted, without conceding, his liability, small in amount, to Mrs. Ball ; and it may well be, though obviously in the circumstances I cannot say more about it, that he is wise so to do. For though, as it is conceded, the work at the house was gratuitously done, in the circumstances I can see at least an argument that it was done pursuant to some such undertaking or arrangement as formed the foundation of the decision of the judge of first instance [WROTTESELEY, J.] in *Davis v. Foots* (11). Miss Ball, however, is, on any view, a stranger to any such undertaking, arrangement, or contract, whether of tenancy or otherwise, within the language of LOPES, J., in *Parry v. Smith* (2), in the passage which my Lord has already read. She is a person between whom and the council there is no privity. The question, therefore, is : Assuming that the London County Council owed anybody any duty when they put in the new boiler, did they owe a duty to Miss Ball ? So expressed, it seems to me that the case falls within a small compass, and, in my judgment, it is governed by the principle of *Malone v. Laskey* (1)—a case which, I gather, unhappily was not cited to the learned judge in the court below. Had it been cited, I cannot help thinking that the formulation by the judge of any cause of action which he found Miss Ball to have would have been differently stated. The cause of action was framed (with a lucidity about which I do not desire to say anything further) by the learned counsel in his statement of claim, and my Lord has already read it, but both that formulation and the passage at the end of the learned judge's judgment which my Lord has also read seem to me to be too widely stated and, unless qualified, to be inconsistent with *Malone v. Laskey* (1).

I entirely agree with counsel for the plaintiffs that in the circumstances of this case it is an irrelevant consideration that the London County Council, who did the work in question, were the landlords of Mrs. Ball, but, if they are to owe a duty to some one with whom they had no privity, then it must be shown that the case falls within one of the three categories which were cited by counsel for the defendants, in his reply, in *Malone v. Laskey* (1). If I may take an example, suppose the London County Council had done some repair work to the roof negligently, so that the roof leaked, and as a result of that leak property of Miss Ball were damaged. On the footing of *Malone v. Laskey* (1) it seems to me impossible to say that the London County Council owed such a duty to Miss Ball as would make them liable for the damage flowing from their incompetent work on the roof. For the present purposes it seems to me that, as my Lord has already said, the case must be shown to fall within the category of which illustrations have been taken both from the judgment of LOPES, J., in *Parry v. Smith* (2) and from the speech of LORD WRIGHT in the citation from SALMOND ON TORTS, 10th ed., p. 570. There is no finding here that the boiler, as the London County Council left it, was a "dangerous thing" within those passages. True, there was a finding that it was dangerous and, indeed, it proved itself so in no uncertain fashion, but so was the cistern in *Malone v. Laskey* (1), and it is, perhaps, worth noting that the fourth question put to the jury and the answer in that case were as follows :

"Q.—Did the defendants, when they put up the bracket and placed the tank upon it, do this work in an improper or negligent manner, and leave the apparatus in a condition dangerous to anyone properly using the lavatory ? A.—Yes."

What, in fact, caused the calamity in the present case was, as my Lord has already stated, the combination of an exceptionally hard frost in the winter

of 1947, and the somewhat temerarious conduct of Miss Ball in lighting the boiler fire in order to thaw out the frozen pipes. I do not wish to go through the evidence which TUCKER, L.J., has analysed. It seems to me impossible to say that the plaintiff, Miss Ball, has established a case that the boiler, as left, was *ejusdem generis*, so to speak, with the type of instances given in the citations above referred to, of loaded pistols, explosives, and such like. I say nothing whatever about the propriety of the London County Council in having not fitted, in the circumstances, a safety valve to this boiler. As I have already indicated, if what they did was done on the terms of any contract or arrangement with their tenant, it may well be that they would be liable to her for their negligent conduct in failing to fit a safety valve, and not only for any damage she personally may have suffered but also for any obligation which she herself might have been under to pay to other people. That, however, as I have indicated, in my judgment does not seem enough. In order that they may be held liable to strangers, the case must be, as I have said, within the category of dangerous things. For reasons which I do not wish further to repeat, the plaintiff, Miss Ball, in my judgment, has failed to bring the case within that category. I have stated my reasons briefly, because we are differing from the learned judge, but I also wish to endorse everything that has fallen from TUCKER, L.J., and, for the reasons which he has given as well as those which I have briefly stated, I agree that the appeal should be allowed.

SINGLETON, L.J. [after stating the facts:] It seems to me that whether the plaintiff, Miss Ball, is entitled to succeed depends entirely on whether she comes within the words of LORD DUNEDIN ([1909] A.C. 646) in *Dominion Natural Gas Co., Ltd. v. Collins and Perkins* (3)—or, if I may put it in another way, whether she comes within the passage which my Lord has already read, and which I venture to read again, from the judgment of LOPES, J., in *Parry v. Smith* (2). The learned judge said (4 C.P.D. 327):

“I think the plaintiff’s right of action is founded on a duty which I believe attaches in every case where a person is using or is dealing with a highly dangerous thing, which, unless managed with the greatest care, is calculated to cause injury to by-standers. To support such a right of action, there need be no privity between the party injured and him by whose breach of duty the injury is caused, nor any fraud, misrepresentation, or concealment; nor need what is done by the defendant amount to a public nuisance. It is a misfeasance independent of contract.”

So that, for Miss Ball to hold her judgment, it must be shown, as I think, that that which the defendants installed in her mother’s house was a highly dangerous thing, or, at least, a dangerous thing as installed.

The boiler was installed about seven years before the explosion, and it had worked, so far as we have been told, without any complaint. Mr. De Groot, an expert witness called on behalf of the plaintiffs, was asked:

“Q.—Is there anything very extraordinary about it, or would you call it an ordinary domestic hot water system? A.—It is an ordinary domestic hot water system, with one serious omission.”

The serious omission was the lack of a safety valve. If one asked: “What is the purpose of a safety valve?” the answer one would receive, I suppose, would be: “To promote safety or to give additional protection or safety.” The witness described the lack of a safety valve as a serious omission. He was cross-examined, and in answer to the question:

“I do not want to get you involved in questions with other engineers, but I put it to you, quite definitely, that there is no hard and fast rule about there being a safety valve to a boiler of this size in a house?”
—he said:

“My only answer to that is that some local authorities insist on a safety

valve being applied on any type of domestic boiler. There is no hard and fast rule."

He was giving evidence in 1948; this installation was in the early days of the war, 1940 or thereabouts. If there was no hard and fast rule for local authorities in 1948, it is difficult to see that there could be any regular practice in 1940. Again, if there is, or was, no hard and fast rule among local authorities in matters of this kind, it is a little difficult to see that it is shown, on that evidence at least, that this boiler, as installed, was a dangerous or a highly dangerous thing. There were two other witnesses who were called on this matter. One was the defendants' representative, Mr. Hutson, who was asked:

"Do you express your view as to whether a safety valve was necessary with a boiler of that size or not?"

He answered:

"I would say that a safety valve is not necessary for a boiler of this size. It is a low pressure boiler with the open expansion pipe . . ."

The matter was not very fully pursued. There was no examination, so far as I can find from the transcript, as to the difference between a high pressure boiler and a low pressure boiler for this purpose. Mr. Bright, an expert witness called on behalf of the defendants, was cross-examined by the learned junior counsel for the plaintiffs, and was asked:

"Q.—If both exits are sealed off by frost, is it not equally essential to have a safety valve? A.—There should either be a safety valve or the fire should not be alight."

I would draw attention to the fact that, when the ordinary householder in the morning seeks to light the boiler to heat some water, he or she cannot always know whether the pipes are frozen or not. The witness was asked further:

"Q.—So, if there is any likelihood of the sealing off of the pipes by frost and the likelihood of somebody lighting a fire, a safety valve is an essential precaution. Is that what you are saying? A.—I would say, Yes. Q.—It is customary, is it not, to fit safety valves to domestic boilers? It is a normal thing, is it not. A.—Close to the boiler."

Then the witness agreed with some extracts from FOWLER ON DOMESTIC HEATING BOILERS which were read to him. The result of that experienced witness's evidence shows that, if there may be frost so that the external pipes are frozen, a safety valve is an essential precaution. Everyone knows that there may be frost and that pipes may become frozen. It is for that reason, I imagine, in part at least, that a safety valve is regarded as the usual or normal fitting on or near a boiler for heating purposes. The witness further showed that it was the normal practice to have a safety valve fitted close to a boiler, and I imagine he was dealing with a boiler of this kind.

I have been greatly troubled in this case to know why the London County Council departed from what was and is the normal practice. I asked several times in the course of the hearing and counsel on their behalf assured me that they were most anxious to keep nothing back, but, from what he told the court, they could for a few shillings have acquired a safety valve and their workman could have fitted it. Whether they had safety valves in stock at that time I do not know. It is right to say that it was in war-time and there may have been shortages. I wondered again, in the course of the hearing, what is the practice of the London County Council to-day. As far as I gathered from counsel, it may be just the same as it was, not to instal safety valves. I hope it is not. The trouble in deciding this case is to arrive at a true conclusion on the evidence as given in the court below. When one has an admission from the plaintiffs' expert witness that there is no hard and fast rule as to having

safety valves, even at the time of the trial, and when one has, from a witness for the defendants, the fact that he thinks it is unnecessary to have a safety valve in a small boiler of this kind—indeed when one sees from that evidence that there is a divergence in practice—it seems to me difficult, to say the least, to come to a conclusion that that small boiler as installed was dangerous of itself. I regard a safety valve as necessary because of the danger of blocked pipes, either by frost or from some other cause, and, although I agree that in the result this appeal must be allowed, I am most anxious that it shall not go out from this court that a safety valve is unnecessary on boilers in general or even on such small boilers as this. I believe that, had one been fitted on this boiler, the terrible injury which the plaintiff, Miss Ball, suffered would have been avoided. It is for that reason that I thought it right to add something, because I do not think that the judgment of this court ought to be used in any sense as meaning that safety valves are unnecessary. If the evidence for this plaintiff had been a little different the judgment of this court might well have been in her favour.

Appeal allowed. Costs paid by the defendants in the court below to be returned. No other order as to costs.

Solicitors: J. H. Pawlyn (for the defendants); G. Howard & Co. (for the plaintiffs.)

Applied. PRUDENTIAL ASSURANCE CO., LTD. v. CHATTERLEY-WHITEFIELD COLLIERIES CO., LTD. *Post*, p. 1094. [Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

Applied. Re JOHN SMITH'S TADCASTER BREWERY CO., LTD. [1952] 2 All E.R. 751.

SCOTTISH INSURANCE CORPORATION, LTD. AND OTHERS v. WILSONS AND CLYDE COAL CO., LTD.

[HOUSE OF LORDS (Viscount Maugham, Lord Simonds, Lord Uthwatt*, Lord Normand and Lord Morton of Henryton), March 1, 2, 3, May 6, 1949.]

Company—Reduction of capital—Extinguishment of preference stock—Colliery undertaking—Assets transferred to National Coal Board—Voluntary liquidation intended later—Return to preference stockholders of their whole paid-up capital—Rights of stockholders—Articles—Construction—Companies Act, 1929 (c. 23), s. 55 (1) (c)—Coal Industry Nationalisation Act, 1946 (c. 59), s. 25.

A company incorporated in 1876 to acquire and carry on colliery undertakings had, in September, 1947, a nominal capital of £850,000, and an issued capital of £725,000, divided into £40,000 7 per cent. cumulative first preference stock, £10,000 7 per cent. cumulative second preference stock, and £675,000 ordinary stock. By arts. 11 and 12 of its present articles of association (adopted in 1923), the company could issue new shares with a preferential or qualified right to dividends. By art. 17 the company was enabled from time to time by special resolution to reduce its capital. By art. 78 every unit of stock had one vote on a poll at any company meeting. Article 128, which dealt with rights to the profits of the company, provided that, after setting aside any amount which might be carried to any reserve fund or written off, the profits should be applied to the payment of a cumulative preferential dividend of 7 per cent. to the first and second preference stockholders in their order of priority and that the residue of profits should be divisible among the ordinary stockholders. Article 139 enabled the directors to set aside out of profits such sum as they might think proper as a reserve fund which might be used for (*inter alia*) making provision for paying off the preference capital. Article 141 (a) empowered the company by ordinary resolution to convert its undivided profits, including divisible profits arising by way of permanent appreciation

* LORD UTHWATT was present at the hearing of the argument, but he died on Apr. 24, 1949, before the opinions were delivered.

in value of the company's assets, into capital and to distribute it by way of bonus among the ordinary stockholders. Articles 159 and 160 provided that, in the event of the company being wound-up, the first preference stock "shall rank before the other [stocks] of the company on the property of the company to the extent of repayment of the amounts . . . paid thereon," and that the second preference stock should similarly rank before the ordinary stock but after the first preference stock.

On Jan. 1, 1947, under the Coal Industry Nationalisation Act, 1946, the colliery assets of the company were transferred to and vested in the National Coal Board with the result that the company could no longer pursue the objects for which it was incorporated, and it was its avowed intention in due course to go into voluntary liquidation. At an extraordinary general meeting on Sept. 26, 1947, the company passed a special resolution for the reduction of its capital from £850,000 to £462,500 divided into £337,500 ordinary stock and £125,000 ordinary shares, by returning their whole paid-up capital to the holders of the £50,000 preference stock, and extinguishing such stock, and by returning to the holders of the £675,000 ordinary stock 10s. for each £1 unit held by them. On a petition to the court under the Companies Act, 1929, s. 56 (1), for an order confirming the reduction, certain of the preference stockholders objected to the reduction on the grounds (a) that it deprived them prematurely of the advantages of a well-secured 7 per cent. investment, (b) that it deprived them of the right to participate, along with the ordinary stockholders, in the surplus assets of the company on liquidation, and (c) that it deprived them of the opportunity of obtaining a favourable adjustment of their interests under the Coal Industry Nationalisation Act, 1946, s. 25.

HELD : (i) [LORD MORTON OF HENRYTON *dissenting*] on a true construction of the company's articles, subject to the payment to the preference stockholders of their capital and their preferential dividends, if any not yet paid, and subject also to the discretionary applications by the directors under arts. 139 and 141 (a), the whole of the reserve funds and other assets of the company, including the proceeds of sale of the capital assets, were appropriated to the ordinary stockholders to the exclusion of the preference stockholders : *Will v. United Lankat Plantations Co., Ltd.* ([1914] A.C. 11 ; 109 L.T. 754), *applied* ; and, therefore, as the preference stockholders had no right to anything beyond what they would receive under the proposed reduction of capital, and as the articles gave them clear notice that there was no assured permanence of their right to a cumulative 7 per cent. dividend, their complaint that payment off in the present circumstances was unfair and inequitable was groundless. In determining what was fair between the parties, the court could not properly have regard to the consideration that the incidence of income tax would be a deterrent to the use of the alternative measures available to the company under arts. 139 and 141 (a).

(ii) [LORD MORTON OF HENRYTON *dissenting*] arts. 159 and 160 contained a complete statement of the rights of the preference stockholders in the winding-up for the reason that the whole of the profits and assets of the company (subject to payment of the amounts called up and paid on the preference stock) had been appropriated before liquidation to the ordinary stockholders, and there was nothing in the articles to indicate that the rights of the preference stockholders, if they had not already been paid off, would be increased by attributing to them part of the profits and assets which had been appropriated to the ordinary stockholders : *Re Bridgewater Navigation Co.* ([1891] 2 Ch. 317 ; 64 L.T. 576), *approved* ; *Re William Metcalfe & Sons, Ltd.* ([1933] Ch. 142 ; 148 L.T. 82), *overruled*. Therefore, as the preference stockholders would not be entitled on a winding-up to

anything more than a return of their paid-up capital, apart from any considerations arising out of the Coal Industry Nationalisation Act, 1946, s. 25, their objections to the proposed reduction had no substance.

(iii) in the exercise of its jurisdiction under the Companies Act, 1929, s. 55 (1), the court should regard the provisions of s. 25 of the Act of 1946 as a factor to be included in its consideration of the fairness of a proposed reduction of the capital of a colliery company, but there was nothing in s. 25 to oust the jurisdiction of the court under the Companies Act, 1929. As, however, notwithstanding the publication of the Coal Industry Nationalisation (Company Adjustment) Regulations, 1948, made under s. 25 (1) of the Act of 1946, it was still impossible to foretell what, if any, adjustment of interests as between different classes of stockholders would ultimately be made under s. 25, the possibility that the preference stockholders might ultimately get something better than the repayment of their capital in full did not justify the court in saying that the proposed reduction was not fair and equitable between the different classes of stockholders.

[AS TO REDUCTION OF CAPITAL, see HALSBURY, Hailsham Edn., Vol. 5, pp. 170-186, paras. 305-330; and FOR CASES, see DIGEST, Vol. 9, pp. 148-162, Nos. 833-949.]

Cases referred to :

- (1) *Re Bridgewater Navigation Co.*, [1891] 2 Ch. 317; 64 L.T. 576; 10 Digest 1005, 6977.
- (2) *Birch v. Cropper, Re Bridgewater Navigation Co., Ltd.*, (1889), 14 App. Cas. 525; 61 L.T. 621; 10 Digest 1003, 6965.
- (3) *Re Metcalfe (William) & Sons, Ltd.*, [1933] Ch. 142; 148 L.T. 82; *affirmed*, [1933] Ch. 153; 148 L.T. 85; Digest Supp.
- (4) *Will v. United Lankat Plantations Co., Ltd.*, [1914] A.C. 11; 109 L.T. 754; *affirmg.*, [1912] 2 Ch. 571; 107 L.T. 360; 9 Digest 597, 3991.
- (5) *Re Chatterley-Whitfield Collieries, Ltd.*, [1948] 2 All E.R. 593, *affd.*, H.L., p. 1094 *post*.
- (6) *British and American Trustee and Finance Corpn. v. Couper*, [1894] A.C. 399; 70 L.T. 882; 9 Digest 149, 840.
- (7) *Collaroy Co., Ltd. v. Giffard*, [1928] Ch. 144; 138 L.T. 321; Digest Supp.
- (8) *Re Fraser and Chalmers, Ltd.*, [1919] 2 Ch. 114; 121 L.T. 232; 10 Digest 1008, 6989.
- (9) *Re National Telephone Co.*, [1914] 1 Ch. 755; 109 L.T. 389; 9 Digest 598, 3992.
- (10) *Williamson-Buchanan Steamers, Ltd. (Liquidators of)*, 1936 S.L.T. 106.
- (11) *Re Espuela Land & Cattle Co.*, [1909] 2 Ch. 187; 101 L.T. 13; 10 Digest 1006, 6984.

APPEAL by preference stockholders against an interlocutor of the First Division of the Court of Session (LORD RUSSELL and LORD KEITH, the LORD PRESIDENT (LORD COOPER) *dissenting*), dated Feb. 17, 1948, and reported 1948, S.C. 360, repelling their objections to a petition by the respondent company for confirmation of a special resolution, dated Sept. 26, 1947, for the reduction of the capital of the company.

The respondent company was incorporated for the purpose of acquiring and carrying on colliery undertakings, and, on the transfer of its assets to the National Coal Board on Jan. 1, 1947, under the provisions of the Coal Industry Nationalisation Act, 1946, its effective business was brought to an end and its avowed intention was to go into voluntary liquidation when the compensation payable under the Act was assessed and paid. By the special resolution of Sept. 26, 1947, for the reduction of capital, the preference stock was to be extinguished by returning to the preference stockholders the whole of their paid-up capital. The preference stockholders contended that the court should

not confirm the proposed reduction as it was not fair and equitable. The House now held (LORD MORTON OF HENRYTON *dissenting*) that there was no substance in the objections of the preference stockholders to the proposed reduction, and dismissed the appeal. The facts and the relevant articles of association appear in the opinion of LORD SIMONDS.

A *Sir Cyril Radcliffe, K.C., Morison, K.C., and William Grant* for the appellants (some of the preference stockholders).

The Dean of Faculty (John Cameron, K.C.), J. F. Gordon Thomson, K.C., and C. J. D. Shaw (all of the Scottish Bar) for the respondent company.

The House took time for consideration.

May 6. The following opinions were read.

B **VISCOUNT MAUGHAM :** My Lords, the facts in this case are sufficiently stated in the speech of my noble and learned friend, LORD SIMONDS, which I have had the advantage of studying in print, and I see no benefit to be gained by repeating them. I also agree with the conclusions which he has reached, and, if I think it is desirable to express my own opinion on the construction of the articles of association so far as they bear on the question whether the proposed
C reduction of capital is fair and equitable as between the ordinary shareholders and the preference shareholders, it is because there has been a difference of opinion in the First Division of the Court of Session and your Lordships have listened to the citation of a large number of authorities which are thought to bear on the matter in debate. I should, perhaps, add that I have arrived at my conclusion by somewhat different considerations from those on which LORD SIMONDS
D prefers to lay stress.

I will begin by treating the matter as if s. 25 of the Coal Industry Nationalisation Act, 1946, did not enter into the case. The company as a matter of law is not in liquidation and I agree with the view that the circumstances that liquidation is contemplated in the near future ought not to affect the construction of the terms on which the preference shares were issued, that is, in
E this case the articles of association which are to be found set out in LORD SIMONDS's speech. We are not, therefore, entitled in considering the question of fairness to shut our eyes to the fact that the directors still have their powers as such and that they and the shareholders at any time before liquidation can exercise their rights under arts. 139 and 141 (a). My Lords, if I am right so far, I can see no great difficulty in the present case. We must first have regard to the
F plain terms of art. 128. It is a complete statement of the rights of the shareholders to the profits earned year by year by the company as a going concern, subject to two supplementary articles, 139 and 141 (a), which must be read with it. Article 128 begins with saving the rights of members entitled to shares issued on special conditions. The words in the article as to division of "the residue"
G (after the word "thirdly") are perfectly clear, and they beyond doubt show that, subject to a reserve fund and amounts written off for "depreciation or otherwise" (a far-reaching phrase) and to payment of cumulative preferential dividends due on the issues of preference shares, the whole residue is divisible among the holders of the ordinary shares in proportion to the amounts paid up or credited as paid up on their shares. The amounts of profits so distributed may obviously be less or greater than the amounts paid up or credited as paid
H up; but the preference shareholders have no share in the residue. So far the article has only dealt with the rights of the ordinary shareholders to the whole of the *divisible* profits (the so-called "residue") after paying the preference dividends, and there would remain the reserve fund, and any proper provision for depreciation and also, no doubt, sums carried forward which, of course, would come into the profit and loss account for the next year. The ordinary shareholders for obvious reasons are not given any immediate right to call for division of these amounts of profit, but arts. 139 and 141 (a) make clear provision

that the items in question are only being retained among the company's undistributed assets so long as it is thought expedient, and it is these articles which, in my opinion, clinch the matter. Article 139, after elaborate provisions as to how the reserve fund is to be employed, and subject to a number of permissible applications for the general benefit of the undertaking, contains the following words as to distribution :

" . . . or for division by way of bonus to the ordinary shareholders or as bonuses to the employees of the company or for repaying any moneys borrowed by the company or *for making provision for paying off the preference share capital* or for such other purposes as the directors shall in their absolute discretion think conducive to the interests of the company or its shareholders."

I have italicised the words as to paying off the preference share capital. The words are none the less important because the reduction of capital would require the sanction of the court. They show, at least, that, if the transaction is fair and equitable, the article contemplates that the preference shareholders can be paid off with or without their consent.

Article 141 (a) is also of great importance and is in these terms :

"The company in general meeting may, on the recommendation of the directors, from time to time by ordinary resolution convert any undivided profits of the company available for dividends on its shares (whether such profits should stand to the credit of any reserve fund or reserve account or a profit and loss account of the company or otherwise, and including divisible profits arising by way of permanent appreciation in value of any of the company's assets) into capital, and appropriate and distribute the same among the members of the company who are holders of ordinary shares, in proportion to the amounts paid up on the shares held by them respectively, by way of bonus, or they may apply such undivided profits in or towards satisfaction of the amounts unpaid in respect of any shares in the capital of the company allotted among such ordinary shareholders or previously unissued."

It thus provides for the conversion into capital of undivided profits standing to the credit of a reserve fund, or a profit and loss account *or otherwise, and including divisible profits arising by way of permanent appreciation in value of any of the company's assets* and the distribution of these amounts *among the members of the company who are holders of ordinary shares*. My comment on the words I have here italicised is that, if the undertaking of the company had been sold for cash (and provision made out of a reserve fund or otherwise for payment of debts and liabilities and for paying off the preference share capital), every penny could be distributed among the holders of ordinary shares. I should add here that I agree with LORD KEITH that the suggestion that such a distribution is unlikely because of the sur-tax liability which might accrue to the richer of the recipients is an accidental consideration which ought not be to considered.

My Lords, for these and other reasons given by your Lordships, my conclusion is that, taking these articles together, it is reasonably clear that, subject to the payment to the preference shareholders of their capital and their preferential dividends, if any not yet paid, and subject also to discretionary applications by the directors under the terms of arts. 139 and 141 (a) as above set forth, the whole of the reserve funds and other assets of the company, including the proceeds of sale of the capital assets, are appropriated to the ordinary shareholders and in that sense belong to them to the exclusion of the preference shareholders. If then the question of the approval by the court falls to be considered in the light of the present position of the company, it must follow that the main argument of unfairness falls to the ground, but I am not prepared

to deny that the admitted intention to go into liquidation might be one of the facts which the court ought to consider and I will, therefore, state my opinion on that footing. If there is a liquidation, arts. 159 and 160, which are sufficiently stated in the speech of my noble friend, will apply to the first and second issues of the preference shareholders. Are these articles a complete statement of the rights attached in a winding-up to the preference shares, or should such shares also have a right to participate with the ordinary shares in the remaining assets after payment of the amounts called up and paid up on the ordinary shares ? My Lords, I am of opinion that the articles in question must be construed as a complete statement of the rights of the preference shares in the winding-up for the reason that the whole of the profits and assets of the company (subject to payment of the amounts called up and paid on the preference shares) has been appropriated before liquidation to the ordinary shareholders, and that there is not a word to indicate that on liquidation the rights of the preference shareholders (if they have not already been paid off) would be increased, perhaps very materially, by attributing to them part of the profits and assets which have been appropriated to the ordinary shareholders. There might, perhaps, have been some doubt as to the compensation payable under the Coal Industry Capitalisation Act, 1946, s. 25, as being "surplus assets" of the nature of capital not distributable as dividend, and I will deal later with this point.

The view which I have suggested as to the effect of an appropriation of profits in favour of a certain class of shareholders is supported by a decision of LINDLEY, L.J., in the Court of Appeal in *Re Bridgewater Navigation Co.* (1), a sequel to the important case in this House of *Birch v. Cropper* (2). The facts were briefly these. The capital of the company was divided into preference and ordinary shares. The company was the owner of the Bridgewater and other canals which it sold in 1887 for £1,710,000 to the Manchester Ship Canal Co. It then went into liquidation. The liquidators paid all the debts and liabilities, and repaid to the preference and ordinary shareholders the amount of capital paid up on their shares. There remained in their hands a surplus of £550,000, and the question arose how this sum should be distributed between the ordinary and the preference shareholders. The latter were entitled under art. 85 while the company was a going concern to a preferential dividend of 5 per cent. and there was (in the view of this House) no other relevant term or condition as to their rights. On liquidation the article ceased to be applicable. Part of the £550,000 consisted of three distinct reserve funds for river improvements, insurance and depreciation, but none of these funds was actually set apart from the other assets of the company. In the books of the company they were sums deducted from profits which the ordinary shareholders might have divided among themselves ; they were the undrawn profits of the ordinary shareholders. But the House of Lords did not deal with these items. They decided (see *per* LORD MACNAGHTEN (14 App. Cas. 548)) (in the complete absence of any such articles as we have in this case) that, subject to the payment of the costs, charges and expenses of the winding-up and to the costs of the application :

" . . . the assets of the company remaining undistributed other than the reserve fund, which is not the subject of this application, ought to be distributed among all the shareholders in proportion to their shares."

When the question of the reserve funds came before the Court of Appeal [in *Re Bridgewater Navigation Co.* (1)] it was held that, since the assets or amounts in question consisted of the undrawn profits of one class, those profits ought to be distributed in the winding-up amongst the members of that class in the absence of some sufficient reasons to the contrary ; and there was no such reason. In the result the ordinary shareholders were exclusively entitled to the three reserve funds. I have no doubt that this was a correct decision, and there was no appeal. Apart, however, from any authority, I cannot see any sufficient reason for coming to a conclusion other than the one I have above indicated. In

my view it is a sound *prima rule* that profits which have been appropriated, subject to possible application for the benefit of the company, to the ordinary shareholders to the exclusion of the preference shareholders must, in the absence of some other consideration, remain the property of the former on a winding-up. It should be observed that in *Re Bridgewater Navigation Co.* (1) there were no such articles as exist in the present case, which is an *a fortiori* one.

Much reliance is placed on behalf of the appellants on *Re William Metcalfe & Sons, Ltd.* (3). I must say that, in my opinion, that case was wrongly decided; and it should be noted that it is expressly stated that the bulk of the sum of £21,000 there in dispute was attributable to undistributed profits. It seems to me difficult to reconcile that case with the decision of this House in *Will v. United Lankat Plantations Co., Ltd.* (4), and impossible to reconcile it on sound grounds with the decision of *Re Bridgewater Navigation Co.* (1). It is true that the general principle does not by itself apply to moneys arising from appreciations in value of capital, but in the present case I read art. 141 as showing that such appreciations are appropriated (in the sense in which I use the word) to the ordinary shareholders. Apart from that view it seems to me that any doubt as to the attribution of such special assets is removed by the terms of arts. 159 and 160 which refer to "the property of the company" as a whole, and do not justify the conferring of a further right to the preference shares beyond the amounts called up and paid thereon. Such a right would require definition and cannot, in my opinion, be derived as a matter of construction from the language of the two articles. I doubt whether there exist any such assets in the present case where the colliery assets were transferred compulsorily under the Coal Industry Nationalisation Act, 1946. Counsel for the appellants in his forcible argument claimed—and, I think, with prudence—that his clients were entitled to share in the whole of the (so-called) surplus assets, and no distinction was drawn between different kinds of such assets.

The question that arises as to the effect, if any, of s. 25 of the Coal Industry Nationalisation Act, 1946, is due to the difficulty of appreciating its purpose or its implications. I agree with the preliminary considerations stated by LORD GREENE, M.R., which are to be found in his judgment on the appeal of *Re Chatterley-Whitfield Collieries, Ltd.* (5), including his remarks as to the drafting of the regulations which are contemplated by the section. In particular, I agree with the following remarks of LORD GREENE, M.R. ([1948] 2 All E.R. 599):

"One thing the section clearly does not do. It does not purport expressly or impliedly to limit or affect in any way the existing provisions of the Companies Act, or the well-known practice of the courts thereunder, or to lay down any new principles for the court to follow."

The Coal Industry Nationalisation (Company Adjustment) Regulations, 1948 (S.I., 1948, No. 2360), the regulations contemplated by the section, have now been published and the remark of the MASTER OF THE ROLLS applies with additional force. It would, I think, be going too far to say that, in confirming or refusing to confirm a reduction of the capital of a colliery company, the court ought to act as if the Act of 1946 had not been passed. On the other hand, I think that those who oppose the reduction by founding their argument on the provisions of s. 25 are bound to indicate how the section, or the Coal Industry Nationalisation (Company Adjustment) Regulations, 1948, on any reasonable view of probability can operate in this case to give the preference shareholders any rights to share in the assets beyond those they now possess under the articles of association. Taking the view I have expressed as to the position of these shareholders either now or in a liquidation, and agreeing with my noble and learned friend, LORD SIMONDS, in the view that the court in the exercise of its jurisdiction should regard the provisions of s. 25 as a factor in its consideration of the fairness of a proposed reduction, I find myself unable

to see any want of fairness in the proposed reduction of capital. I will summarise the grounds of my decision as follows. The case is one in which liquidation, when it comes, will have been brought about by the action of the legislature. If there were no reduction of capital, the holders of preference shares would not, in my opinion, be entitled in a winding up to anything more than a return of their paid-up capital. I am quite unable to see why they should claim more on the proposed reduction, nor why they should object to being repaid by means of the reduction the amounts so paid up which they would receive on the proposed liquidation. In my opinion, the decision of the judges of the Court of Session by a majority was right and the appeal must be dismissed. The answers should be repelled as irrelevant and the petition should now be remitted to a reporter. The appellants must pay the costs of the appeal.

A **LORD SIMONDS :** My Lords, on Jan. 1, 1947, the colliery assets of the respondent company, Wilsons & Clyde Coal Co., Ltd., which I will call the respondents, were in terms of the Coal Industry Nationalisation Act, 1946, transferred to and vested in the National Coal Board, which was constituted under that Act. Thus the effective business of the respondents was brought to an end and it is their avowed intention in due course to go into voluntary liquidation. But this they will not do until the compensation payable to them under the Act has been assessed and paid, an event which at the hearing of this appeal in March, 1949, could not be assumed to be immediately impending. In the meantime they have all the powers of a company which is not in liquidation and I cannot attach any legal significance to the description of them as "comatose," "moribund," or "having one foot in the grave." The respondents have had a long history. They were incorporated as a limited company in 1876 for the purpose of acquiring and carrying on certain colliery undertakings in Lanarkshire. Clause 5 of their memorandum of association provided that their capital should be £150,000 divided into 15,000 shares of £10 each with power to the company to increase their capital by the creation and issue of new shares either ordinary or having such preference, priority and special privileges attached thereto as might be determined by special resolution of the company. In exercise of this power the respondents from time to time increased or altered their capital until, at the date of the special resolution of Sept. 26, 1947, to which I shall refer, the nominal capital stood at £850,000 and the issued capital at £725,000, divided into £40,000 first preference 7 per cent. cumulative stock, £10,000 second preference 7 per cent. cumulative stock, and £675,000 ordinary stock. The first and second preference stock represented issues of preference shares which had been made in 1875 and 1894 respectively.

In 1923 the respondents by special resolution adopted new articles of association and, inasmuch as in one view the rights of the parties to this appeal depend to some extent on the meaning and effect of these articles, I must refer to some of them in detail. Article 11 provides that the company in general meeting may from time to time by special resolution increase the capital by the creation of new shares of such amount as may be deemed expedient. Article 12 provides that the new shares shall be issued on such terms and conditions and with such rights and privileges annexed thereto as by the special resolution creating the same may be directed, and, if no direction shall be given, as the directors may determine : and, in particular, such shares may be issued with a preferential or qualified right to dividends and to ranking in the distribution of the assets of the company and with a special, or without any, right of voting, or partly in one of these forms and partly in another. This article is a re-statement in ampler form of part of cl. 5 of the memorandum. By art. 78 every shareholder, whether preference or ordinary, is to have one vote for every share held by him. Article 128 is of immediate importance. It provides that, subject to the rights of members entitled to shares issued on special conditions and subject as thereinafter provided, the profits of the company, after setting aside any amount

which may be carried to any reserve fund, written off for depreciation, or otherwise, shall be applied in order of priority in manner following, *viz.*: First, to the payment of a cumulative preferential dividend at the rate of 7 per cent. per annum on the capital for the time being paid up on the preference shares (first issue); secondly, to the payment of a similar dividend on the capital for the time being paid up on the preference shares (second issue); and, thirdly, the residue to be divisible among the holders of the ordinary shares in proportion to the amounts paid up or credited as paid up on their shares. As I have pointed out, the present holders of first and second preference stock have succeeded to the rights of these preference shareholders. Article 139 empowers the directors, before recommending any dividend, to set aside out of the profits of the company such sum as they may think proper as a reserve fund and this fund they are authorised to use for a wide variety of purposes, of which I will only mention the equalising or supplementing of dividends, the division by way of bonus to the ordinary shareholders, the repaying of any moneys borrowed by the company, and the making of provision for paying off the preference share capital. Article 141 (a) enables the company by ordinary resolution to convert its undivided profits available for dividends on its shares, whether such profits should stand to the credit of any reserve fund or reserve account or a profit and loss account of the company or otherwise, and including divisible profits arising by way of permanent appreciation in value of any of the company's assets, into capital and distribute the same amongst the ordinary shareholders by way of bonus. Finally, I refer to arts. 159 and 160. These articles provide that, in the event of the company being wound-up, the preference shares (first issue) "shall rank before the other shares of the company on the property of the company to the extent of repayment of the amounts called up and paid thereon" and that the preference shares (second issue) shall similarly rank before the ordinary shares but after the preference shares (first issue).

These, my Lords, being the articles which govern the rights of the ordinary and preference stockholders of this company, at an extraordinary general meeting held on Sept. 26, 1947, the company passed a special resolution for the reduction of the capital of the company from £850,000 (consisting of £40,000 first preference stock, £10,000 second preference stock and 800,000 ordinary shares of £1 each, of which 675,000 had been issued and converted into £675,000 ordinary stock), to £462,500 divided into £337,500 ordinary stock and 125,000 ordinary shares of £1 each and for effecting such reduction by returning to the holders of the first and second preference stocks £1 for each unit of stock held by them and extinguishing such stocks and by returning to the holders of the £675,000 ordinary stock capital to the extent of 10s. for each unit of such stock held by them. It appears that not all those who voted for the resolution were ordinary stockholders, nor did all the preference stockholders vote against it, nor do they all now oppose the reduction. I do not think that your Lordships can get any guidance from the way in which votes were given. The resolution, of which the formal validity is not challenged, having thus been passed, the respondents, as the Companies Act, 1929, s. 56, requires, presented a petition to the Court of Session for confirmation of the reduction, and on Feb. 17, 1948, in spite of opposition by the appellants, who hold about 45 per cent. of the first and second preference stock of the company and lodged answers, by which they averred that the proposed reduction was contrary to law and in any event unfair and inequitable, the First Division of the Court of Session consisting of the Lord President (LORD COOPER), LORD RUSSELL and LORD KEITH (the LORD PRESIDENT *dissenting*) repelled the answers as irrelevant in *hoc statu* and made an order for the usual procedure to follow. Against that interlocutor the present appeal is brought.

My Lords, apart from a special factor which is introduced into it by the provisions of the Coal Industry Nationalisation Act, 1946, s. 25, I do not

entertain any doubt about this case. The court should, in my opinion, confirm the reduction on which the respondents have resolved. The Companies Act, 1929, no more than its predecessors, prescribes what is to guide the court in the exercise of its discretionary jurisdiction to confirm or to refuse to confirm a reduction of capital. But I agree with the learned LORD PRESIDENT that, important though its task is to see that the procedure, by which a reduction is carried through, is formally correct and that creditors are not prejudiced, it has the further duty of satisfying itself that the scheme is fair and equitable between the different classes of shareholders: see *e.g.*, *British and American Trustee and Finance Corpn. v. Couper* (6). But what is fair and equitable must depend on the circumstances of each case and I propose, ignoring for the moment the particular factor introduced by the Coal Industry Nationalisation Act, 1946, to consider the elements on which the appellants rely for saying that this reduction is not fair to them.

In the formal Case which they have presented to the House the element of unfairness on which the appellants insist is that the reduction deprives them of their right to participate in the surplus assets of the company on liquidation and leaves the ordinary stockholders in sole possession of those assets. But in their argument both in the Court of Session and before your Lordships they have further relied on the fact that they have been deprived of a favourable seven per cent. investment which they cannot hope to replace and might have expected to continue to enjoy. They further contend that the deprivation of these rights, which would in any case have been an unmerited hardship, is rendered the more unfair because it is likely to be followed at an early date by the liquidation of the company or, as it is less accurately expressed because it is itself only a step in the liquidation of the company. The first plea makes an assumption, *viz.*, that the articles give the preference stockholders the right in a winding-up to share in surplus assets, which I for the moment accept but will later examine. Accepting that assumption, I yet see no validity in the plea. The company has at a stroke been deprived of the enterprise and undertaking which it has built up over many years: it is irrelevant for this purpose that the stroke is delivered by an Act of Parliament which at the same time provides some compensation. Nor can it affect the rights of the parties that the only reason why there is money available for repayment of capital is that the company has no longer an undertaking to carry on. Year by year the seven per cent. preference dividend has been paid; of the balance of the profits some part has been distributed to the ordinary stockholders, the rest has been conserved in the business. If I ask whether year by year the directors were content to recommend, the company in general meeting to vote, a dividend which has left a margin of resources, in order that the preference stockholders might, in addition to repayment of their capital, share also in surplus assets, I think that directors and company alike would give an emphatic negative. And they would, I think, add that they have always had it in their power, and have it still, by making use of art. 130 or art. 141 (a) to see that what they had saved for themselves they do not share with others. I observe that the learned LORD PRESIDENT was of opinion that such a use of one or other of these articles would be an impropriety which would at least be open to challenge in a court of law, but learned counsel for the appellants candidly admitted that he could not support this view. Reading these articles as a whole with such familiarity with the topic as the years have brought, I would not hesitate to say, first, that the last thing a preference stockholder would expect to get (I do not speak here of the legal rights) would be a share of surplus assets, and that such a share would be a windfall beyond his reasonable expectations, and, secondly, that he had at all times the knowledge, enforced in this case by the unusual reference in art. 139 to the payment off of the preference capital, that at least he ran the risk, if the company's circumstances admitted, of such a reduction as is now

proposed being submitted for confirmation by the court. Whether a man lends money to a company at seven per cent. or subscribes for its shares carrying a cumulative preferential dividend at that rate, I do not think that he can complain of unfairness if the company, being in a position lawfully to do so, proposes to pay him off. No doubt, if the company is content not to do so, he may get something that he can never have expected, but, so long as the company can lawfully repay him, whether it be months or years before a contemplated liquidation, I see no ground for the court refusing its confirmation. To combat the suggestion that, so far as any benefit to the preference stockholders is concerned, the position is substantially the same whether they are now repaid their capital or full use is made of arts. 139 and 141 (a), it was urged that the incidence of income tax would be a sufficient deterrent of this alternative measure. I do not, however, think that the court can properly have regard to such a consideration as this in determining what is fair between the parties. It might, indeed, be considered improper to do so if it drove the ordinary stockholders to a course less advantageous to themselves but no more advantageous to the preference stockholders. A B

It will be seen, my Lords, that, even making an assumption favourable to the appellants, I reject their first plea. But it is perhaps necessary, in case there should be a division of opinion which would make this a decisive issue, that I should shortly examine the assumption. It is clear from the authorities, and would be clear without them, that, subject to any relevant provision of the general law, the rights *inter se* of preference and ordinary shareholders must depend on the terms of the instrument which contains the bargain that they have made with the company and each other. This means that there is a question of construction to be determined and, undesirable though it may be that fine distinctions should be drawn in commercial documents such as articles of association of a company, your Lordships cannot decide that the articles here under review have a particular meaning, because to somewhat similar articles in such cases as *Re William Metcalfe & Sons, Ltd.* (3) that meaning has been judicially attributed. I have earlier in this opinion stated the relevant articles, and, reading them as a whole, I come to the conclusion that arts. 159 and 160 are exhaustive of the rights of the preference stockholders in a winding-up. The whole tenor of the articles, as I have already pointed out, is to leave the ordinary stockholders masters of the situation. If there are "surplus assets," it is because the ordinary stockholders have contrived that it should be so, and, though this is not decisive, in determining what the parties meant by their bargain it is of some weight that it should be in the power of one class so to act that there will or will not be surplus assets. There is another somewhat general consideration which also, I think, deserves attention. If the contrary view of arts. 159 and 160 is the right one and the preference stockholders are entitled to a share in surplus assets, the question will still arise what those surplus assets are. For the profits, though undrawn, belong, subject to the payment of the preference dividend, to the ordinary stockholders, and, in so far as surplus assets are attributable to undrawn profits, the preference stockholders have no right to them. This appears to follow from the decision of the Court of Appeal in *Re Bridgewater Navigation Co.* (1), in which the judgment of the House of Lords in *Birch v. Cropper* (2) is worked out. This again is not decisive, but I am unwilling to suppose that the parties intended a bargain which would involve an investigation of an artificial and elaborate character into the nature and origin of surplus assets. C D E F G H

Apart, however, from those more general considerations the words of the specifically relevant articles, "rank before the other shares on the property of the company to the extent of repayment of the amounts called up and paid thereon" appear to me apt to define exhaustively the rights of the preference stockholders in a winding-up. Similar words, in *Will v. United*

Lankat Plantations Co., Ltd. (4), "rank, both as regards capital and dividend, in priority to the other shares," were held to define exhaustively the rights of preference shareholders to dividend, and I do not find in the speeches of VISCOUNT HALDANE, L.C., or LORD LOREBURN in that case any suggestion that a different result would have followed if the dispute had been in regard to capital. I do not ignore that in the same case in the Court of Appeal the distinction between dividend and capital was expressly made by both COZENS-HARDY, M.R., and FARWELL, L.J., and that in *Re William Metcalfe & Sons, Ltd.* (3). ROMER, L.J., re-asserted it. But I share the difficulty, which LORD KEITH has expressed in this case, in reconciling the reasoning that lies behind the judgments in *Will's* case (4) and *Re William Metcalfe & Sons, Ltd.* (3) respectively. In *Collaroy Co., Ltd. v. Giffard* (7) ASTBURY, J., after reviewing the authorities, including his own earlier decision in *Re Fraser and Chalmers, Ltd.* (8) said, in regard to capital and dividend preference respectively ([1928] Ch. 155) :

"But whether the considerations affecting them are 'entirely different' is a question of some difficulty."

He approved the proposition there urged by the ordinary shareholders that a fixed return of capital to shareholders in a winding-up is just as artificial as a provision for a fixed dividend, and that, if the latter is regarded as exhaustive, there is no *prima facie* reason why the former should not be similarly regarded. So, also, that learned judge was influenced by the consideration which appears to me to have much weight, that, if such an article as our art. 159 is regarded as a complete definition of the rights of the preference stockholders in a winding-up, then there is a logical consistency between their rights before and after the company is put into liquidation. In effect, I prefer the reasoning of ASTBURY, J., in *Collaroy Co., Ltd. v. Giffard* (7) to that of EVE, J., and the Court of Appeal in *Re William Metcalfe & Sons, Ltd.* (3). Counsel for the appellants in the present case sought to draw a distinction between the right to repayment of capital and the right to some further share in surplus assets and pointed to the fact that arts. 159 and 160 said nothing about surplus assets. But this distinction is not, in my opinion, in the present context a valid one. Articles 159 and 160 are the first two in a number of articles headed "Distribution of assets on winding-up," and there is nothing in them to suggest a distinction between "property of the company," the expression in fact used in arts. 159 and 160, required for repayment of capital or distributable as surplus assets. Nor, I think, is the latter expression used throughout the articles : it is perhaps an expression which is better avoided.

Finally, on this part of the case I ought to deal with an observation made by LORD MACNAGHTEN in *Birch v. Cropper* (2) on which counsel for the appellants relied. LORD MACNAGHTEN said (14 App. Cas. 546) :

"... they [the preference shareholders] must be treated as having all the rights of shareholders, except so far as they renounced those rights on their admission to the company."

But, in my opinion, LORD MACNAGHTEN can have meant nothing more than that the rights of the parties depended on the bargain that they had made and that the terms of the bargain must be ascertained by a consideration of the articles of association and any other relevant document, a task which I have endeavoured in this case to discharge. I cannot think that LORD MACNAGHTEN intended to introduce some new principle of construction and to lay down that preference shareholders are entitled to share in surplus assets unless they expressly and specifically renounce that right. For these reasons I reject the assumption on which the appellants' first plea is founded.

I can deal shortly with the other element of unfairness on which the appellants rely, *viz.*, that they have been prematurely deprived of a favourable

investment. Much that I have already said is equally applicable here. Funds being available for payment off of capital, the natural order is to pay off that capital which has priority and I see no glimmer of unfairness in the company doing so at the earliest possible moment, particularly if, their undertaking having been wrested from them, they can no longer earn 7 per cent. or anything like it on their money. I am of opinion then that, apart from the special considerations arising from s. 25 of the Coal Industry Nationalisation Act, 1946, the appellants' objections to the proposed reduction have no substance. I turn then to this section. I will not repeat its provisions. The appellants say (I quote their formal reasons) that the "proposed reduction of capital unfairly and illegally deprives the preference stockholders of their right to an adjustment of their interest in the company's assets as affected by the payment of compensation under s. 25" of the Act and that it "is contrary to or in any event frustrates, the object of s. 25 and therefore ought not to be sanctioned by the court." In argument it has been urged that the preference stockholders have a statutory right to adjustment, with which the court either cannot or should not interfere.

I dissent at once from the major proposition that in view of s. 25 it is no longer competent for the court to exercise its jurisdiction under s. 55 (1) of the Companies Act, 1929. It is impossible to read any such implication into s. 25 of the Act of 1946 or to suppose that the jurisdiction of the court could have been intended to be ousted except by express words. The greater difficulty lies in the alternative proposition that, at least in the exercise of a discretionary jurisdiction, the court ought not to preclude any interested party from the opportunity of such advantage as s. 25 might afford him. In support of this view it may be urged that, until the statutory compensation has been awarded, it is not possible to predicate of any class of shareholders what is a fair way of dealing with any of the assets of the company. I have felt the force of this argument. But, if it is accepted, the court must in the result hold its hand in every case in which a company carrying on a colliery undertaking proposes either to reduce its capital or to enter into a scheme of arrangement affecting classes of shareholders or debenture holders, perhaps, too, even where debenture holders take proceedings to enforce their security, on the ground that by exercising jurisdiction the court might prejudice the inchoate rights of some person under s. 25 of the Act of 1946. I cannot think it right to accede to a suggestion which would involve so much delay and inconvenience to companies which wish to re-arrange their affairs in view of the changes brought about by the Act. I prefer, therefore, to adopt the view put forward by the learned Dean of Faculty and to say that the court should, in the exercise of its jurisdiction, regard the provisions of s. 25 as a factor to be included in its consideration of the fairness of a proposed reduction, but no more than that. It is in that way that I propose to examine the section in relation to the present proposal. The section looks forward to regulations to be made in due course, which are to provide facilities for adjusting the respective interests of different classes in the company's assets so as to give effect, so far as may be, to their "relative expectations of income yield" and to their respective "rights of priority." At the date of the proceedings in the Court of Session no regulations had been made and it was legitimate to hope that, when they were made, they would throw further light on the way in which effect should be given to expectations of income yield and rights of priority. That hope has been disappointed, for the Coal Industry Nationalisation (Company Adjustment) Regulations, 1948 (S.I., 1948, No. 2360), have now been made, but they do not illumine the darkness. The court, therefore, has on the one hand to take into account all those factors with which I have already dealt in considering whether the proposed reduction apart from the Act of 1946 is fair, and the further, by no means negligible, factor that the interposition of further months and perhaps years of delay can be nothing but a hardship to the ordinary stockholders, and,

on the other hand, the factor that the preference stockholders might at long last get something better than they are now getting, *i.e.*, repayment in full of their capital, a possibility resting not on any sure guidance in the section or regulations, but on the speculative hope that, since there is no guidance, anything may happen. It does not appear to me, my Lords, that there is in this latter factor such weight as to justify the court in saying that the reduction here proposed is not fair and equitable between the different classes of shareholders. I do not want to prejudge what may happen in any similar case that comes before a tribunal to be set up under the Act of 1946. But I find it difficult to conceive circumstances in which preference stockholders, being repaid their capital in full and their claims to priority being thus satisfied, can yet assert with any hope of success that their expectations of income yield relative to those of the ordinary stockholders entitle them to something more. I am, therefore, of opinion that the court has properly exercised its jurisdiction in confirming the proposed reduction and that this appeal should be dismissed with costs.

LORD NORMAND : My Lords, on Jan. 1, 1947, the colliery assets of the respondent company were by the Coal Industry Nationalisation Act, 1946, transferred to and vested in the National Coal Board. The immediate result was that the company could no longer pursue the objects for which it was incorporated and that it had on its hands investments and other assets which it could no longer employ remuneratively. It is not intended that the company should continue to carry on business and liquidation is inevitable. Liquidation is, however, postponed till the compensation provided under the Coal Industry Nationalisation Act, 1946, has been settled and paid. In the meantime and as a preliminary step towards liquidation a special resolution for the reduction of capital was passed by an extraordinary general meeting of the company on Sept. 26, 1947. The present appeal is against an interlocutor of the First Division of the Court of Session repelling objections to the petition for confirmation of the reduction of capital.

At the passing of the resolution the capital of the company was £850,000 divided into £40,000 7 per cent. first preference stock, issued and fully paid, £10,000 7 per cent second preference stock issued and fully paid, £675,000 ordinary stock issued and fully paid, and 125,000 ordinary shares of £1 each unissued. By the reduction of capital now proposed their whole paid-up capital will be returned to the holders of the £50,000 preference stock and 10s. will be returned to the holders of the £675,000 ordinary stock for each £1 unit held by them. The appellants are certain of the preference stockholders who lodged answers to the petition for confirmation. Their objections to the proposed reduction are that it deprives them prematurely of the advantage of a well-secured 7 per cent. investment; that it deprives them of a right to participate in the liquidation along with the ordinary stockholders in the division of the property of the company, if any remains after repayment of the capital of all stockholders; and that it deprives them of the opportunity of obtaining a favourable adjustment of their interests under s. 25 of the Coal Industry Nationalisation Act, 1946.

I shall begin by dealing with the first and second of these objections and it is first necessary for that purpose to consider what are the rights of the preference stockholders under the articles of association. Article 17 enables the company from time to time by special resolution to reduce its capital. Under art. 78 every share (now every unit of stock) has one vote in a poll at any company meeting. Article 128 deals with rights to the profits of the company, and it provides that, after setting aside any amount which may be carried to any reserve fund or written off, the profits shall be applied to the payment of a cumulative preferential dividend of seven per cent. to the first and second preference stockholders in their order of priority, and that the

residue of profits shall be divisible among the ordinary stockholders. Article 139 enables the directors to set aside out of profit such sum as they may think proper as a reserve fund which may be used for, *inter alia*, making provision for paying off the preference capital. Article 141 (a) empowers the company in general meeting by ordinary resolution to convert undivided profits, including divisible profits arising by way of permanent appreciation in value of the company's assets, into capital and to distribute it by way of bonus among the ordinary stockholders in proportion to the amounts paid up. Articles 159 and 160 deal with the distribution of the property of the company between stockholders in the event of liquidation. Article 159 provides that the first preference stock shall rank before the other stocks on the company property to the extent of repayment of the amount paid. Article 160 confers on the second preference stock the same priority of ranking over the ordinary stockholders.

These articles give clear notice to the preference stockholders that there is no assured permanence of their right to a cumulative seven per cent. dividend, and there is no unfairness in abridging, if that were all, the brief period now remaining before liquidation, in which dividends might still be paid, by the use of the power to repay preference capital. The appellants' case, indeed, was not founded so much on the loss of their expectation of future dividends as on the deprivation of the major right which they said they had in the property of the company in a liquidation, and if their case on this major ground fails, their case on loss of expectation of dividend must fall with it. So much is this true that there would have been, I think, no opposition if a substantial *pari passu* repayment of the capital of all stockholders had been proposed. What the appellants object to is the complete extinction of their rights as stockholders by the repayment of their whole capital on the eve of liquidation, and their main claim is that, as corporators, they have an equal right with the ordinary stockholders to share in the company's property in a liquidation, unless that right is excluded by the terms of those articles by which their rights are conferred. The chief controversy is, therefore, whether arts. 159 and 160 contain an exhaustive statement of their rights in a liquidation, excluding any further right to share in what have been called the surplus assets of the company. But these articles can only be properly understood if they are read in conjunction with arts. 17, 78, 128, 139 and 141 (a). The cumulative effect of these articles is to give the ordinary stockholders power until liquidation begins to distribute among themselves in one way or another all accretions to capital which may arise either from the profits of the company or from the permanent appreciation of its assets, and I find it difficult to reconcile a power so comprehensive in its scope with an intention that the preference stockholders should, after liquidation takes place, retain an interest in the company's property beyond what is necessary to satisfy their prior claim for the return of their capital. The wording of arts. 159 and 160 appears to be well designed to give effect to this limitation of their rights. The appellants placed some reliance on the word "rank," which they said implied an ulterior right to participate in the company's property after their priority right to a return of capital and the ordinary stockholders' right to a like return were satisfied. In support of this view it was argued that there were three elements to be considered, the rights of the stockholders to dividends while the company was a going concern, and in a liquidation their rights, first, to a return of their capital and, secondly, to "surplus assets." I am unable to assent to these contentions. The word "ranking" may be used, and in Scottish legal practice it is habitually used, of an absolute and exhaustive right, and it carries no implication of an ulterior right not included in the ranking. Moreover, in art. 12, which empowers the issue of new shares "with a preferential or qualified right to dividends and to ranking on the distribution of the assets of the company," the word "ranking" is plainly used with reference to a right which may be exhaustive. The rights in liquidation are not two rights but one, a

right to participate in the division of the company's property. In arts. 159 and 160 the priority ranking of the preference stockholders is expressly a ranking on "the property of the company" and there is no room for the suggestion that these articles leave over a further unexpressed ranking also on the property of the company. I, therefore, come to the conclusion that, subject to the argument based on s. 25 of the Coal Industry Nationalisation Act, 1946, the preference stockholders have no right to anything beyond what they will receive under the proposed reduction of capital.

My Lords, the same conclusion results from a consideration of the authorities and especially of *Will v. United Lankat Plantations Co., Ltd.* (4). In that case art. 43 of the articles of association provided that new shares should be issued with such priority as regards dividends or in the distribution of assets as the company in general meeting might direct. The special resolution creating new shares declared :

" . . . that the holders thereof be entitled to a cumulative preferential dividend at the rate of 10 per cent. per annum on the amount for the time being paid up on such shares ; and that such preference shares should rank, both as regards capital and dividend, in priority to the other shares."

In the Court of Appeal it was held that the preference shareholders were not entitled in the distribution of profits to anything more than a 10 per cent. dividend. COZENS HARDY, M.R., said ([1912] 2 Ch. 576) :

"Sir Francis Palmer in his book, PALMER'S COMPANY PRECEDENTS, 11th edn., pt. I, p. 814, says : 'It is generally assumed that where the preference shares are given a fixed preferential dividend at a specified rate, that impliedly negatives any right to take any further dividend, and probably this assumption is well founded.' In my opinion that assumption is well founded."

FARWELL, L.J., agreed. But these learned judges were careful to confine their judgments to preferential dividend rights, and FARWELL, L.J., said (*ibid.*, 580) that the considerations affecting capital and dividend were entirely different and that he did not think that you could reason from what will happen to capital in a winding up to what ought to happen to dividend while the company is a going concern. This House affirmed the decision of the Court of Appeal, and VISCOUNT HALDANE, L.C., said ([1914] A.C. 17) :

"I should have thought that if we were dealing with an ordinary case of two individuals coming together, and if a document were produced saying 'You are to have a cumulative preferential dividend of ten per cent.' or whatever might be the equivalent in the circumstances of the bargain, it would be naturally concluded that that was the whole of the bargain between the parties on that point. You do not look outside a document of this kind in order to see what the bargain is ; you look for it as contained within the four corners of the document."

Later in his judgment he added (*ibid.*) :

"I think that FARWELL, L.J., called attention to what is really a cardinal consideration in this matter. Shares are not issued in the abstract and priorities then attached to them ; the issue of shares and the attachment of priorities proceed *uno flatu* ; and when you turn to the terms on which the shares are issued you expect to find all the rights as regards dividends specified in the terms of the issue."

With this opinion LORD LOREBURN and LORD ATKINSON agreed. My Lords, the *ratio decidendi* applies with equal force to priorities of participation in the company's property, and I see no ground on which it may be supposed that the declaration of rights as regards dividends is exhaustive but the declaration of rights as regards property is not exhaustive. There is as good

reason and it is equally easy to define exhaustively the one set of rights as the other. In *Re National Telephone Co.* (9) SARGANT, J., said ([1914] 1 Ch. 774 :

" . . . it appears to me that the weight of authority is in favour of the view that, either with regard to dividend or with regard to the rights in a winding-up, the express gift or attachment of preferential rights to preference shares, on their creation, is, *prima facie*, a definition of the whole of their rights in that respect, and negatives any further or other right to which, but for the specified rights, they would have been entitled."

The decision of this House in *Will's* case (4) had not been pronounced when SARGANT, J., decided *Re National Telephone Co.* (9), and his opinion reflects his construction of the judgment of the Court of Appeal. The next case is *Re Fraser & Chalmers, Ltd.* (8) in which ASTBURY, J., held that the preference shareholders in the company were entitled to participate along with other shareholders in the company's property after repayment of the capital; but he explained later in *Collaroy Co., Ltd. v. Giffard* (7) that this decision was based on the particular terms of the special resolution and he retracted what he had said in *Fraser v. Chalmers* (8) so far as it controverted the opinion of SARGANT, J., in *Re National Telephone Co.* (9) which I have quoted. The last case calling for consideration is *Re William Metcalfe & Sons, Ltd.* (3). In that case EVE, J., repudiated the idea that an express direction as to ranking in priority for return of capital excludes any further *pari passu* ranking on surplus property, and held that the ordinary shareholders must establish that the preference shareholders had renounced their statutory rights as members of the company to share in the company's property in a liquidation. His judgment was affirmed by the Court of Appeal. With respect to the learned judges who were parties to the decision, I have felt unable to reconcile it with the *ratio* of the judgment in *Will's* case (4). It is unnecessary for me to elaborate my reasons, because they are most clearly stated in the opinion of LORD KEITH in the present case and I could respectfully adopt what he has there said. It is, I think, not possible to distinguish *Metcalfe's* case (3) from the present case, and I have, therefore, come to the conclusion that it should be overruled and that the *ratio* of *Will v. United Lankat Plantation Co., Ltd.* (4) was correctly applied in *Collaroy Co., Ltd. v. Giffard* (7) and in *Re National Telephone Co.* (9).

I must now turn to s. 25 of the Coal Industry Nationalisation Act, 1946, and I begin with what is common ground, that the statutory jurisdiction of the court to confirm reductions of capital is not ousted. It was, however, said that the court should decline to entertain applications for confirmation of a reduction of capital in the interval between the vesting date and the settlement and payment of compensation under the Act on the ground that the declared intention of Parliament is that the interests of different classes of shareholders or stockholders shall be subject to an adjustment under regulations made by virtue of s. 25. That, I think, is in accordance with the opinion of the LORD PRESIDENT (LORD COOPER). I share, however, the difficulty, which LORD GREENE, M.R., felt and expressed in his judgment in *Re Chatterley-Whitfield Collieries, Ltd.* (5), in appreciating what the declared intention of Parliament may be. It must be remembered that a court of law has no discretion whether it shall exercise its jurisdiction or not : *judex tenetur impertiri judicium suum*. The court, therefore, cannot be moved to suspend applications for confirmation of reduction of capital in order to give place to a tribunal created by a statute which has neither clearly ousted nor clearly suspended the jurisdiction. Its duty, therefore, remains, to consider whether the proposed reduction of capital is fair and equitable, but in discharging this duty it must have regard to the provisions of s. 25. If that section opens to the preference stockholders a prospect of advantage, of which they could be deprived only by a reduction of capital

involving the extinction of their shares before liquidation, I would be prepared to hold that the reduction was unfair. But neither s. 25 nor the Coal Industry Nationalisation (Company Adjustment) Regulations, 1948 (S.I., 1948, No. 2360), which have been made under it since this case was before the Court of Session, justify any firm expectation of advantage to the preference stockholders. How the regulations will be applied by the tribunal is a matter of doubtful speculation.

A The ordinary stockholders are not bound to await the operation of the regulations before exercising powers which are committed to them by the articles. It was conceded that the payment of a dividend which would absorb all "surplus assets" or the distribution of a bonus which would exhaust the undivided profits could not be met by an interdict based on the plea that these were oppressive abuses of powers. Why, then, should they hold their hand if they desire to reduce the capital in the manner proposed rather than to take part in the doubtful hazard of proceedings before a tribunal constituted under s. 25?

B The company is not bound to satisfy the court that its proposals are not unfair. It has brought forward proposals which are *intra vires*, regular on the face of them, and in conformity with the usual practice as laid down in BUCKLEY ON THE COMPANIES ACT, 11th ed., p. 120. If the objectors can find in the provisions of s. 25 or of the regulations anything which should stand in the way of the court's approval, it is for them to disclose it. If they fail to do this, the court has no material before it which would warrant a finding that the proposed reduction is unfair. I would dismiss the appeal.

LORD MORTON OF HENRYTON: My Lords, the respondent company (hereafter called "the company") seeks to effect a reduction of its capital, by returning to the holders of its £40,000 first preference stock and £10,000 second preference stock capital to the full extent of £1 in respect of each £1 of such stock held by them respectively and thereby extinguishing these two stocks, and by returning to the holders of its £675,000 issued ordinary stock capital to the extent of 10s. in respect of each £1 of such stock held by them respectively. This reduction can only be carried out subject to confirmation

E by the court and the court will not confirm the reduction unless it is "fair and equitable." It is this discretion, vested in the court, which properly safeguards the interests of a dissenting minority: see *British and American Trustee & Finance Corpn. v. Couper* (6), per LORD HERSCHELL, L.C. ([1894] A.C. 406). The words "fair and equitable" are not used with any technical meaning, but

F "in the ordinary sense of those words": see per LORD MACNAGHTEN (*ibid.*, 413). The appellants are a dissenting minority, of no fewer than 71 preference stockholders, holding among them about 45 per cent. of the preference capital, and there can, I think, be no doubt that the proposed reduction is detrimental to the preference stockholders and beneficial to the ordinary stockholders. Moreover, there is no reason for the proposed reduction, at this stage in the company's history, other than the desire of the ordinary shareholders to obtain

G a benefit for themselves at the expense of the preference shareholders. It is for your Lordships to determine whether, notwithstanding these facts, the proposed reduction is fair and equitable in all the circumstances of the present case.

In agreement with the LORD PRESIDENT (LORD COOPER) of the Court of Session, but in disagreement with the majority of the First Division, I have

H reached the conclusion that it is neither fair nor equitable. I shall first state my reasons and shall then proceed to expand them and to consider the arguments advanced at the hearing in favour of the proposed reduction. For the sake of brevity, I shall refer to the proposed reduction as "the scheme" and shall use the phrase "surplus assets" as a convenient phrase to describe the assets which remain, in the winding-up of a company, when all its creditors have been paid and all the members have been repaid the amounts paid up on the capital held by them. In so using the phrase I do not forget LORD MACNAGHTEN'S

observation in *Birch v. Cropper* (2) (14 App. Cas. 546), that the "surplus assets" are :

" . . . part and parcel of the property of the company—part and parcel of the joint stock or common fund—which at the date of the winding-up represented the capital of the company. It is through their shares in the capital, and through their shares alone, that members of a company limited by shares become entitled to participate in the property of the company." A

My Lords, my reasons for the conclusion already stated are as follows. (i) In my view, the preference stockholders have, under the company's memorandum and articles, a right to share in the surplus assets in a winding-up. (ii) The company's *substratum* is gone and a winding-up is inevitable. Thus the scheme does not serve any useful business purpose connected with the carrying on of the company. The only results which will follow from it are : (a) the preference stockholders will cease to receive their interest at 7 per cent. forthwith, instead of continuing to receive it until winding-up ; (b) the preference stockholders will be excluded from any share in the surplus assets on a winding-up. The ordinary shareholders have used their voting power in order to secure these results, and for no other purpose ; there is no other reason why the company should not proceed to liquidation without taking this preliminary step. (iii) The opposition to the scheme does not come from a small or factious minority, but from a substantial minority who have excellent reasons for wishing to oppose the scheme. (iv) It is possibly of some importance that the scheme cuts out the preference stockholders from any chance of getting favourable adjustment of their interests in the company's assets under s. 25 of the Coal Industry Nationalisation Act, 1946. As will appear hereafter, however, I attach very little weight to this point. B C D

My Lords, my first reason is of great importance. If the preference stockholders are not entitled to share in the surplus assets, the scheme at once assumes a different aspect. In the Court of Session LORD KEITH thought that they were not so entitled, and the question is, of course, one of construction. The respective rights of preference and ordinary stockholders depend entirely on the company's memorandum and articles of association, to which I now turn. By cl. 5 of the memorandum the company has power to increase its capital : E

" . . . by the creation and issue of new shares, either ordinary, or having such preference, priority and special privileges attached thereto as may be determined by special resolution of the company." F

It is, I think, unnecessary to trace the stages by which the company's capital reached its present amount. In 1923 the company by special resolution adopted new articles of association. Before that date, all the preference stock had been issued, and, in my view, no other document is material for determining the present rights of all classes of stockholders. The articles must, of course, be read as a whole, and in reading them it is important to bear in mind that (to quote LORD MACNAGHTEN in *Birch v. Cropper* (2) (14 App. Cas. 543)) : G

" Every person who becomes a member of a company limited by shares of equal amount becomes entitled to a proportionate part in the capital of the company, and, unless it be otherwise provided by the regulations of the company, entitled, as a necessary consequence, to the same proportionate part in all the property of the company . . . " H

Thus, in the present case the preference stockholders are entitled to share in the surplus assets with the ordinary stockholders in proportion to their respective holdings, unless the articles of the company otherwise provide.

I turn first to arts. 159 and 160, since they are the only articles which deal directly with the matter in issue, though, of course, they must be read in con-

junction with all the other articles, in order to get a complete picture. I shall quote these two articles, as they have not yet been read in full :

" 159. In the event of the company being wound-up, the preference shares (first issue) shall rank before the other shares of the company on the property of the company, to the extent of repayment of the amounts called up and paid thereon.

A 160. In the event of the company being wound-up, the preference shares (second issue) shall rank before the ordinary shares but after the said preference shares (first issue) on the property of the company to the extent of repayment of the amounts called up and paid thereon."

B As these two articles are similar in their terms, *mutatis mutandis*, it will be sufficient to examine one of them in detail. Certainly neither of them contains any words which expressly exclude the preference stockholders from sharing in the surplus assets, although such words are very commonly found in a company's articles, and they appear, for instance, in the articles of Chatterley-Whitfield Collieries, Ltd., the respondent company in the next appeal before this House*. The omission of any words of exclusion is, I think, somewhat significant. The new articles were adopted in 1923, and in 1919 ASTBURY, J., had decided in *Re Fraser and Chalmers, Ltd.* (8) that the preference shareholders in the company then in question were entitled to share in the surplus assets, pointing out ([1919] 2 Ch. 120) that :

D "All shareholders are entitled to equal treatment unless and to the extent that their rights in this respect are modified by the contract under which they hold their shares."

This was the last relevant decision before the company in the present case adopted its new articles, and I think that, if it had been intended to exclude the preference shareholders from any share in the surplus assets, express words of exclusion would have been inserted in arts. 159 and 160. Are there any words which raise an implication of such an exclusion ? My Lords, I cannot find them. Article 159 is concerned simply with the *order* in which shares shall rank "on the property of the company," and the *extent* to which the first preference shares (now stock) shall rank before the other shares of the company. They are to rank before the other shares, on that property, to the extent of repayment of the amounts paid up. Surely the implication is that, except to the extent

E just stated, the preference shares are to have no priority, but are to rank equally on any property of the company which is left after the paid-up capital has been repaid ? If, however, there is no such implication, there is not a word which raises the implication that they are to be excluded from the ordinary right, as corporators, to share equally with other corporators in a winding-up on this portion of "the property of the company." Turning now to the other articles,

G I look in vain for any words which expressly or impliedly exclude the preference shareholder from the right just mentioned. I would first note that art. 12 has no relation to the existing preference stock, as it had all been issued before this article was adopted. I do not think it matters whether or not there was an earlier article in the same terms, as the present rights of all stockholders depend on the 1923 articles. Counsel for the company relied particularly on arts. 128,

H 139 and 141 (a). I shall have to return to these articles later, and I have no desire to minimise the marked difference between the position of the preference and the ordinary stockholders in regard to the profits, while the company is a going concern. But, with all respect to those who think otherwise, I cannot obtain from these three articles any light on the respective positions of the preference and the ordinary stockholders when the company goes into liquida-

* See p. 1094 *post*.

tion. As ROMER, L.J., said ([1933] Ch. 161) in *Re William Metcalfe & Sons, Ltd.* (3) :

"... because . . . the preference shareholders, as regards dividend, are entitled to nothing more than the fixed preferential dividend expressed to be given to them, it does not in the least follow that so far as regards their rights in a winding-up they are only entitled to the privileges of preference expressly given to them in that respect."

In order to find out how the company's property is to be dealt with when that event happens, one has to return to the articles dealing with the position in a winding-up. I have already dealt with arts. 159 and 160, and, having travelled full circle, I have discovered nothing which expressly or impliedly deprives the preference stockholders of their ordinary right as corporators to share in the surplus assets in a winding-up.

My Lords, I hope and believe that I have avoided approaching this question of construction "with any obsession or preconceived idea as to the inherent equality between shareholders in a company," to quote again ROMER, L.J. ([1933] Ch. 159) in *Metcalfe's* case (3). I have construed the memorandum and articles with an entirely open mind, and having construed them I fall back on that inherent equality which is, to my mind, in no way disturbed by the regulations of the company. I leave the articles by asking, and answering to the best of my ability, two questions : (a) What would have been the position as to the distribution of the company's property on a winding-up if the articles had contained no provisions at all as to how that property was to be distributed ? In that event there could, I suppose, be no doubt that the balance remaining after payment in full of the creditors would have been divisible equally among all the stockholders, preference and ordinary alike, under ss. 211 and 247 of the Companies Act, 1929 : see *Birch v. Cropper* (2) per LORD MACNAGHTEN (14 App. Cas. 546, 547). (b) To what extent is the position altered by the memorandum and articles of this company ? Answer—The only provisions as to this are contained in arts. 159 and 160, and they do no more than confer a priority on the preference stockholders "to the extent of" repayment of their capital.

My Lords, in every case the answer to the question now under consideration depends on the true construction of the regulations of the company in question. I am, however, strengthened in the view which I have formed by the closely reasoned judgment of EVE, J., in *Metcalfe's* case (3), unanimously accepted by the Court of Appeal as correct. There are, of course, differences, in the wording of the memorandum and relevant articles, between the present case and *Metcalfe's* case (3). The articles are very shortly set out in the report, which does not show whether or not there were any articles on the same lines as arts. 128, 139 and 141 (a) in the present case, but counsel for the ordinary shareholders argued ([1933] Ch. 144) :

"... the moment before the winding-up the ordinary shareholders could have passed a resolution dividing the whole of the surplus assets or accumulated profits between them."

This argument was dealt with by EVE, J. (*ibid.*, 151, 152). I think, therefore, that any distinction which exists between the present case and *Metcalfe's* case (3) must be an extremely fine one.

Metcalfe's case (3) settled, so far as regards the Court of Appeal, a long-standing difference of judicial opinion which is fully set out in the judgments. It is not binding on your Lordships' House, but, in my view, the decision, and the reasoning on which it was founded, were correct. I also agree with the reasoning and the decision in *Liquidators of Williamson-Buchanan Steamers, Ltd.* (10). I have not overlooked *Re Bridgewater Navigation Co.* (1). If the preference stock were to continue in existence until liquidation, interesting

questions might arise whether that case was rightly decided, and, if so, whether the facts of the present case would support any claim by the ordinary stockholders similar to the claim successfully put forward in the *Bridgewater* case (1). I do not, however, find that case, in which the facts were of a very special nature, of any assistance on the question of construction which arises on the present case.

A It is, of course, necessary to consider carefully the decision of this House in *Will v. United Lankat Plantations Co., Ltd.* (4). I would observe, first, that the House was then dealing only with a question of the rights of the preference shareholders in respect of dividend while the company was a going concern, but certain observations of VISCOUNT HALDANE, L.C., were much relied on by counsel for the company. My Lords, for my part, I do not think that B VISCOUNT HALDANE, L.C., was addressing his mind in the slightest degree to the rights which the preference shareholders would have in a winding-up. These rights were not in dispute in this House: see *Collaroy Co., Ltd. v. Giffard* (7) ([1928] Ch. 154, n.). VISCOUNT HALDANE, L.C., was delivering an impromptu opinion on one topic only, and I do not think he intended his words to be applied to any other topic. The other noble and learned Lords also C concentrated on the topic with which alone the case was concerned. I cannot form any idea what view the House would have taken if the rights of the preference shareholders to surplus assets in a winding-up had been under consideration. I am supported in my view that *Will's* case (4) is of no assistance in the present problem by the following facts. (a) When *Will's* case (4) was heard in the Court of Appeal COZENS-HARDY, M.R., clearly thought that the preference shareholders would share in surplus assets in a winding-up D ([1912] 2 Ch. 578), while FARWELL, L.J., said (*ibid.*, 580):

“To my mind the considerations affecting capital and dividend are entirely different. The preference given to capital is in the winding-up, and the preference claimed to be given to dividend here is in a going concern; and I do not think that you can reason from what will happen to capital in a winding-up to what ought to happen to dividend while the company is a going concern. As to what may happen in a winding-up I express no opinion. SIR FRANCIS PALMER says this, immediately following the passage read by the MASTER OF THE ROLLS, in PALMER'S COMPANY PRECEDENTS, 11th ed., pt. i, p. 814: ‘Where preference shares are given a preference as regards capital, that does not impliedly exclude them from sharing in the surplus assets in winding-up, after clearing off the whole of the paid-up capital: *Re Espuela Land and Cattle Co.* (11). It is, therefore, open to contention that the attachment of a preferential dividend does not impliedly exclude the right to participate in surplus profits after paying a like dividend on the subordinate shares. In order, however, to preclude any question on this point, it has for some time past been customary to insert express words negating the right of preference shareholders to participate in further profits.’” E F G

If this House, in affirming the Court of Appeal, had disagreed with these observations, it would seem likely that some member of the House would have criticised them. The absence of any such criticism may indicate that their Lordships either formed no view upon the observations of COZENS-HARDY, M.R., and FARWELL, L.J., or agreed with those observations. (b) In *Metcalfe's* case (3) all the members of the Court of Appeal mentioned *Will's* case (4), and clearly did not think it contained anything adverse to the reasoning of EVE, J. (c) It may possibly be material to note that in *Will's* case (4) this House had to consider the joint effect of the second resolution of July 13, 1891, which (to quote VISCOUNT HALDANE, L.C. ([1914] A.C. 16)) “gave the authority to make the bargain and defined the terms which the bargain was to contain” when the preference shares were issued, and the articles of the company, in H

particular, art. 43. In the present case the first preference shares were created in 1878, and the second preference shares in 1892 and the present rights of the shareholders are defined by the articles adopted in 1923. Your Lordships do not know, nor, in my view, is it now material to know, what were the terms of the original offer of preference shares at the time when they were created. For these reasons, my Lords, I am of opinion that the preference shareholders in the present case are entitled to share in the surplus assets, and that the authorities furnish no good ground for a contrary conclusion. A

I now come to my second reason for thinking that the scheme is unfair and inequitable, and I should like to adopt, respectfully, the summary of the situation given by the learned LORD PRESIDENT (LORD COOPER) (1948 Sc. L.T. 276):

“What are the admitted facts? This company’s capital structure consists of preference and ordinary stock in the ratio of roughly 1 to 13. Its business was coal-mining, and on Jan. 1, 1947, its collieries and working assets passed to the National Coal Board in exchange for a share, as yet undetermined, in the global sum of compensation. Liquidation is inevitable. The company’s *substratum* is gone. Its remaining assets, consisting of investments and cash, can no longer be employed in prosecuting the objects for which it was formed. No resumption of business is in contemplation. It survives, with one foot in the grave, solely for the purposes of being wound-up, and it will be wound-up as soon as the compensation has been ascertained. There is no question in this case, as in earlier cases, of recasting the company’s finances in its interests as a trading entity. There is no question here of discretionary forecasts of business men as to the company’s commercial future. This company’s future is behind it. Its creditors are provided for. There is only one active controversy, *viz.*, the division of the assets amongst the shareholders. These assets, even without taking into account the compensation from the National Coal Board, are ‘much more than sufficient’ to meet all liabilities, and a glance at the balance sheets is enough to show that at the end of the day there are bound to be considerable surplus assets. Faced with this situation (which must have a parallel in many other concerns affected by nationalisation of the industries in which they have previously been engaged), this company determined to wind-up by instalments and to die by inches. On Sept. 26, 1947, a special resolution was passed (by a majority) reducing the capital from £850,000 to £462,000 by returning capital to the shareholders to the extent of £388,000, described as being in excess of the wants of the company, as it manifestly is. Had this return of capital been effected rateably, no objection could have been stated. But the proposal is to pay off the whole preference stock at par and to return 10s. in the £ to the ordinary stockholders, who, if the scheme is approved, will be left in undisputed possession of the field. In answer to a protest on behalf of the preference stockholders, the secretary of the company wrote on Sept. 17, 1947: ‘In view of the passing of the Coal Industry Nationalisation Act, 1946, the liquidation of this company sooner or later is inevitable. The proposed reduction of capital is only the *first step in that direction*, the directors being unwilling to proceed with *formal liquidation* until further progress has been made with the adjustment of the company’s claims . . .’ (The italics are mine). Confirmation is now opposed not by a single obstructive shareholder, or a small coterie of dissentients, but by 71 preference stockholders holding 45 per cent. of the preference stock.” B C D E F G H

Later, the LORD PRESIDENT said (*ibid.*, 277):

“If it were not anticipated by both parties that there will be a substantial surplus after repaying to all the shareholders their subscribed capital—

and on the accounts this anticipation is plainly well founded—this case would be academic. Both parties see that, if there is no ‘first step’ of a reduction of capital to extinguish the preference stock at par, the surplus assets will have to be divided between all the shareholders, whereas if this reduction is confirmed, the whole of the surplus assets will be appropriated by the ordinary stockholders, and the preference stockholders will get nothing but the par value of their stock. The ordinary stockholders have used their voting predominance with the object of cutting the preference stockholders out, and the question for us is whether in the circumstances that is, in a business sense, fair and equitable.”

Finally, he observed (*ibid.*) :

“ . . . it can make no appreciable difference to these ordinary stockholders whether they get 10s. in the £ now at the ‘first step’ in the winding-up, or whether the relative investments continue to be held by the company until the ‘formal liquidation.’ On the other hand, it is impossible on any business view of the matter to see how in the inevitable liquidation the preference stockholders could ever get less than 20s. in the £ for their stock ; and if they are forced to accept 20s. now and to forego their right to a seven per cent. dividend and to participation in the surplus assets in the liquidation, they are being bought off for less than a just equivalent, and this loss is being inflicted upon them not in the interests of the company but solely in order that the ordinary stockholders may eventually appropriate 13-13ths of the surplus assets instead of 12-13ths. This is not my idea of what is just or equitable, and I do not believe that any jury of business men would so regard it.”

My Lords, these passages express so clearly my own views on this branch of the case that I would only add this—there is no question in the present case of a “continuing burden” on the company in paying the dividend on the preference stock. Winding-up is inevitable, the sum required to pay this dividend only amounts to £3,500 gross per annum, and this sum cannot seriously be regarded as a burden, having regard to the free assets of the company and the “interim income” provisions of the Act of 1946 [ss. 19 (2) and 22.]

My third reason, as to the nature of the opposition to the scheme, is also dealt with in the passages quoted above. I would only add that it is not, of course, to be supposed that the holders of the remaining 55 per cent. of preference stock support the scheme, merely because they have not appeared in these proceedings. Indeed, I find it difficult to imagine that any well-informed preference stockholder would support the scheme, unless he were also a still larger holder of ordinary stock. I do not place much weight on my fourth reason, because it is impossible to foretell with any accuracy what (if any) adjustments of interests will ultimately be made under s. 25 of the Act of 1946, if the preference stock continues in being. There may be cases in which it can be said that an adjustment will probably be made in favour of preference stockholders, but I am not satisfied that this is such a case. The existence of s. 25 is, I think, of little importance in the present case, one way or the other. It certainly cannot be regarded as suspending the power of the court to approve a reduction of capital ; it is merely a circumstance to be taken into account when the court is exercising its discretion.

My Lords, I now turn to the reasons urged by counsel in favour of the scheme. First, it is said that it is the ordinary practice, where money is to be returned to the shareholders in a company, to return it in the same manner as capital is repayable in a winding-up. Counsel referred, as part of his argument, to a passage in BUCKLEY ON THE COMPANIES ACTS, 11th ed., p. 120, which has appeared in a number of editions of that work, including at least one which LORD WRENBURY himself prepared. There is a striking lack of authority on this point, but I would agree that in an ordinary case, where a company is

intending to carrying on business and desires to pay off any paid-up share capital under s. 55 (1) (c) of the Act of 1929, the practice is as stated in BUCKLEY ON THE COMPANIES ACT. It is still necessary, however, for the court to consider with care in each case whether a scheme is fair and equitable in the circumstances of that particular case. It is not enough for those supporting a scheme to say "the company is still in being and the proposed repayment is in accordance with the ordinary practice." If that were enough, the court's discretion would be cut out and the ordinary shareholders would be able to treat preference shares as being redeemable, at their option, as soon as sufficient capital, in excess of the wants of the company, became available for the purpose. The practice can, at most, have the effect of making it necessary for objectors to point to some circumstances which distinguish the case under consideration from the ordinary run of cases. Here they can point at once to the taking over of the company's business by legislative action, the imminence of liquidation, and the absence of any reason, from the standpoint of the company's business, for any repayment of capital at this stage. Thus I think that the practice in question is of little assistance to the respondent company's argument. The ordinary stockholders are, in effect, seeking to use to the detriment of the preference stockholders a priority in respect of capital which was intended to be for their benefit. I would call attention, on this point, to the contrast drawn between the position of a company intending to continue its business and a company whose business is at an end in the judgment of LORD GREENE, M.R., in *Re Chatterley-Whitfield Collieries, Ltd.* (5) which your Lordships are about to consider*. The considerations which make the practice *prima facie* a fair and convenient one in the former case have no application in the latter case.

Next, reliance is placed on art. 139, and, in particular, on the power expressly given to the directors to set aside, out of the profits, a reserve fund to be used, *inter alia*, "for making provision for paying off the preference share capital." This provision formed, I think, the basis for LORD RUSSELL's approval of the scheme, but, with all respect, I feel that he gave too little weight to the fact that this article gave the ordinary stockholders no contractual right to pay off the preference. If and when provision had been made for this purpose, it would still have been necessary to bring the proposal before the court for its confirmation or rejection. In this House it was argued that this article "gave warning" to the preference stockholders that they might be paid off some day, and, therefore, they could not properly complain if this event happened. No doubt, any stockholder who read art. 139 would be given this warning. But, in the case of every company whose articles contain no provision as to the redemption of its preference shares, every preference shareholder who reads s. 55 of the Act of 1929 is given warning that, subject to confirmation by the court, a scheme may provide for the payment off of his shares. The preference stockholders in this company are in exactly the same position; they may be paid off if the court, in its discretion, thinks fit, and they will not be paid off if the court does not think it fair and equitable. I cannot see why the existence of this "warning" in art. 139 should be of any real assistance to this House in deciding the question whether payment off, *in the present circumstances*, is fair and equitable. It may not be irrelevant to note that no funds have ever been set aside for the express purpose of paying off the preference stock, which has stood at the figure of £50,000 for over 50 years. I think that the LORD PRESIDENT was justified in observing (1948, Sc. L.T. 277) that:

"... but for the Act of 1946, the investment would in all human probability have continued to yield seven per cent. for an indefinite time..."

Lastly, and this is, I think, the point which was most strongly pressed, it is said that there can be nothing unfair or inequitable about the scheme, because

* See p. 1094 *post*.

the profits (after payment of the preference dividend) are divisible among the ordinary stockholders under s. 128; any surplus assets are due to the abstinence of the ordinary shareholders as regards dividends in the past, and the ordinary shareholders could now, if they thought fit, use their voting power to divide the surplus assets among themselves, either (a) by declaring a vast ordinary dividend under art. 129, or (b) by capitalising all undivided profits under art. 141 (a) and distributing the resulting capital among themselves by way of bonus. My Lords, I was at first impressed by this argument, but I have come to the conclusion that it is of little weight. Article 128 merely expresses that which is the ordinary rule in companies having preference shares, and no doubt there were good reasons, from the point of view of the company's business, why no larger ordinary dividends were paid in the past. Now comes an event, imposed on the company from without, which puts an end to the company's business. The fact that there are surplus assets arises partly from this event and only partly from the past abstinence of the ordinary stockholders. I have already said why I think it would be unfair if the preference stockholders were now cut out by the proposed reduction of capital. In my view, it would also be unfair if at this stage the ordinary stockholders were to adopt either course (a) or course (b) already mentioned. It is quite true that they have a contractual right to do so, but it is easy to think of many cases in which it becomes unfair for a man to exercise a contractual right in a particular way—cases in which some unexpected event happens, giving rise to a state of circumstances utterly different from that which the parties contemplated. In the present case, nationalisation has come on the company and has made liquidation inevitable. The preference stockholders are about to lose an investment which they would have liked to keep; the ordinary stockholders would probably have preferred the company's business to continue. In these circumstances it does not avail the ordinary stockholders to say: "This scheme is not unfair, because we could have achieved the same result by employing either of two other methods." I would reply: "Be it so; the adoption of either of these two methods would be unfair. It may be that the court could not prevent you from achieving your ends by either of these methods, but you have chosen a third method which gives the court a discretion to stop you, and you will be stopped." For these reasons I do not think that your Lordships' decision should be affected by the "alternative methods" argument. The only question before you is in regard to this particular scheme for getting rid of the preference shareholders. Is it fair and equitable or not? I think it is not. I would allow the appeal, with the result that the company's petition for confirmation of the reduction of capital would meet with the fate which, in my view, it richly deserves, that of dismissal with costs.

Appeal dismissed with costs.

Solicitors: *Parker, Garrett & Co.*, agents for *J. & R. A. Robertson*, Edinburgh (for the appellants); *Allen & Overy*, agents for *McGrigor, Donald & Co.*, Glasgow, and *Shepherd & Wedderburn*, Edinburgh (for the respondent company).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

PRUDENTIAL ASSURANCE CO., LTD. AND OTHERS
v. CHATTERLEY-WHITFIELD COLLIERIES CO., LTD.

[HOUSE OF LORDS (Viscount Maugham, Lord Simonds, Lord Uthwatt,* Lord Normand and Lord Morton of Henryton), March 3, 7, May 6, 1949.]

Coal—Nationalisation of industry—Colliery company—Reduction of capital—Rights of shareholders under Coal Industry Nationalisation Act, 1946 (c. 59), s. 25 (1). A

A colliery company, whose capital of £400,000 was divided into 20,000 six per cent. preference shares of £10 each and the same number of ordinary shares of a like nominal value, passed a special resolution, as empowered by its articles of association, to reduce its capital to £200,000 by returning to the preference shareholders the whole capital paid up on their shares. The articles conferred on the preference shareholders a right to a cumulative preference dividend of 6 per cent., and on winding-up, in priority to ordinary shareholders, to repayment of capital together with any arrears of dividend down to the date of such repayment in priority to the claims of the holders of ordinary shares, but to no other participation in the assets. On Jan. 1, 1947, under the Coal Industry Nationalisation Act, 1946, the company's colliery undertaking became vested in the National Coal Board, and, pending the payment of compensation, the company was entitled under s. 22 (3) of the Act to interim income, and under s. 22 (2) to interest on the amount of the compensation. The Act provides by s. 25 : " (1) Provision shall be made by regulations for due regard being had, as between classes . . . of members . . . of a company being an owner of transferred interests, to what their relative expectations of income yield from their respective interest in the company would have been if this Act had not been passed, and for that purpose the regulations shall provide facilities for adjusting the respective interests of such classes in the company's assets as affected by the substitution of the compensation under this Act for the transferred interests of the company so as to give effect, so far as may be, on the one hand to the said expectations and on the other hand to the rights of priority conferred on such classes respectively by the . . . memorandum and articles of association of the company." Certain preference shareholders dissented from the resolution to reduce capital in the proposed manner and opposed the petition to confirm it. It appeared that the company was not contemplating liquidation, but was prospecting for coal in Ireland and had other activities in view. B C D E F

HELD: the jurisdiction of the court to adjudicate on the proposed reduction of capital was unaffected by the provisions of s. 25, and it was the duty of the court not to postpone consideration of the proposed reduction, but, giving such weight as it thought proper to s. 25, to dispose of the matter ; in accordance with the principles on which the jurisdiction was exercised the proposal in the present case was fair and equitable ; and, therefore, it was proper to be confirmed. G

Scottish Insurance Corpn., Ltd. v. Wilsons & Clyde Coal Co., Ltd. (p. 1068 ante), applied.

Decision of Court of Appeal ([1948] 2 All E.R. 593), affirmed.

[AS TO REDUCTION OF CAPITAL, see HALSBURY, Hailsham Edn., Vol. 5, pp. 170-176, paras. 305-316 ; and FOR CASES, see DIGEST, Vol. 9, pp. 148-161, Nos. 833-936.] H

Case referred to :

- (1) *Scottish Insurance Corpn., Ltd. v. Wilsons and Clyde Coal Co., Ltd.*, [1949] 1 All E.R. 1068.

* LORD UTHWATT died on April 24th, 1949, before the opinions were delivered.

A APPEAL by dissenting preference shareholders from a decision of the Court of Appeal (LORD GREENE, M.R., and ASQUITH, L.J., EVERSHED, L.J., *dissenting*), dated July 30, 1948, and reported [1948] 2 All E.R. 593, reversing an order of His Honour JUDGE PEEL, K.C., Deputy Vice-Chancellor of the Duchy and County Palatine of Lancaster, reported [1948] 1 All E.R. 911, and confirming a proposal by a colliery company to reduce its capital by repayment of the whole of its preference capital. The House of Lords now dismissed the appeal. The facts appear in the opinion of LORD SIMONDS.

Sir Cyril Radcliffe, K.C., Ungood-Thomas, K.C. and Raymond Walton for the appellants (the dissenting preference shareholders).

Christie, K.C., and Eric Griffith for the company.

B The House took time for consideration.
May 6. The following opinions were read.

VISCOUNT MAUGHAM : My Lords, the facts in this appeal are sufficiently stated in the speech of my noble and learned friend LORD SIMONDS and no useful purpose would be served by my repeating them. It is not in dispute that, if the company had thought fit to pass a voluntary resolution for a winding-up, or to do so in the near future, the rights of the preference shareholders (apart from any possible action by the tribunal appointed under s. 25 of the Coal Industry Nationalisation Act, 1946), would be to receive a repayment of their share capital together with any arrears of preference dividend and they would have no other right to participate in the assets of the company. The unusual position is that the appellants, as holders of a substantial number of preference shares, object to the proposed reduction of capital by a repayment in full of their preference capital. Desiring to retain their preference shares though the undertaking of the company has been entirely changed, they invite the court to hold that the proposed repayment is unfair and inequitable and that the reduction ought not, therefore, to be approved. They acquired their shares on the footing that, subject, no doubt, to the approval of the court, they might be paid off under art. 43 of the company's articles of association, but this they urge at the Bar is not the occasion or the method which should be adopted for such a reduction. They, perhaps, wisely do not tell us when that course would, in their view, be appropriate.

My Lords, I do not propose to state the grounds on which the majority in the Court of Appeal or my noble friends in this House have declined to accept this contention, but I should like to add a few observations of my own, for the simplest arguments sometimes escape attention merely because they are assumed. In the present case the main fact is that the undertaking of the company has been compulsorily acquired by the National Coal Board under the Coal Industry Nationalisation Act, 1946. There is no longer, therefore, any reason for the retention by the company of the assets and funds of great value which have been slowly added to year by year with a view to meeting contingencies or spending enormous sums in improving or re-constructing or enlarging the colliery undertaking. The obvious thing to do would be to wind-up and distribute all the assets after paying debts and liabilities in accordance with the articles. It is not, I think, suggested that the holders of preference shares could properly object to such a course. They would cease to own a well-secured six per cent. investment, and the ordinary shareholders would no longer possess shares paying in recent years double that amount in dividend. The object of the Coal Act was not, of course, the benefit of shareholders, but, if we ask whether in this case preference or ordinary shareholders are the most injured by the transfer subject to compensation of the colliery undertaking to a State enterprise, I think the current view of commercial men would probably be that the ordinary shareholders are the greater victims. The company, however, proposes not to go into liquidation, at any rate at present, but to

embark on two entirely new ventures in Eire and Northern Ireland, one of them a new colliery, if prospective operations should prove satisfactory, and the other the business of digging for clay and the manufacture of tiles and like articles. The necessary working capital for those enterprises is only a fraction of the available existing funds of the company, and, accordingly, the special resolution duly passed by the company in general meeting on Oct. 30, 1947, provided for the reduction of the capital of the company from £400,000 to £200,000 by returning to the preference shareholders the amounts paid up on their shares. It is, in my opinion, from the point of view of those shareholders an accidental circumstance that a large majority of the ordinary shareholders have approved of the starting of two entirely new, and it may be highly speculative, enterprises with which the preference shareholders, if the reduction goes through, will obviously have no concern. If the preference shares are not paid off, and the new undertaking proved to be a success, the preference shares would become more and more valuable as the assets of the company became increasingly substantial. If, on the other hand, the undertaking were unsuccessful, those shares might nevertheless be worth par in a winding-up while the ordinary shares might have become valueless. The risk, in short, would be the risk of the ordinary shareholders, while the gain might well be that of the preference shareholders. That proposal does not commend itself to me as a fair one, and the same objection, with smaller figures affected, must apply to a proposal for a *pari passu* reduction of the ordinary and the preference shares. In short, like my noble friend LORD SIMONDS, I am at a loss to see what other method of reduction is to be preferred as more fair and equitable in the circumstances of this case.

The question of the effect of s. 25 of the Coal Act on the present case is one with which your Lordships have dealt in the very recent case of the *Scottish Insurance Corpn., Ltd. v. Wilsons & Clyde Coal Co., Ltd.* (1). That was also the case of a company whose undertaking was a colliery, and the dispute, as here, was between two classes of shareholders, but that company proposes to go into liquidation as soon as the amount of compensation payable under the Coal Act has been ascertained, and the preference shareholders were claiming (but unsuccessfully) to be entitled to rank equally in the winding-up with the ordinary shareholders in the surplus assets of the company, that is, in the assets available after payment of debts and liabilities and the amounts of capital paid on the ordinary and preference shares. Counsel for the preference shareholders there, as here, relied on s. 25 of the Coal Act and said that the proposed reduction of capital deprived the preference shareholders of their right to an adjustment of their interest in the company's assets. Your Lordships have now dealt with the appeal in that case and have considered the regulations [the Coal Industry Nationalisation (Company Adjustment) Regulations, 1948 (S.I. 1948, No. 2360)] which have now been made under s. 25. They have held that there was no ground in that case for postponing the decision of the court on the petition before the court, and they were not persuaded that there was good reason for thinking that the apparent fairness of the proposal before the court would be affected or displaced by any order which was in the least likely to be made under the jurisdiction derived from s. 25. The reduction here proposed, in my opinion, is in itself fair and equitable, and there is here, as in the previous case, no real ground for the speculation that the tribunal might give the preference shareholders anything more than they would become entitled to receive in a liquidation. In my opinion, therefore, this appeal should be dismissed with costs.

LORD SIMONDS : My Lords this appeal is from an order of the Court of Appeal reversing an order of His Honour JUDGE PEEL, K.C., sitting as the deputy of the Vice-Chancellor of the County Palatine of Lancaster. That learned judge had dismissed a petition presented by Chatterley-Whitfield Collieries,

A Ltd., which I will call the company, under s. 55 of the Companies Act, 1929, for confirmation of the reduction of its capital by repayment of the whole of its preference capital. The Court of Appeal (LORD GREENE, M.R., and ASQUITH, L.J., EVERSHED, L.J., dissenting) reversed his decision and confirmed the reduction. Hence this appeal by two large holders of preference shares. Apart from a question that arises under s. 25 of the Coal Industry Nationalisation Act, 1946, which I will call "the Coal Act," the case is, I think, free from difficulty.

B The company was incorporated in 1891 with the principal objects of acquiring certain properties from the North of England Trustee Debenture and Assets Corporation, Ltd. and carrying on the business of colliery proprietors, and since its incorporation its principal business has been that of a colliery undertaking in Staffordshire. It is a private company. Clause 5 of the company's memorandum of association provides that the capital is £400,000 divided into 40,000 shares of £10 each with power to increase the same and to issue any shares with any preference or priority. The capital has at all times been £400,000 divided into 40,000 shares of £10 each, of which 20,000 are preference and 20,000 ordinary shares. All the shares have been issued and are fully paid. C The preference shares were issued and fully paid many years ago. The ordinary shares were also issued many years ago, but the final call of £2 10s. per share was not made in respect of them until 1939. The present articles of association of the company were adopted by special resolution on Apr. 28, 1944. I think it necessary to mention few of them. By art. 7 (which, in effect, replaced one of the original articles) the holders of preference shares have the right to a fixed D cumulative preferential dividend at the rate of 6 per cent. per annum on the amount paid up thereon, and, in the event of the winding-up of the company, to repayment of capital together with any arrears of dividend down to the date of such repayment in priority to the claims of the holders of ordinary shares, but have no other right to participate in the assets of the company. Article 43 E empowers the company by special resolution to reduce its capital in any manner authorised by law. Article 65 provides that on a show of hands every member present in person shall have one vote and that on a poll every member present in person or by proxy shall have one vote for every share held by him. Article 109 provides for the creation of a reserve fund which may be used for any purpose for which the net profits of the company may lawfully be used.

F On Jan. 1, 1947, the company's colliery undertaking vested in the National Coal Board under the provisions of the Coal Act. The company thereupon became entitled to receive from the Crown a sum by way of compensation for the expropriation of its property. The major part of this sum, which is to be ascertained by means of (a) the ascertainment by arbitration of the value of the assets of the industry as a whole ; (b) the division of the sum so ascertained by award of a Central Valuation Board among the several mining districts in G the country ; and (c) the division by awards of District Valuation Boards of each district's share among the colliery owners of the district, will ultimately be satisfied by an issue of government stock. On the other hand, the compensation to be paid in respect of certain assets such as stores and coal stocks is payable in cash. It is further provided by s. 22 (2) and (3) of the Coal Act that interim income is payable by the Crown at a prescribed rate for the first H two years after the vesting date, and that thereafter the colliery owner shall be entitled to interest on the sum ultimately found due to him, also at a prescribed rate, but such interest is not payable until the compensation is finally paid. Before I further examine the impact of these provisions on the affairs of the company I will say a few words about its history.

From the time of its incorporation the company carried on its colliery business with a considerable measure of success. It earned large profits, and, after paying the 6 per cent. preference dividend, was able during the 12 years before national-

isation to pay an average dividend of 12 per cent. on its ordinary shares and to build up a substantial reserve fund and to carry forward a very large sum on Jan. 1, 1947. The profits in the last year of working were exceptionally large, but the picture as a whole is of a successful and prosperous company which had been conservative in its financial policy and could look to the future with confidence. The main undertaking of the company has now gone, but it does not propose to go into liquidation. It intends to carry on coal mining in Northern Ireland if the prospecting in which it is now engaged proves successful, and also through a subsidiary company to carry on the business of digging for clay and manufacturing drain pipes and other articles, but there is no dispute that the effect of nationalisation with its provision for compensation in cash and in stock is to leave the company with liquid assets far in excess of its needs. It is, therefore, the natural and obvious course for it to pursue to reduce its capital by repayment of some part of its share capital. I do not understand that this proposition is disputed by the appellants. It is the proposed method of reduction that is challenged. On Oct. 30, 1947, a meeting of the company was held at which a resolution was passed as a special resolution for reducing the capital of the company from £400,000 to £200,000 by returning to the holders of the 20,000 preference shares the capital paid up thereon. 30,217 votes were cast for the resolution and 6,000 against it. Some attempt has been made to analyse the votes cast for the resolution in order to show that with few exceptions those who so voted either held ordinary shares only or had a greater interest in ordinary than in preference shares. I do not intend to pursue this matter, which would, I think, only be of importance if the preference shareholders made out a *prima facie* case that the result was in any way unfair to them and such as could only have been reached by the influence of some improper or, at least, extraneous consideration, but this is far from being the case, for, apart from the special element introduced by the Coal Act, I am wholly at a loss to see what other method of reduction is to be preferred as more fair and equitable. LORD GREENE, M.R., has stated in language, on which I cannot hope to improve, the principles on which the court has acted and should continue to act in its discretionary jurisdiction to confirm or refuse to confirm a reduction of capital. In accordance with those principles the reduction of capital in this case by repayment of the preference shareholders is fair and equitable and proper to be confirmed, unless the Coal Act induces a different conclusion.

In *Scottish Insurance Corpn., Ltd. v. Wilsons and Clyde Coal Co., Ltd.* (1), which has been appealed to this House from the Court of Session, your Lordships have had to consider the incidence of s. 25 of the Coal Act on the jurisdiction of the court in company matters and I would not repeat at length what I said in that case. It was conceded at the Bar that the jurisdiction of the court is not ousted, but the practical result of the able argument of counsel for the appellants would be to require the court to hold its hand in every case, in which a party interested, ordinary or preference shareholder, or, I suppose, debenture holder, might possibly apply to the tribunal which is to be set up under the Act. A simple reduction of capital, a more complicated scheme of arrangement, even, I think, a debenture holder's action, where a colliery undertaking is involved, must await the deliverance of the tribunal. Neither s. 25 nor the regulations now made under it give any guidance as to the way in which the rights of interested persons are to be adjusted, and, though now in 1949 the ascertainment of the compensation payable to the company and the setting up of tribunals under the Act may be regarded as appreciably nearer than they were in 1947 when the special resolution for reduction was passed, it is not possible to give any real content to the claims of the preference shareholders or to predict when they may be adjudicated on by any tribunal. In these circumstances I am satisfied that it is the duty of the court not to postpone the consideration of a new proposed reduction, but, giving such weight as it

thinks proper to s. 25, to dispose of the matter. Dealing with the petition in this way I can see no reason for thinking that a claim by preference shareholders to be repaid more than the nominal amount of their capital has any substance in it. Counsel for the appellants, being asked to indicate the sort of adjustment that the preference shareholders might fairly claim, suggested that they might get £12 for every £10 of capital on their submitting to be paid off. As I said

A in the recent appeal from the Court of Session, I should not wish to prejudice any similar claim that may come before a statutory tribunal, but I see no slightest justification for such a claim. Of the two elements that have to be considered, "rights of priority" and "relative expectations of income yield,"

B the first is fully satisfied in favour of the preference shareholders by the repayment of their capital in full before any payment is made to the ordinary shareholders. The second is more difficult to evaluate, but it is surely the ordinary shareholders whose position has been prejudiced by the expropriation of the company's property. The preference shareholders may or may not eventually find a 6 per cent. investment for their money. Probably they will not, but it is in the highest degree unlikely that the ordinary shareholders will receive an income commensurate with what they might reasonably have expected if

C the Act had not been passed. It is, therefore, to put it at the lowest, so unlikely that the preference shareholders can get anything more than the full amount of their capital returned to them, that the court should not depart from its well-known and familiar practice in dealing with a petition to confirm a reduction of capital. This practice would, as I have already pointed out, lead to a confirmation of the reduction proposed in this case. I am of opinion, therefore,

D that this appeal should be dismissed with costs.

LORD MORTON OF HENRYTON : My Lords, your Lordships have just decided in *Scottish Insurance Corpn., Ltd. v. Wilsons and Clyde Coal Co., Ltd.* (1), with only one dissident, that the proposed reduction of the capital of Wilsons and Clyde Coal Co., Ltd., is fair and equitable. The reasons which led your

E Lordships to that conclusion seem to me to apply with even more force to the circumstances of the present appeal, and I, therefore, concur in the motion proposed.

LORD NORMAND : My Lords, I agree with the opinions delivered by my noble and learned friend on the Woolsack and by my noble and learned friend

F **LORD SIMONDS.** I would only add that the judgment pronounced today in *Scottish Insurance Corpn., Ltd. v. Wilsons and Clyde Coal Co., Ltd.* (1) necessarily leads to the conclusion that the appeal in this case fails.

Appeal dismissed with costs.

Solicitors: *Slaughter & May* (for the preference shareholders); *Baddeley, Wardlaw & Co.* (for the company).

G [Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

Re WOOD (deceased). *BARTON v. CHILCOTT AND OTHERS.*

[CHANCERY DIVISION (Harman, J.), May 6, 1949.]

Will—Gift—Uncertainty of object—Direction to set aside fund to provide £2 per week to be paid to the cause for which appeal broadcast on Sunday.

By her will, dated June 22, 1938, a testatrix, who died in September, 1946, devised and bequeathed the whole of her estate to her trustees on trust for sale. She directed her trustees to set apart a fund, called the B.B.C. trust fund, sufficient to produce £104 per annum, and continued: "I declare that my trustees shall hold the B.B.C. trust fund upon trust . . . out of the income . . . to pay or cause to be paid each week the sum of £2 towards the funds of the society, institution or body corporate or incorporate on behalf of which an appeal shall have been transmitted on the Sunday from the National station of the British Broadcasting Corporation or other body corporate or incorporate authority or government department for the time being exercising the functions now exercised by the British Broadcasting Corporation And I declare that if by reason of alteration of existing arrangements or circumstances it shall become impossible for my trustees to carry out the foregoing trust provisions my trustees shall apply the income of the said B.B.C. trust fund in such manner as shall in the opinion of my trustees carry out the objects of the trusts thereof as nearly as may be." It was accepted that the cause for which an appeal might be made would not necessarily be charitable, but it was argued that the bequest was good for 21 years.

HELD: the gift had no object which was certain or could be made certain by the directions given by the testatrix, but the object depended on the decision of someone else, and, therefore, the gift failed for uncertainty.

Re Kelly ([1932] I.R. 255), considered.

[AS TO DEFINITION OF OBJECTS TO BE BENEFITED, see HALSBURY, Hails- ham Edn., Vol. 33, pp. 101, 102, Nos. 166-170; and FOR CASES, see DIGEST, Vol. 43, pp. 592-595, Nos. 410-437.]

Cases referred to:

- (1) *Houston v. Burns*, [1918] A.C. 337; 118 L.T. 462; 44 Digest 542, 3593.
- (2) *Re Kelly*, [1932] I.R. 255.

ADJOURNED SUMMONS to determine whether on the true construction of a will a gift to provide £2 per week for the causes for which appeals were broadcast on Sundays by the British Broadcasting Corporation was a valid charitable gift, or, in the event of its being held not to be charitable, whether the gift was (a) wholly valid, (b) wholly void, (c) valid for 21 years from the testatrix's death, or (d) valid for some other, and, if so, what, period. HARMAN, J., held that the gift was wholly void for uncertainty. The facts appear in the judgment.

Geoffrey Cross, K.C., for the plaintiff, one of the executors.

McMullen for the first and second defendants, interested in the residuary estate.

J. A. Wolfe for the third defendant, the Distressed Gentlefolks' Aid Association, for whom an appeal had been broadcast since the testatrix's death.

Danckwerts for the Attorney-General.

HARMAN, J.: Irene Constance Wood made her will on June 22, 1938, and died in September, 1946. One of her executors now brings before the court the question of a bequest contained in cl. 12 of her will, which after a devise and bequest of the entirety of her estate to her trustees on trust for sale, she directed them to set apart a fund which she describes as the B.B.C.

trust fund, sufficient to produce what she called £104 a year, which is meant, I think, to be £2 a week. Then she went on :

A “And I declare that my trustees shall hold the B.B.C. trust fund upon
trust to invest the same so far as not consisting of investments of such
kind as aforesaid and out of the income of the investments thereof to
pay or cause to be paid each week the sum of £2 towards the fund of the
society, institution or body corporate or incorporate on behalf of which
an appeal shall have been transmitted on the Sunday from the National
station of the British Broadcasting Corporation or other the body corporate
or incorporate authority or government department for the time being
exercising the functions now exercised by the British Broadcasting Corpor-
ation And I declare that if by reason of alteration of existing arrangements
B or circumstances it shall become impossible for my trustees to carry out
the foregoing trust provisions my trustees shall apply the income of the
said B.B.C. trust fund in such manner as shall in the opinion of my trustees
carry out the objects of the trusts thereof as nearly as may be.”

C It appears to be admitted that this is a reference to a feature which, as I
understand it, has long been part of the B.B.C. programme on Sunday evenings,
whereby a speaker speaks on behalf of what is called “The Week’s Good
Cause.” It is clear from the evidence before me, and it was admitted, that
“The Week’s Good Cause” was not necessarily a charity. Therefore, this
bequest could not prevail on the footing of its being a charitable bequest.
D Nevertheless, it was argued that this was a bequest of £2 week by week,
and could be supported for the period of 21 years as not being obnoxious
to the rule against perpetuities which, it was admitted, would apply to it after
that date.

E I have heard a very interesting discussion on the question of perpetuities,
but it seems to me that there is an earlier obstacle which is fatal to the validity
of this bequest, namely, that a gift on trust must have a *cestui que trust*, and,
there being no *cestui que trust* here, the gift cannot be good. You cannot leave
it to another to make a will for you, as LORD HALDANE pointed out in the
House of Lords in *Houston v. Burns* (1) ([1918] A.C. 342), except in the case
of a gift to a charity. This is not a gift to charity. You cannot simply say :
“I give part of my estate to the British Broadcasting Corporation if and when
they decide on any Sunday during the next 21 years to issue an appeal on behalf
F of some cause or another and I am willing to leave to them the entire discretion
as to which cause it is.” There is no *cestui que trust* there, and the gift must
fail on that ground.

I have been referred to a number of cases on the question of perpetuity,
and to a work for which I have the very greatest respect, Mr. GRAY’s book on
PERPETUITIES. It is there argued (3rd ed., p. 359, para. 410 (a)) :

G “Suppose property is devised to trustees in trust to pay the income
to a class of persons forever (or for a period exceeding 21 years). If there
be no requirement as to the time when the income shall be paid, as it
may not be paid over till a too remote period, the whole trust is void.
But suppose there is a direction that the annual income shall be paid
over annually to those who on a certain day in each year answer a particular
H description, e.g., to those who shall then be the heirs of the testator.
What then ? Such trust is clearly bad as a whole. Is it good for 21 years ? ”

The learned author seems to argue that it is, but during the 21 years in question
there must be persons who are heirs of the testator. Here there is no class and
no certainty. It is supposed that the British Broadcasting Corporation will
continue this feature, and, secondly, that it will name a particular institution
as the good cause in question. It is apparent from the evidence that there
is one Sunday in the month during which seven good causes are broadcast

in different parts of the country. Of which of them can it be said that it is the *cestui que trust*? The same thing is illustrated by *Re Kelly* (2), to which I was referred, where a gift to maintain the testator's dogs was held good for a period of 21 years. There the learned judge was very careful to say that the point that there was no *cestui que trust* had not been taken before him, and that people were not bound to take a point if they did not wish. Therefore, all the rest of the reasoning, as he said very carefully, was only dealing with what he called the perpetuity point. He quite plainly hinted that a dog could not be a *cestui que trust*. There was not a *cestui que trust*, and if that point had been taken the gift must have been held to be bad, so that the case is no authority against the view I am putting forward. I hold that this gift is bad. It has no object, no *cestui que trust*, which is either certain or can be made certain by the directions which the testatrix has given. It can be only made certain by somebody else's will and decision. That is delegation of the testamentary power which, except in the case of a charity, is not good. Consequently, I hold that the whole of this bequest is bad.

Declaration accordingly. Costs of all parties as between solicitor and client to be taxed and paid out of the estate in due course of administration.

Solicitors: *Lovell, Son & Pitfield*, agents for *H. W. Dibben & Co.*, *Wimborne Minster* (for the plaintiff and the first and second defendants); *Watson, Sons & Room* (for the third defendant); *Treasury Solicitor*.

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

Distinguished. MARSH v. MOORES.
[1949] 2 All E.R. 27.

REAY v. YOUNG AND ANOTHER.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Birkett and Lynskey, J.J.), May 4, 1949.]

Street Traffic—Motor vehicle—Insurance against third-party risks—Using vehicle, and permitting vehicle to be used, on road without policy of insurance in force—Disqualification for holding licence—"Special reasons" for refraining from disqualification—"Reasons" special to the offence—Lonely road, absence of traffic, short distance—Road Traffic Act, 1930 (c. 43), s. 35 (1), (2).

The owner of a motor car, which was insured against third-party risks while any person holding a driving licence was driving it, allowed his wife, who did not hold a driving licence, to drive it one afternoon along a lonely moorland road where the only other traffic at the time was a motor cycle ridden by a police officer. The wife drove the car only about 150 yds., and very slowly, and the owner was in the car at the time. The owner and his wife were each convicted of an offence against the Road Traffic Act, 1930, s. 35 (1), but the justices held that there were special reasons, within the meaning of s. 35 (2), for not disqualifying either of them for holding and obtaining a licence.

HELD: the facts (a) that the offence was committed in broad daylight on a lonely moorland road where little traffic was to be expected, (b) that the wife drove only for a short distance and very slowly, and (c), that the owner was in the car at the time, were mitigating circumstances, and, as they were reasons special to the facts which constituted the offence and not special to the offender, they were "special reasons," within the meaning of s. 35 (2) of the Act of 1930, for not imposing on the owner or his wife disqualification for holding and obtaining a licence.

Whittall v. Kirby ([1946] 2 All E.R. 552; [1947] K.B. 194; 175 L.T. 449), *applied*.

[FOR THE ROAD TRAFFIC ACT, 1930, s. 35, see HALSBURY'S STATUTES, Vol. 23, p. 636.]

Cases referred to :

- (1) *Whittall v. Kirby*, [1946] 2 All E.R. 552; [1947] K.B. 194; 175 L.T. 449; 111 J.P. 1; 2nd. Digest Supp.
(2) *R. v. Crossan*, [1939] N.I. 106.

CASE STATED by justices for the county of Durham.

A At a court of summary jurisdiction sitting at Consett on Nov. 22, 1948, the first respondent was convicted of having on Oct. 19, 1948, used a motor vehicle on a road without a policy of insurance against third-party risks being in force in relation to that user, contrary to the Road Traffic Act, 1930, s. 35 (1), she not being the holder of a driving licence, and the second respondent was convicted of having permitted the motor vehicle to be so used by the first respondent on that day. The justices fined each respondent £2, but for special reasons did not disqualify either of them under s. 35 (2) B for obtaining and holding a driving licence. The "special reasons" were (a) that there was no risk of accident because it was a moorland road where traffic at any time would be light and, at the time of the offence, except for the motor cycle ridden by the police officer who saw the offence, there was no other traffic on the road; (b) the second respondent was in the car with C the first respondent; and (c) the car was driven slowly and for a short distance (100-150 yds.) only. The prosecutor appealed against the order on the ground that no special reasons for not disqualifying the respondents existed. The Divisional Court now dismissed the appeal.

H. G. Garland for the appellant.

The respondents did not appear.

D LORD GODDARD, C.J. : The only question raised in this Case stated by justices for the county of Durham is whether or not there were facts which could amount to "special reasons," within the meaning of the Road Traffic Act, 1930, s. 35 (2), so as to justify the justices in not imposing on the respondents, under that sub-section, disqualification for holding or obtaining a driving licence after convicting them of having, respectively, used a vehicle, and E permitted a vehicle to be used, on a road without a policy of insurance against third-party risks being in force, contrary to s. 35 (1) of the Act. The respondents were husband and wife, and the husband was insured only if he himself was driving or if he was allowing the car to be driven by a person holding a driving licence. On the afternoon in question the car was stopped by a police officer when the wife was holding the driving wheel. I am not here concerned F to consider—it may arise in another case—whether or not the husband was, in fact, the driver of the car (*i.e.*, whether he was controlling the driving so that he was the driver), because both respondents pleaded Guilty. Therefore, we must assume that the wife was the driver and that the husband was permitting her to drive in the full sense of the term. As the respondents had pleaded Guilty, the justices imposed a fine, but they came to the conclusion, G as they are entitled to do under s. 35 (2) of the Act, that there were special reasons which would justify them in not imposing the additional penalty of disqualification.

The law laid down by this court on the subject is that, to constitute a "special reason" within the meaning of s. 35 (2), the reason must be special to the facts which constitute the offence and not special to the offender. That is H why it cannot be a "special reason" that the offender is a first offender and has never been convicted before, or that he is a lorry driver who drives for his living, or that great financial hardship may be caused. Those are matters which are special to the offender and not to the offence, and if the justices had refrained from imposing the disqualification because the first respondent was the wife of the second respondent, or because she was a woman, that would have been a circumstance special to the offender and not to the offence. In this case the offence was committed in the afternoon (*i.e.*, in broad day-

light) on a lonely moorland road where there was very little traffic ever to be expected—there was, in fact, no traffic at the time except a motor cycle ridden by the policeman who saw the offence. It was also found by the justices that the first respondent (the wife) had driven only about 150 yds., and very slowly. It was just what often happens, *i.e.*, a driver of a car was allowing someone else to hold the wheel for a short distance. I am far from saying that there may not be cases in which, if that were done, the penalty of disqualification would most properly be applied—*e.g.*, if a person in the street of a town, or even of a village, chose to let an uninsured person drive in such circumstances that the car was uninsured, it would be a serious matter and disqualification ought to follow, because one could not say that there was some special reason there which would mitigate the offence.

On the facts which the justices found, however, and which induced them to refrain from disqualification in this case, I think it would be impossible for us to say that no such facts existed as would justify them in holding that there were "special reasons" within the meaning of s. 35 (2) of the Act. It is perfectly true that when justices have found the facts, the question whether they can amount to "special reasons" is a question of law. In every case the justices are entitled to express their own opinion, and the court must see that they have applied their minds to the proper facts. If there are facts which can amount to "special reasons" and the justices have found them, it is not for this court to reverse their decision. In this case I think that it would be impossible to say that the facts which the justices found did not constitute "special reasons" within the meaning of s. 35 (2), *i.e.*, there were mitigating circumstances which, while they did not amount to a defence, entitled the justices to mitigate their decision. Therefore, we see no reason to differ from the justices, and the appeal is dismissed.

BIRKETT, J. : I am of the same opinion. In *Whittall v. Kirby* (1) my Lord cited ([1946] 2 All E.R. 555) these words of ANDREWS, C.J. ([1939] N.I. 112) delivering the judgment of the Divisional Court of the King's Bench Division of Northern Ireland in *R. v. Crossan* (2) :

"A 'special reason' within the exception is one which is special to the facts of the particular case, that is, special to the facts which constitute the offence. It is, in other words, a mitigating or extenuating circumstance, not amounting in law to a defence to the charge, yet directly connected with the commission of the offence, and one which the court ought properly to take into consideration when imposing punishment."

When this case originally came before this court the opinion of the justices, as there stated, concluded with these words :

"We came to the conclusion that the facts amounted to a special reason for not disqualifying either of the respondents and considered that the fines were sufficient punishment."

On that this court directed that the Case should go back for the justices to state more fully the reasons which had impelled them to the conclusion to which they had come. Accordingly, the fuller facts are now before the court, and it is quite clear, when those fuller circumstances are read, that the justices manifestly addressed their minds to the question on the lines laid down in *Whittall v. Kirby* (1) and, that being so, I concur fully with my Lord that there was adequate and sufficient material for them to come to the conclusion to which they came, and, as they exercised their judgment properly on those facts, I see no reason to differ from them. For these reasons I agree with the judgment expressed by my Lord.

LYNSKEY, J. : I agree.

Appeal dismissed.

Solicitors : *Wrinch & Fisher* (for the appellant).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

DUFFIELD v. DUFFIELD.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Ormerod, J.), March 15, 17, 1949.]

Adultery—Justices—Wife's summons for maintenance—Charge of adultery by husband—Need for particulars of charge—Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 6.

A By s. 6 of the Summary Jurisdiction (Married Women) Act, 1895 : " No orders shall be made under this Act on the application of a married woman if it shall be proved that such married woman has committed an act of adultery."

B The parties were married in 1920. In 1942 the wife left the husband because he persistently made general charges of adultery against her. In December, 1948, the wife took out a summons alleging desertion and wilful neglect to maintain. At the hearing the husband, without giving any particulars, made general charges of adultery against her. The wife did not apply for an adjournment, nor did she ask for further particulars of the charges, and the justices dismissed the summons, having found that at some time between 1942 and the date of the hearing she had committed adultery.

C HELD : whenever a charge of adultery is made in a matrimonial matter which comes before a court of summary jurisdiction full particulars of the charge must be given. The husband having failed to comply with these requirements in the present case, the wife was entitled to an order.

D *Dicta* of LORD MERRIVALE, P., and HILL, J., in *Broadbent v. Broadbent* (1927) (43 T.L.R. 186, 187), *applied*.

[EDITORIAL NOTE. This decision follows naturally from that in *Ginesi v. Ginesi* ([1947] 2 All E.R. 438) that in a matrimonial case the same strict proof is required of adultery as is required in criminal cases of criminal offences properly so called. It is a fundamental principle of criminal practice that adequate particulars of the offence charged should be given to the alleged offender. The parallel between criminal cases and those wherein adultery is alleged was also illustrated in the recent case of *Fairman v. Fairman* (p. 938, *ante*) which decided that evidence of adultery given by an accomplice in the act should generally be corroborated, an application of the well known rule in criminal cases laid down in *R. v. Baskerville* ([1916] 2 K.B. 658) and other authorities. Those who set out to prove a charge of adultery must, as in criminal cases, rebut the presumption of innocence enjoyed by the person charged by evidence which, to use the words of DENNING, J., in *Miller v. Minister of Pensions* ([1947] 2 All E.R. 372, 374), " turns the scale definitely " in their favour.]

G AS TO REFUSAL OF ORDER ON PROOF OF ADULTERY, see HALSBURY, Hailsham Edn., Vol. 10, p. 841, para. 1343 ; and FOR CASES, see DIGEST Supp.]

Case referred to :

(1) *Broadbent v. Broadbent*, (1927), 43 T.L.R. 186 ; Digest Supp.

H APPEAL by the wife from a decision of the Grimsby justices, dated Dec. 18, 1948, dismissing a summons taken out by her based on desertion and wilful neglect to maintain. At the hearing before the justices the husband made various unspecified charges of adultery against the wife, and the justices, holding that adultery had thereby been proved, dismissed the summons under s. 6 of the Summary Jurisdiction (Married Women) Act, 1895. The Divisional Court now allowed the appeal. The facts appear in the judgment of LORD MERRIMAN, P.

J. R. T. Hooper for the wife.

Grieve for the husband.

LORD MERRIMAN, P. : This is an appeal from Grimsby borough justices by a wife against the dismissal on Dec. 18, 1948, of her summons based on desertion and wilful neglect to maintain. The justices dismissed these charges on the grounds—(i) that she had committed adultery and (ii) that she had left the matrimonial home without reasonable cause.

The parties were married in 1920, and there is a child aged 16. They parted in July, 1942, and have never lived together since. The wife said in her evidence that she left her husband because he persisted in making general and unspecified charges of adultery against her. She said that six or eight months after they had parted she took out a summons, but he asked her to withdraw it and to return to live with him, and he threatened that, if she went on with the summons, he would “drag her through the mud,” or words to that effect, by making charges of adultery, unspecified as before. Finally, when she came to court she was confronted with a charge of adultery, again unspecified as to the time, the place, or the identity of the person with whom she was alleged to have committed adultery. Thus confronted with a charge of adultery as a complete answer to her summons under s. 6 of the Summary Jurisdiction (Married Women) Act, 1895, the wife made no application for an adjournment, nor, indeed, even at the hearing does it appear that any particulars were asked for. That, I recognise, puts some difficulty in the way of the wife, but I regard the obligation to give proper particulars of such a charge as this as paramount to all considerations of tactics at the hearing. In *Broadbent v. Broadbent* (1), LORD MERRIVALE, P., and HILL, J., put the matter in a way which is unanswerable and is unlimited in its application to any circumstance in which a charge of adultery may arise before a court of summary jurisdiction. It was sought to be argued that this was not a case where the husband had issued a summons to discharge an existing order under s. 7 of the Act of 1895, in which case, it was admitted, he would have had to give particulars of the adultery he was charging. This, it was said, was only resisting a wife’s application for an order on the ground that the justices had no jurisdiction to make it because she had committed adultery.

That is beside the point. No more serious charge can be made against a woman, and it is natural justice that she should not be called on to face such a charge without having some idea when and where she is supposed to have committed the offence and with whom, and it was with that in mind that LORD MERRIVALE, P., said (43 T.L.R. 186), speaking in relation to the jurisdiction of courts of summary jurisdiction in 1927 : “The situation is that, for a limited purpose, a woman may be found guilty of adultery by justices.” The very use of the words “for a limited purpose” shows plainly that the learned President was intending to cover all aspects of the matter, whichever of the limited purposes might happen to be the one in question, and by the use of the word “limited” he meant that it could not produce a decree of divorce, but it could produce every result which is possible under the statutes governing courts of summary jurisdiction. He went on (*ibid.*) :

“In this court and in every court which has exercised in this country a jurisdiction such as this court exercises, the utmost care has been taken to secure that so grave a matter as a conviction of adultery shall not take place without full compliance with all the ordinary requirements of the administration of justice. The first of them is that the accused party shall have notice of the charge. The charge here was a charge against a woman, separated from her husband for twelve years, that since the separation order she had been guilty of adultery.”

In that case those remarks were addressed to a situation in which some sort of notice had been given of the charge. In the present case no notice was given. I wish to emphasise, as has been emphasised repeatedly by this court, that it is of the utmost importance that, whenever a charge of adultery is made, in what-

ever context, under the summary jurisdiction procedure, full and proper particulars should be given. The particulars required are stated plainly in the concurring judgment of HILL, J., who said (*ibid.*, 187) :

A "I agree with every word that my Lord has said, and I only want to emphasise that, in my judgment, this case will not be properly re-heard until the preliminary particulars of the time, the place of adultery, and the alleged adulterer have been given to the wife . . ."

B He was saying that with reference to a case in which one of the witnesses had come into court on behalf of the husband and said : " I know the name of the adulterer perfectly well, but I decline to give it." In case there is any doubt about it still let it be plainly understood from this moment onwards that this court is laying down once more, in the most emphatic terms, the necessity for the giving of these particulars.

C **ORMEROD, J. :** I agree. The wife's complaint in this case is that her husband deserted her, and the desertion which is alleged is that she was forced to leave the house because her husband without any justification accused her of committing adultery. It is on that desertion that she makes her claim for an order. In the justices' court she gave evidence of the allegations which her husband had made against her. The husband did not choose to go into the witness box to justify these allegations, and at no time during the hearing of the case was there any attempt made by him or anybody on his behalf to justify the allegations which he had made against the wife before she left. In those circumstances it seems clear to me that, unless it can be shown that either D at that time or at a later date the wife had committed adultery, there has been desertion of the wife by the husband, and, therefore, there must be an order. The justices, however, say that they find that at some time between 1942 and the time when the case came before them, the wife was living in adultery, If E they were justified in coming to that finding, it is clear that that is an answer to the charge and there can be no order. My Lord has made it clear that the evidence said to prove adultery by the wife which was given in this case should not have been accepted in any court to substantiate so serious a charge. I am satisfied that this appeal must be allowed. In conclusion, it cannot be emphasised too strongly that in cases where adultery is alleged, whatever the circumstances in which it is alleged, full particulars must be given. Other- F wise, the wife is faced with the burden of attempting to answer a charge which is extremely serious and may have implications of all kinds without having any idea of the nature of the allegations made against her. I agree, therefore, that this appeal should be allowed.

Appeal allowed with costs.

G Solicitors : *Peacock & Goddard*, agents for *E. D. Tyssen Drakes*, Caistor (for the wife) ; *Hancock & Scott*, agents for *Wilkin & Chapman*, Grimsby (for the husband).

[Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.]

VESTEY'S (LORD) EXECUTORS AND ANOTHER *v.* INLAND REVENUE COMMISSIONERS. SAME *v.* COLQUHOUN (Inspector of Taxes). SAME *v.* INLAND REVENUE COMMISSIONERS.

[HOUSE OF LORDS (Lord Simonds, Lord du Parcq*, Lord Normand, Lord Morton of Henryton and Lord Reid), February 7, 9, 10, 14, 15, 16, 17, May 6, 1949.]

Income Tax—Sur-tax—Avoidance—Income payable to persons abroad by virtue of a transfer of assets—Lease of foreign assets to company—Rent payable to trustees abroad—Trust deed executed by lessors directing trustees to hold rent for benefit of widows and issue of lessors as the lessors should appoint—Lessors retaining power to direct and vary investments—Whether power to direct investments an “interest”—Whether power to determine lease rendered lessors “entitled to property comprised in the settlement”—Whether benefit to a widow a benefit to a wife—“Power to enjoy income of a person resident out of the United Kingdom”—“Property payable to the settlor”—Income Tax Act, 1918 (c. 40), All Schedules Rules, r. 18—Finance Act, 1936 (c. 34), s. 18 (1), (3), (5) (a)—Finance Act, 1938 (c. 46), s. 38 (1), (2), (3), (4).

The Finance Act, 1936, s. 18, provides : “For the purpose of preventing the avoiding by individuals ordinarily resident in the United Kingdom of liability to income tax by means of transfers of assets by virtue or in consequence whereof . . . income becomes payable to persons resident or domiciled out of the United Kingdom, it is hereby enacted as follows :—

(1) Where such an individual has by means of any such transfer, either alone or in conjunction with associated operations, acquired any rights by virtue of which he has, within the meaning of this section, power to enjoy, whether forthwith or in the future, any income of a person resident or domiciled out of the United Kingdom which, if it were income of that individual received by him in the United Kingdom, would be chargeable to income tax by deduction or otherwise, that income shall, whether it would or would not have been chargeable to income tax apart from the provisions of this section, be deemed to be income of that individual for all the purposes of the Income Tax Acts : . . . (3) An individual shall, for the purposes of this section, be deemed to have power to enjoy income of a person resident or domiciled out of the United Kingdom if—(a) the income is in fact so dealt with by any person as to be calculated, at some point of time, and whether in the form of income or not, to inure for the benefit of the individual ; or (b) the receipt or accrual of the income operates to increase the value to the individual of any assets held by him or for his benefit ; or (c) the individual receives or is entitled to receive, at any time, any benefit provided or to be provided out of that income or out of moneys which are or will be available for the purpose by reason of the effect or successive effects of the associated operations on that income and on any assets which directly or indirectly represent that income ; or (d) the individual has power, by means of the exercise of any power of appointment or power of revocation or otherwise, to obtain for himself, whether with or without the consent of any other person, the beneficial enjoyment of the income ; or (e) the individual is able in any manner whatsoever, and whether directly or indirectly, to control the application of the income . . . (5) For the purposes of this section—(a) a reference to an individual shall be deemed to include the wife or husband of the individual . . .”

The Finance Act, 1938, s. 38, provides : (2) If and so long as the terms of any settlement are such that—(a) any person has or may have power, whether immediately or in the future, and whether with or without the consent of any other person, to revoke or otherwise determine the settlement or any provision thereof ; and (b) in the event of the exercise of the power,

* LORD DU PARCQ died on Apr. 27, 1949, before the opinions were delivered.

the settlor or the wife or husband of the settlor will or may become beneficially entitled to the whole or any part of the property then comprised in the settlement or of the income arising from the whole or any part of the property so comprised; any income arising under the settlement from the property comprised in the settlement in any year of assessment or from a corresponding part of that property, or a corresponding part of any such income, as the case may be, shall be treated as the income of the settlor for that year and not as the income of any other person: . . . (3) If and so long as the settlor has an interest in any income arising under or property comprised in a settlement, any income so arising during the life of the settlor in any year of assessment shall, to the extent to which it is not distributed, be treated for all the purposes of the Income Tax Acts as the income of the settlor for that year, and not as the income of any other person . . . (4) For the purpose of the last foregoing sub-section the settlor shall be deemed to have an interest in income arising under or property comprised in a settlement, if any income or property which may at any time arise under or be comprised in that settlement is, or will or may become, payable to or applicable for the benefit of the settlor or the wife or husband of the settlor in any circumstances whatsoever . . .”

By a lease, dated Dec. 29, 1921, made between W.V. and E.V., of the first part, the U.C.S. Co., Ltd. (hereafter called “the company”), of the second part, and three persons living in Paris (hereafter called “the Paris trustees”), of the third part, W.V. and E.V. demised or agreed to demise certain properties situate abroad to the company for a term of 21 years from Apr. 10, 1921, determinable by W.V. and E.V. and by the company on six month’s notice. The company undertook to pay therefor to the Paris trustees the rent of £960,000 per annum by quarterly instalments. W.V. and E.V. had power under the lease to withdraw any part or parts of the demised premises from the lease, and thereafter the rent was to be reduced by such amount as should be agreed. This power was exercised on several occasions, although on all occasions but one W.V. and E.V. substituted other properties. It was common ground that, if no further document had been executed, the Paris trustees would have received the rent as bare trustees for W.V. and E.V. On Dec. 30, 1921, however, a trust deed was made between W.V. and E.V., of the one part, and the Paris trustees, of the other. The lease was recited and that the deed was made in consideration of the natural love and affection of W.V. and E.V. for the beneficiaries. The operative part provided: “1. The expression ‘authorised persons’ used herein means the settlors jointly during their lives and the survivor of them during his life and after the death of such survivor the following four persons namely (a) the two eldest of the beneficiaries of 25 years of age and upwards for the time being entitled to share in William’s fund hereunder but preferring males to females so that no such female beneficiary shall be included amongst the authorised persons so long as there are two male beneficiaries of that age and (b) such two persons as the said [E.V.] may appoint during his lifetime or by his will and in default of such appointment [P.C.V.] and [R.A.V.] and in the case of the death of either of such authorised persons such person as the survivor for the time being shall appoint by deed writing or will to fill the vacancy the said [E.V.] expressing the opinion that it is advisable to select a member of the family of the said [E.V.] to fill such vacancy provided that the person making such appointment considers such member of the said family is fit for the position provided that if the authorised persons being not more than two in number cannot agree the trustees shall act on the direction of the majority but in case of equal voting by the authorised persons the trustees shall exercise their own discretion. 2. The trustees shall receive the aforesaid rent payable to them in accordance with the terms and

during the continuance of the said lease (subject to any refund or rebate they may be liable to make thereunder to the said lessees as aforesaid) and shall capitalise the same until the expiration of twenty years from the death of the last surviving grandchild now living of the settlors (hereinafter referred to as 'the time of distribution') by investing the same subject as hereafter provided in or upon any of the investments and in manner hereby authorised that is to say the settled fund shall (at the direction in writing of the authorised persons or a majority thereof and in the event of an equality of voting by such authorised persons at the trustees' discretion) be invested in the names or under the legal control of the trustees in or upon stocks funds shares securities or other investments of whatever nature and wheresoever (but where involving liability only with the consent of the trustees) or upon personal credit or upon loans to any company or companies wheresoever domiciled and with or without security and with the like power of varying such investments from time to time to the intent that the said trustees shall (subject to such direction as aforesaid) have the same full and unrestricted powers of investing and transposing the investments of the settled fund in all respects as if they were absolutely entitled thereto beneficially." The subsequent clauses provided (*inter alia*) for the division of the residue of the income arising from the settled fund into two parts, called "William's fund" and "Edmund's fund" respectively, and for the accumulation of the two parts. After the expiry of the period of accumulation, the two accumulated funds were to be held in trust for the benefit of the children or remoter issue (and their wives or widows) of W.V. and E.V. as W.V. and E.V. might by deed or will respectively appoint. In default of and subject to such appointments, the funds were to be divided among the issue of W.V. and E.V. The trust deed reserved a power to W.V. and E.V. to appoint by will any interest in William's fund or Edmund's fund in favour of the "widow of the appointor." On Nov. 26, 1935, W.V. irrevocably appointed by deed all funds both capital and income which he had power to appoint to his issue, but he did not release his power to appoint to his widow. On Dec. 31, 1935, E.V. irrevocably appointed to his issue by deed part of the property over which he had power to appoint, and on Mar. 31, 1937, he irrevocably appointed the remainder of the said property to his children and extinguished his power to appoint to his widow. The Crown made claims against W.V. and E.V. for income tax and sur-tax for the years 1936-1941 in respect of the rents payable under the lease and in respect of the income arising from the investments and accumulations under the trust deed of Dec. 30, 1921.

HELD: (i) on the true construction of the trust deed the power of the authorised persons to direct how the rent payable by the company should be invested by the Paris trustees was a fiduciary power and must be used, not to benefit themselves, but in the best interests of the beneficiaries, and it was not an interest or a power within either s. 18 or s. 38.

(ii) the lease and deed of trust together constituted an "arrangement" within s. 41 (4) (b) of the Act of 1938 and consequently a "settlement" for the purposes of pt. IV of that Act, but the only property "comprised in the settlement" within the meaning of s. 38 at any time was the rent payable by the company together with any property resulting from the investment of the rent and from the accumulation of income arising from such investment, and, therefore, even if the determination of the lease was a determination of a provision of the settlement within s. 38 (2) (a), the exercise of the power so to determine it would not have the effect of rendering W.V. or E.V. or the wife of either entitled to property comprised in the settlement within s. 38 (2) (b), for it would leave undisturbed the trusts concerning rents already accrued.

Chamberlain v. Inland Revenue Comrs. ([1943] 2 All E.R. 200), *applied*.

Inland Revenue Comrs. v. Morton, 1941 S.C. 467, *no longer law*.

(iii) the existence of the power of appointment in favour of the widow of W.V. and E.V. respectively did not have the effect of bringing any income within the ambit either of s. 18 or s. 38. Section 38 (4) referred to payments to a wife and payments to someone not answering that description at the date of payment, *e.g.*, a widow, would not be within the sub-section.

Gaunt v. Inland Revenue Comrs. ([1941] 2 All E.R. 662; 165 L.T. 168), *sub nom.*, *Inland Revenue Comrs. v. Gaunt* ([1941] 1 K.B. 706), *overruled*.

(iv) the words "where . . . an individual has . . . acquired any rights" in s. 18 (1) referred to the acquisition of rights by an individual alone, and not to their acquisition by a group of persons, and therefore W.V. and E.V. had each acquired two rights only within s. 18 (1) by virtue of the trust deed, *viz.*, the power to appoint to his widow and the power to appoint to his issue and their wives. Those rights were obtained by such a "transfer of assets" as is mentioned in s. 18 (1), and were not merely reserved to themselves by W.V. and E.V.

(v) W.V. had not at any relevant time "power to enjoy" within s. 18 (1) by virtue of his two powers of appointment because, as regards his power to appoint to his widow, (a) there were no findings of fact by the Special Commissioners to which s. 18 (3) (a) could be applied; (b) s. 18 (3) (b) did not apply because, although in view of s. 18 (5) (a) the words "or for the benefit of his wife" should be added, the power was to appoint to his widow and not his wife; (c) s. 18 (3) (c) was inapplicable because neither W.V. nor his wife received or was entitled to receive any income by virtue of the power; (d) W.V. could not obtain for himself the beneficial enjoyment of any income within s. 18 (3) (d); and (e) the "income" for the purposes of s. 18 (3) (e) was that of the Paris trustees and W.V. could not by exercise of the power prevent the Paris trustees from dealing with the income, in any of the years under consideration, strictly in accordance with the trust deed. As regards W.V.'s power to appoint to his issue and their wives, only para. (e) of the paragraphs of s. 18 (3) could be material, and while that paragraph properly could not apply even before the execution of the appointment of Nov. 26, 1935, as soon as he made that irrevocable appointment W.V. prevented its application. The same reasoning applied to E.V.'s powers of appointment, and the fact that E.V. did not finally exercise his powers until the second appointment, dated Mar. 31, 1937, did not render him liable to tax in 1936-37 because the limited power which he retained until that date did not give him power "to control the application" of any income within the meaning of s. 18 (3) (e).

(vi) the words "payable to" in s. 38 (4) did not apply to payment made by way of loan, and, therefore, although W.V. and E.V. could direct the payment to themselves of money on loan and although the fact that having regard to their fiduciary capacity W.V. and E.V. would be bound to pay a commercial rate of interest did not prevent such a loan being a benefit to them, the benefit arising from such a loan was not an application of money "for the benefit of" W.V. and E.V. within the sub-section.

Per LORD MORTON OF HENRYTON: To argue that, having regard to r. 18 of the General Rules in sched. I to the Income Tax Act, 1918, the taxpayer could not be assessed in respect of income which was to be "treated" as his income under s. 38 of the Act of 1938 or "deemed to be" his income under s. 18 of the Act of 1936, was to place too narrow a meaning on r. 18, and could not be accepted.

[FOR THE FINANCE ACT, 1936, s. 18, AND THE FINANCE ACT, 1938, s. 38, see HALSBURY'S STATUTES, Vol. 29, pp. 230-232, and Vol. 31, pp. 348-351, respectively.]

Cases referred to :

- (1) *Chamberlain v. Inland Revenue Comrs.*, [1943] 2 All E.R. 200 ; 25 Tax Cas. 317 ; 2nd Digest Supp.
- (2) *Gaunt v. Inland Revenue Comrs.*, [1941] 2 All E.R. 82, 662 ; 165 L.T. 168 ; *sub nom.*, *Inland Revenue Comrs. v. Gaunt*, [1941] 1 K.B. 706 ; 24 Tax Cas. 69 ; 2nd Digest Supp.
- (3) *Cottingham's Executors v. Inland Revenue Comrs.*, [1938] 4 All E.R. 663, n ; [1939] 1 K.B. 250 ; 160 L.T. 7 ; 22 Tax Cas. 344 ; Digest Supp.
- (4) *Inland Revenue Comrs. v. Morton*, 1941 S.C. 467 ; 24 Tax Cas. 259 ; 2nd Digest Supp.
- (5) *Adamson v. Union Cold Storage Co., Ltd.*, (1931), 146 L.T. 172 ; *sub nom.*, *Union Cold Storage Co., Ltd. v. Adamson*, 16 Tax Cas. 293 ; Digest Supp.
- (6) *Re Peel's (Sir Robert) Settled Estates*, [1910] 1 Ch. 389 ; 102 L.T. 67 ; 40 Digest 679, 2151.

APPEALS by the taxpayers and cross-appeals by the Crown from orders of the Court of Appeal made on appeals by the Crown and cross-appeals by the taxpayers from two orders of MACNAGHTEN, J. The Crown claimed income tax and sur-tax under the Finance Act, 1936, s. 18, and the Finance Act, 1938, s. 38, in respect of certain rents and income payable to persons abroad. The claims depended largely on three questions : (1) whether the right of the "authorised persons" under the trust deed dated Dec. 30, 1921, to direct how trust property, *i.e.*, the rent under the lease dated Dec. 29, 1921, should be invested was a fiduciary power which could not be used for the benefit of the "authorised persons"; (2) whether the "settlement" within the Finance Act, 1938, s. 38 (2) was the trust deed alone, or the trust deed together with the lease, and what was the "property comprised in a settlement" within the meaning of that sub-section; and (3) whether the existence of a power of appointment in favour of a widow of a settlor had the effect of bringing income within the Finance Act, 1936, s. 18, or the Finance Act, 1938, s. 38. The House of Lords held (1) the right was fiduciary; (2) the deed of trust and the lease together constituted the "settlement," but the property comprised therein was only the rent reserved by the lease; and (3) the power to appoint to a widow of the appointor did not cause s. 18 or s. 38 to operate in respect of the income. The appeals were allowed and the cross-appeals were dismissed. The facts appear in the opinion of LORD MORTON OF HENRYTON.

Millard Tucker, K.C., Scrimgeour, K.C., and Heyworth Talbot for the taxpayers. *The Solicitor-General (Sir Frank Soskice, K.C.), Sir Andrew Clark, K.C., J. H. Stamp and R. P. Hills* for the Crown.

The House took time for consideration.

May 6. The following opinions were read.

LORD SIMONDS : My Lords, the several appeals and cross-appeals which your Lordships have to consider raise questions of some difficulty and, though I have had the privilege of reading the opinion which my noble and learned friend, LORD MORTON OF HENRYTON, is about to deliver and agree with his reasons and conclusions, I think it right to state in my own words why I do not think that the judgment of the Court of Appeal can stand. I will not, however, repeat the facts which are fully narrated by him.

The determination of these appeals involves a consideration of certain sections of two Acts of Parliament which were designed to bring within the ambit of taxation to income tax and sur-tax income which would otherwise escape that burden. For that reason and because the ways of those who would avoid liability to tax are often devious and obscure, the sections are framed in language of the widest and most general scope and in the case of one of the Acts (I refer to the Finance Act, 1936, s. 18 (4)) the operative sub-sections are reinforced

by a provision which appears to exhort the assessing authority, and presumably the court, to let the balance, wherever possible, be weighted against the taxpayer. But, this notwithstanding, I think that it remains the taxpayer's privilege to claim exemption from tax unless his case is fairly brought within the words of the taxing section, and it is in this light that I examine the applicability of the Finance Act, 1936, s. 18, and the Finance Act, 1938, s. 38, to the circumstances of the late Lord Vestey and his brother Sir Edmund Vestey.

A My Lords, I do not doubt that the two deeds of Dec. 29 and Dec. 30, 1921, of which you have heard so much, were parts of a single design. By the former document, which I call "the lease," the Vestey brothers demised or agreed to procure the demise to the Union Cold Storage Ltd., a company of their own creation, of properties, cattle, lands, freezing works and other assets situate
B in divers parts of the world. The term was for 21 years from Apr. 10, 1921, determinable by either party on six months' notice. The rent was £960,000 per annum reducible in certain events, and it was payable, not to the lessors, but to three gentlemen residing in Paris whom I will call "the Paris trustees." The lease contained a number of usual covenants and one unusual provision by which the lessors were authorised to withdraw properties from the lease,
C the rent in that case being proportionately reduced. By the second document, which I call the deed of trust, the Vestey brothers, as settlors, declared the trusts on which the Paris trustees were to hold the rent payable under the lease as and when received by them. These trusts are of a curiously elaborate character, but in general outline they follow the usual form of a family trust in conformity with the premise that the settlement is made in consideration
D of the natural love and affection of the settlors for the beneficiaries. It is sufficient at this stage to say that no beneficial interest in the ordinary sense of that expression is reserved to the settlors, but they have (a) a special power of appointment in favour of issue, and (b) a special power of appointment in favour of a widow. The latter of these powers gives rise to a question that I will mention later. By means of these documents the Vestey brothers obtained
E immunity from tax in respect of the very large income which was ultimately derived from the rent payable under the lease up to at least 1938. The question is whether s. 18 of the Finance Act, 1936, or alternatively s. 38 of the Act of 1938, was so framed as to make them liable for all or any part of it.

I find it convenient, following the course taken by the Court of Appeal, to refer first to s. 38 of the later Act. There the first question arises under sub-s.
F (2) of the section, and the argument for the Crown is as follows. The lease and the deed of trust (I ignore any other documents) together form the settlement for the purpose of the section. They point to the wide definition of "settlement" in s. 41 (4) (b): "The expression 'settlement' includes any disposition trust, covenant, agreement or arrangement." The whole thing, they say, is an arrangement. Therefore, it is a settlement. Next, they say, the lease is part
G of the arrangement. Therefore, it is "a provision of the settlement." Therefore, the power, vested in lessors or lessee, to determine the lease is a power to determine a provision of the settlement. And, finally, when this has been done, the settlors will or may become beneficially entitled to the whole or part of the property then comprised in the settlement. This view, which commended itself to the majority of the Court of Appeal but not to EVERSHED,
H L.J., is not, in my view, tenable in face of the decision of this House in *Chamberlain v. Inland Revenue Comrs.* (1). True it is, that, as was there observed, each case must be judged on its own facts, but I think that the principle of that decision clearly is that the steps which are taken towards a settlement are not to be confused with the settlement itself and (what is all important to the present case) that the "property comprised in the settlement" is that property alone in respect of which some beneficial interest is created. Applying this principle, which apart from authority that constrains me commends itself to

my reason, I find that the only property comprised in the settlement is the rent payable under the lease to the Paris trustees with the investments and accumulations of income arising from it. If so, no person has power to determine the settlement or any provision thereof in such manner that the settlors will become entitled to the property comprised in the settlement or any part of it and the sub-section is not applicable. I may add that in any view I should be reluctant to do such violence to the ordinary meaning of words as to hold that to determine a lease is "to revoke or otherwise determine a settlement or any provision thereof."

I turn next to s. 38 (3) and (4). Here the question is whether Lord Vestey (or Sir Edmund Vestey, but for convenience I will take Lord Vestey) had during any year of assessment "... an interest in any income arising under or property comprised in a settlement. He must be deemed to have had such an interest :

"... if any income or property which may at any time arise under or be comprised in the settlement is, or will or may become, payable to or applicable for the benefit of the settlor or the wife or husband of the settlor in any circumstances whatsoever."

Here are very wide words. But, apart from the question of the special power of appointment in favour of a widow which I leave for later consideration, counsel for the Crown do not, I think, suggest that Lord Vestey had any interest within the meaning of the sub-section except that to which I now refer. In doing so I would observe that this is a matter which is of equal importance to a consideration of s. 18 of the Finance Act, 1936. The alleged "interest" of Lord Vestey on which counsel for the Crown rely arises in this way. Under the deed of trust the Paris trustees are bound to invest the rent received by them "at the direction in writing of the authorised persons or a majority thereof and in the event of an equality of voting by such authorised persons at the trustee's discretion" in their names or under their control :

"... in or upon stocks funds shares securities or other investments of whatsoever nature and wheresoever ... or upon personal credit or upon loans to any company or companies wheresoever domiciled and with or without security."

The expression "authorised persons" is defined earlier in the deed. It means the settlors during their joint lives and the survivor of them during his life and after the death of such survivor the following four persons, namely, (a) the two eldest of the beneficiaries of 25 years of age and upwards for the time being entitled to share in the fund therein called William's fund but preferring males to females as therein mentioned, and (b) such two persons as Sir Edmund might appoint during his lifetime or by his will and in default of such appointment Percy Charles Vestey and Ronald Arthur Vestey and in the case of the death of either of such authorised persons such person as the survivor for the time being should appoint by deed writing or will to fill the vacancy, Sir Edmund expressing the opinion that it was advisable to select a member of his family to fill such vacancy provided that the person making such appointment considered such member of the family fit for the position. There is, finally, a proviso that, if the authorised persons, being more than two in number, cannot agree, the trustees are to act on the direction of the majority, but in case of equal voting by the authorised persons they are to exercise their own discretion. I have cited at length this definition of "authorised persons" for it may well have some bearing in considering what is the nature of the right or power entrusted to them.

The first question here for consideration is what is the nature of the right to direct investment which is vested in the authorised persons. On behalf of the Crown it is urged that it is not a fiduciary power or right, but a right exercisable by the authorised persons for their own benefit, so that they can

require the trustees to invest the trust funds by way of loan to themselves or any company in which they are interested at any rate of interest whether or not such an investment is or is intended to be for the benefit of the trust estate. It is, therefore, in this view some kind of beneficial interest, albeit a kind, I think, hitherto unknown to the law. So far as s. 38 (3) and (4) is concerned, I observe that, even if the argument for the Crown so far prevails, it must still be established that by reason of the settlor's right to direct investment the income or property arising under or comprised in the settlement is "payable to or applicable for the benefit of the settlor." I am clearly of opinion that it is not. I think that these words contemplate an out-and-out parting with the trust property or income by payment to the settlor in money or money's worth. They are as familiar words as any in the conveyancing art. Investment is the very antithesis of this, for it contemplates the retention of something as part of the trust property. I think, therefore, that in any case the claim of the Crown on this head under s. 38 (3) and (4) must fail.

As I have said, however, the nature of this right to direct investment is of crucial importance on s. 18 of the Finance Act, 1936, also, and this is the moment to pursue it. My Lords, I cannot bring myself to regard this right as anything but a fiduciary right and, if so, it appears to me to follow that it is not to be regarded as conferring any kind of benefit on its holders. I do not ignore the surrounding circumstances, on which so much reliance was placed. I am content to bear in mind what happened after 1921, though such events can have no bearing on the deed of that year. But, if I ask how any court of equity would regard this power, it seems to me that the only answer must be that it is a fiduciary power to be exercised with a single eye to the benefit of the beneficiaries. Let me suppose that the authorised persons, who may for this purpose be either the Vestey brothers or those who later answer that description (since the character of the power will not vary with those who exercise it) direct the trustees to invest the trust funds by way of loan to themselves at a low rate of interest without security, and that the trustees, regarding such an investment as very precarious, apply to the court and ask whether they must comply with the direction. In such a case it would, as it appears to me, be an irrelevant plea by the authorised persons that the right to direct investment was merely a part of a scheme for avoiding liability to income tax. The court could see nothing but a settlement with a wide power of investment of the trust funds and a mandate to the trustees to invest at the direction of certain persons. Nothing short of the most direct and express words would, I think, justify a construction which would enable those who exercised the power of direction to disregard the interests of the beneficiaries. If it is said that such a construction defeats the general intention of the scheme, I would reply that it may be that those, who framed it, dug a pit for themselves and have assumed a duty where they thought to acquire a right.

Concluding, then, that this power to direct investment is a fiduciary power and that it is not an "interest" within the Finance Act, 1938, s. 38, I turn now to the Finance Act, 1936, s. 18. It is not claimed that the transactions that I have outlined were effected mainly for some purpose other than the purpose of avoiding liability to taxation. The operation of s. 18 (1) is, therefore, not excluded by the proviso to that sub-section, and it is necessary to examine its language somewhat closely.

In the first place it is necessary to remember that, though your Lordships are for convenience dealing with the cases of Lord Vestey and Sir Edmund Vestey together, each appeal is a separate one and the case of each taxpayer is to be considered as if he alone were concerned. I, therefore, approach this section as if Lord Vestey were "the individual" concerned and I use that expression because I find it in the section. The question then is whether by means of such a transfer as is referred to in the opening words of the section, either

alone or in conjunction with associated transactions, Lord Vestey "acquired any rights by virtue of which" he had within the meaning of this section the "power to enjoy," which in the section is elaborately defined. It is the essential condition of the section being brought into operation that he, the individual, Lord Vestey, should have acquired "rights by virtue of which, etc." It was at this stage that counsel for the taxpayers urged that Lord Vestey could not be said to have "acquired" any rights at all. He distinguished, if I followed his argument, between the reservation and the acquisition of a right and contended that, whatever right Lord Vestey had, he had it by way of reservation out of what passed by the transfer and associated operations. This is, in my opinion, an artificial and inaccurate way of regarding the transaction. The true view is that, after Lord Vestey had joined in the transactions that I have described, any rights that he had, whether enforceable against the trustees or against the settled property, were derived from the settlement, and his interest, whatever it might be, was acquired by virtue of those rights. A

I do not, however, dissent from counsel's further argument—it is indeed implicit in what I have already said—that s. 18 (1) can only operate if it can be predicated of the individual, Lord Vestey, that it is by virtue of some right that he has the power to enjoy income as defined in one or other of the paragraphs of s. 18 (3). I agree that the blending of the governing words with the words of the paragraphs leads to clumsy phraseology, but they are the governing words and cannot be disregarded. It must be asked then what relevant right or rights Lord Vestey acquired. Let me make my meaning clear by an illustration. In the view which I take, s. 18 could have no operation in a case where a settlor in defiance of the terms of the settlement violently resumed possession of the settled property. I recur then to that right, on which alone (apart from the special power of appointment in favour of a widow) the Solicitor-General appeared to rely, *viz.*, the right to direct investment. At once, as it appears to me, the difficulty arises that Lord Vestey as an individual acquired no individual right. I agree with my noble and learned friend, LORD MORTON OF HENRYTON, in thinking that here the Interpretation Act, 1889, cannot be invoked to convert singular into plural. The context does not admit of it. Just as it is the income of an individual that is being assessed, so it is the right of that individual that must be regarded. Whatever view, then, is taken of the right to direct investment, that was not a right of Lord Vestey alone and it cannot be said that by virtue of that right he is brought within the section. C D

I would not, however, dispose of this appeal finally on that short ground. Four other aspects of this case were fully argued and deserve consideration. I shortly consider each in turn of the paragraphs of sub-s. (3). With regard to para. (a), there was some discussion whether the Crown had before the commissioners or in the courts below relied on this paragraph. I cannot find that it was specifically dealt with in any of the judgments and the House has not the advantage of the considered opinion of the learned judge or Lords Justices upon it. This is the more to be regretted as the opening words of the paragraph emphatically indicate that the question is one of fact—"the income is in fact so dealt with, etc." If, therefore, reliance is placed on it, there should be an explicit finding of fact. There is not any such finding. If there was, then, assuming that there was any evidence to support it, the only question of law would be whether it was by virtue of any right that the income was, in fact, so dealt with. I find it convenient to deal finally with this matter when I consider para. (c). The consideration of para. (b) can be short. I will assume that a right to direct investment might come within the extended meaning of "assets" as defined by s. 18 (5) (b), if it could be held that the right was not fiduciary, but, holding as I do that it is fiduciary and exerciseable with a single eye to the interests of the beneficiaries, I find it impossible to say that the receipt of the income, *i.e.*, the receipt of the rent by the Paris Trustees, operates to increase its value to Lord Vestey, though it may add to his responsibility. E F G H

Paragraph (b), therefore, is excluded. Paragraph (c) opens with the words "the individual receives or is entitled to receive" and it is, I think, important to remember that both alternatives are subject to what I have called the governing words. It must be by virtue of some right that the individual either "receives" or is "entitled to receive." Here, too, reliance is placed by the Crown on the right to direct investment. It follows from what I have said that the individual Lord Vestey is in this respect "entitled" to receive nothing.

- A Nor, if he in fact receives anything, does he receive it by virtue of any right. But there is another grave difficulty here in the way of the Crown, and I now refer to a matter which I reserved in my consideration of para. (a). Let it be assumed, contrary to my opinion, that it is immaterial whether Lord Vestey has any rights so long as he in fact has "power to enjoy any income." Then, whether it is sought to bring the case within (a) or (c), there must be a clear and explicit finding of fact. The learned Solicitor-General claimed that in the Case Stated there was such a finding either express or implicit, and, alternatively, asked that the case should be remitted to the Special Commissioners for further findings. My Lords, I am clearly of opinion that there is no such finding in the Case Stated. If it is a condition of the taxpayer's liability that certain facts should be proved, nothing is more necessary, nor anything more easy,
- C than that there should be a clear and explicit finding. I will not examine the Case Stated in detail. I agree with *EVERSHED, L.J.*, that the facts which would satisfy the conditions of either of those paragraphs are not found. It may be that they are not found because the Special Commissioners did not feel justified in finding them. Ought the case then to be remitted for further finding? I think not. It was open to the parties, when the case was settled,
- D to obtain a more explicit statement, if indeed the Special Commissioners thought that the circumstances warranted it. After this lapse of time, especially as one of the commissioners who stated the Case has ceased to hold that office, I do not think that your Lordships would be justified in remitting the case. I turn then to para. (d). Here the individual, Lord Vestey, is liable if he has power, by means of the exercise of any power of appointment or power of
- E revocation or otherwise, to obtain for himself, whether with or without the consent of any other person, the beneficial enjoyment of the income. Once more it is the right to direct investment that is relied on, but it appears to me that, apart from all other difficulties, to say that a man, who may direct that the trust income should be invested in a loan to himself, has the beneficial enjoyment of that income is a misuse of language which not even sub-s. (4) would justify.
- F So also with para. (e). Here Lord Vestey is liable if it can be said of him that he is able in any manner whatsoever, and whether directly or indirectly, to control the application of the income, but, leaving aside the fact that by himself Lord Vestey can do nothing, a right to direct investment is not a control of the application of the income. The latter words point to an out and out disposal of the income for the benefit of some person or persons and are wholly inappropriate to an investment by way of loan. I agree, too, with my noble and learned friend, *LORD MORTON OF HENRYTON*, that the words of this paragraph are not apt to cover a special power of appointment in favour of a class of persons which includes neither the holder of the power nor his wife.

- I have so far ignored one aspect of the case, which in any view has only a limited operation. I refer to the special power of appointment in favour of a
- H widow. This concerns Lord Vestey only. The question here is whether for the purpose of either the Finance Act, 1936, s. 18, or of the Finance Act, 1938, s. 38, "wife" includes "widow." On this point the courts below followed, as they were bound to do, the previous decision of the Court of Appeal in *Gaunt v. Inland Revenue Comrs.* (2) and held that the one word included the other. My own opinion has fluctuated, but, as I understand that your Lordships are agreed in thinking that for the reasons given by my noble and learned friend, *LORD MORTON OF HENRYTON*, the decision in *Gaunt's* case (2) was wrong, I

will not occupy time by expressing my own doubts. The taxpayers, the executors of Lord Vestey, raised a further point. They contended that no assessment could validly be made on them as executors under the Finance Act, 1936, s. 18. On this question too the courts below were bound by the previous decision in *Cottingham's Executors v. Inland Revenue Comrs.* (3). I do not think it necessary to say more on this point than that that case was clearly rightly decided. In the result, I am of opinion that the appeals of the executors of Lord Vestey and of Sir Edmund Vestey must be allowed with costs and the cross appeals of the Crown dismissed and I move accordingly.

My Lords, I must conclude by saying this. In the hearing of this appeal your Lordships were assisted by our late lamented colleague, LORD DU PARCQ, who had written and left behind him a speech which, had he been here, he would have delivered. It would not be proper for me to say more about it than this, which I am happy to say, that LORD DU PARCQ agreed in the conclusions to which your Lordships have come.

LORD NORMAND : My Lords, I have had the advantage of reading in print the judgment which will be delivered by my noble and learned friend, LORD MORTON OF HENRYTON. I agree with the conclusions which he has reached on all the questions at issue in these appeals, and in general with the reasons on which they are founded. It will, therefore, not be necessary for me to enter into a detailed consideration of each section and sub-section of the relevant statutes, or to repeat or summarise the facts of the case. Since, however, I am unfortunate enough to disagree with the decisions of the courts below it is proper that I should express my opinion on some of the more fundamental differences of construction which are involved.

The first and most fundamental question concerns the proper approach to the construction of the statutory provisions dealing with attempts to evade taxation and of the documents by which a transfer of assets is effected within the meaning of the Finance Act, 1936, s. 18, or of the documents included in a "settlement" within the meaning of the Finance Act, 1938, s. 38. The hypothesis of both sections is that the documents to be construed are the instruments of a scheme of tax avoidance, and the purpose of each section is to subject to taxation the income in each year of assessment which would, but for the section, have escaped taxation through the operation of the scheme. But each section has its own specialties, which may be relevant. Section 18 (4) requires that regard shall be had to "the substantial result and effect of the transfer and any associated operations" in determining whether the individual assessed "has power to enjoy income," and the "settlements" aimed at by s. 38 of the Act of 1938 are widely defined by s. 41 (4) (b) so as to include "any disposition, trust, covenant, agreement or arrangement." It is this definition in its relation to s. 38 that has in the past given rise to the general problems of construction which I am now discussing, and it will, therefore, be convenient to deal with them primarily in relation to that section.

It was a possible view that the intention of s. 38 was that the court should first determine what was the whole "arrangement" devised with the object of avoiding tax, and having done so should then treat all assets transferred, or leased, or affected by any document forming part of the "arrangement" as "property comprised in the settlement." That was the view taken by the Court of Session in *Inland Revenue Comrs. v. Morton* (4). In that case, the court held that the "arrangement" included the agreement of a husband and wife to transfer their assets to a company, the formation of the company, the company's memorandum and articles, the transfer of the assets to the company in return for an allotment of preference shares to the husband and wife and of ordinary shares to a son and to trustees, and the deeds of trust by which these trustees were directed to pay the income arising from the shares to daughters of the settlors. The majority of the court next held that as that was the arrangement

(and by definition the "settlement") the "property comprised in the settlement" was the assets transferred by the settlors to the company. LORD MONCRIEFF dissented. He held that "settlement" remained the dominant word and that a settlement meant "the charging of the property of the settlor with rights constituted in favour of others." From that it followed that the "property comprised in the settlement" could only be the shares transferred by the settlors to the trustees and held by them under trust for the payment of the income to the settlor's daughters. That case did not go further. In *Chamberlain's* case (1) the Court of Appeal took the same view, as I read the judgment, as the majority of the Court of Session had taken in *Morton's* case (4), but this House reversed the decision and construed "settlement" in relation to the words "property comprised in the settlement" as LORD MONCRIEFF had construed it in *Morton's* case (4). LORD MACMILLAN, indeed, expressly adopted LORD MONCRIEFF's words above cited, which are the very pivot of his dissent. There were additional grounds on which the judgment of this House was based, but the rule to be deduced from the case is that the property comprised in the settlement is that and that only in respect of which some beneficial right is created in favour of beneficiaries under the settlement. I think also that it is implicit in the judgment of this House, that documents which form part of an "arrangement" within the meaning of s. 41 (4) (c) of the Finance Act, 1938, are to be construed as they would be if they were unconnected with a purpose of tax avoidance.

If I am correct in my understanding of *Chamberlain's* case (1), it will follow in the present case that, even if the lease and the deed of settlement may both be properly treated as components of the "arrangement," yet the property "comprised in the settlement" is the property settled by the deed of settlement, that is, the rents under the lease, and not the property or properties which were the subjects of the lease. And from that it will follow that there can be no liability under s. 38 (2), for the only power to revoke in the case is a power to revoke the lease and the exercise of that power would merely end the payment of the rent without conferring on the settlors any rights in the property comprised in the settlement or in the income arising from it. I have not yet mentioned the words "in any circumstances whatsoever" (s. 38 (4)), for, as it happens, all the questions, numerous as they are, in these appeals can be decided without reference to them, and their precise meaning and effect were not the subject of close debate. All I will say of them is that they do not affect the construction of the documents constituting an "arrangement" for they apply only to the effect of such documents after they have been construed.

In these matters of construction no distinction can be drawn between s. 38 and s. 18. In s. 18 (4) the direction that regard shall be had "to the substantial result and effect of the transfer and any associated operations" does not, in my view, authorise any laxity in construing any of the documents by which the transfer or the associated operations are effected. The court must first determine the meaning and effect of the documents before this provision is applied, and it must then consider whether their effect, though in form not beneficial to the settlor, is so in substance. The contrast is between substance and form, so, if it can be shown in the present case that the effect of the transfer and the associated operations is to vest a benefit in (*e.g.*) a company over which the settlor has complete control, the court may then say that, though in form the company benefits, in substance the company and the settlor are one, and the settlor, therefore, benefits, but the court cannot take this last step unless it is shown that the settlor has himself the legal control, and no reliance must be placed on his influence over others who are not in law bound to follow his directions. This is of importance in relation to the power to direct the investment of the rents received by the trustees. It was argued on s. 18 (3) (c), for example, that the settlors as "authorised persons" might direct the trustees

to lend to the Western Co. at a commercial rate of interest and that money in the hands of the Western Co. was substantially money in the pockets of the settlors. But this argument, assuming all other objections overcome, fails because the settlors did not between them hold a majority of the management shares of Western. It is perhaps not wholly superfluous to say that nothing in either s. 18 or s. 38 authorises resort to extrinsic evidence to ascertain intention, or warrants an assumption that breach of trust will be committed or tolerated.

In supplement of these observations on construction, I would add that one must be on one's guard against reading the two sections so as to cover something which the language cannot without torture be made to cover. For example, it is, I think, impossible, without abuse of the words, to describe a fiduciary power to direct investment as an asset, or to say that by virtue of such a power the donee is "able in any manner to obtain for himself the beneficial enjoyment of the income of the trust" or "to control the application of the income." Even if the power is not fiduciary and if the donee may use it to direct a loan to be made to himself, the words "receive or entitled to receive," or "beneficial enjoyment of the income," or "application of the income" or "payable or applicable for the benefit of the settlor" do not appear in the context of s. 18 to have been intended to refer to loans. It was argued for the taxpayers that the Finance Act, 1938, s. 40, is the section appropriate for dealing with loans made to settlors. For this there may be much to be said, though it is not necessary to decide in these appeals what is the true ambit of s. 40. But it is at all events true that the provisions of s. 40 are very much more tender to the assessee than the provisions of s. 18, or s. 38, and I find it difficult to understand why a loan should be more rigorously dealt with, if it is within either s. 18 or s. 38, than "a capital sum paid directly" to the settlor under s. 40. Parliament in its attempts to keep pace with the ingenuity devoted to tax avoidance may fall short of its purpose. That is a misfortune for the taxpayers who do not try to avoid their share of the burden, and it is disappointing to the Inland Revenue. But the court will not stretch the terms of taxing Acts in order to improve on the efforts of Parliament and to stop gaps which are left open by the statutes. Tax avoidance is an evil, but it would be the beginning of much greater evils if the courts were to overstretch the language of the statute in order to subject to taxation people of whom they disapproved.

On the question whether the power to direct investment is fiduciary (cl. 2 of the trust deed) I feel no doubt. It is a power to direct the investment of a fund which is subject to a properly constituted trust. If the settlors or their successors as "authorised persons," who might eventually be strangers to the Vestey family and its interests, were to claim to exercise this power for their own advantage and without consideration for the interests of beneficiaries they would, I think, receive short shrift from a court of equity.

The next question is raised by s. 18 (5) (a) of the Act of 1936, which provides that "a reference to an individual shall be deemed to include the wife or husband of the individual"; by the references to the "wife or husband of the settlor" in s. 38 (2) of the Act of 1938; and by the provision in s. 38 (4) that for the purpose of s. 38 (3):

"... the settlor shall be deemed to have an interest in income arising under or property comprised in a settlement, if any income or property which may at any time arise under or be comprised in that settlement is, or will or may become, payable to or applicable for the benefit of the settlor or the wife or husband of the settlor in any circumstances whatsoever."

Under cl. 11 of the settlement, Sir William Vestey and Sir Edmund Vestey had power respectively by will or codicil to create an interest in William's fund or Edmund's fund respectively by directing payments to be made thereout in favour of the widow of the appointor for her life or any shorter period. Is this power of appointment a power to appoint in favour of the "wife" of the appointor,

within the meaning of the enactments referred to? It was held in *Gaunt's* case (2) by the Court of Appeal reversing LAWRENCE, J., that the word "wife" in s. 38 (4) includes a widow. The ground of the judgment of LAWRENCE, J., was that the object of the statute was to prevent the settlor from getting the benefit of a provision during his lifetime. CLAUSON, L.J., said in the Court of Appeal ([1941] 2 All E.R. 664):

- A "The question is who are the people whose interests in the fund under the settlement, (or under a possible substitution for it under the power of revocation), are of such a character that the legislature thinks that a very remarkable result should ensue as regards taxability of income. When one realises that that is the point of it, there does not seem to be any sense in making the matter depend upon the possibility of a wife obtaining a benefit in her husband's lifetime. One does not see why, because the benefit which she is to get is to be after her husband's death, the position should be any different from what it is if the benefit is to be before her husband's death. The husband's death seems to have no relevance. *Prima facie*, therefore, one would suppose that the word 'wife' means that which is its true natural meaning, a lady who, during the latter part of the joint lives of herself and a man, has been the wife of that man. That is the meaning of the word 'wife.' It is perfectly true that the word 'widow' is used to express the position of a lady when her husband has died. In one sense, when a lady has become a widow, she is no longer a wife. That is perfectly true, but the description in this section of her as a wife refers to the lady, and has nothing to do with the matter of time."
- B
- C
- D Counsel for the Crown relied on this reasoning though they modified the statement of it. They said that the wife, if there is one, in the year of assessment, is the *persona designata* by the words "the settlor's wife" and if that *persona* may take a benefit within the meaning of any of the relevant provisions at any future time, the requirements of the statute are satisfied. There can, therefore, they said, be no *persona designata* if in the year of assessment the settlor is a
- E bachelor or widower; but if the settlor is married a power to appoint in favour of his wife is the equivalent of a power to appoint in her favour as if she was named. I think that this could lead to some strange and unexpected results; but these I pass over. I respectfully think that the Court of Appeal in *Gaunt's* case (2) and the argument for the Crown in this case leave out of account the important consideration that ss. 18 and 38 are income tax sections, and that it is a principle of income tax law, embodied in r. 16 of the General Rules that
- F for income tax purposes a husband and wife living together are one. I see no reason to doubt that the purpose of the provisions in s. 38 by which a benefit for the wife or husband of the settlor falls to be treated as a benefit for the settlor was intended to give effect to this principle not only in cases where the income is enjoyed by the settlor or his wife in the year of assessment, but also
- G in those cases in which the settlement provides a postponed enjoyment of the income either by the settlor or by his wife in his lifetime. The same considerations apply *mutatis mutandis* to the provisions of s. 18. I do not agree that the "wife of the settlor" in the year of assessment is treated as a *persona designata*, but even if it were so the question would still remain whether the interest of the *persona designata*, if it only takes effect after her marriage has been dissolved,
- H is obnoxious to the provisions of these sections.

My Lords, on what remains of the questions to be decided I have already said that I agree with my noble and learned friend LORD MORTON OF HENRYTON. I will, therefore, not detain your Lordships further than to say that I agree that the appeals should be disposed of as has been proposed by my noble and learned friend on the Woolsack.

LORD MORTON OF HENRYTON: My Lords, the first two appeals before your Lordships' House are original appeals by taxpayers and cross-

appeals by the Crown from two orders of the Court of Appeal dated July 30, 1947. The orders of the Court of Appeal were made on original appeals by the Crown and cross-appeals by the taxpayers from two orders of the King's Bench Division (MACNAGHTEN, J.) dated Nov. 4, 1946. Lord Vestey's executors and Sir Edmund Vestey appealed to the King's Bench Division on two separate Cases stated by the Special Commissioners, one of which raised questions as to the liability of Lord Vestey and of his brother, Sir Edmund Vestey, to sur-tax, and the other raised questions as to their liability to income tax, in respect of rent payable to trustees under a lease dated Dec. 29, 1921, and in respect of income arising from the investment and accumulations of such rent under a voluntary deed dated Dec. 30, 1921.

The claims to tax arising on the first two appeals are claims based only on the provisions of the Finance Act, 1938, s. 38. Claims to tax against the same taxpayers in respect of similar income for earlier years, based on the Finance Act, 1936, s. 18, are the subject of the third appeal, which arises out of a third Case stated by the Special Commissioners. There are three distinct statutory provisions on which claims to tax against each taxpayer are based: (i) those contained in s. 18 of the Finance Act, 1936, (ii) those contained in sub-s. (2) of s. 38 of the Finance Act, 1938, and (iii) those contained in sub-ss. (3) and (4) of the last mentioned section. The claims under s. 38 of the Finance Act, 1938, and those under s. 18 of the Finance Act, 1936, so far as they relate to the same years of assessment, are alternative claims. The effect of the judgments in both courts below in the present appeals, stated briefly, is to affirm the liability to tax of each taxpayer under s. 18 of the Finance Act, 1936, in respect of all the income in question, but to affirm liability under s. 38 of the Finance Act, 1938, in respect of part only, the decision of the Court of Appeal under s. 38 being more favourable to the Crown than that of MACNAGHTEN, J. The cross-appeals of the Crown to this House are directed against the decision of the Court of Appeal so far only as it restricted the liability under s. 38 of the Finance Act, 1938, and are addressed to establishing liability under that section in respect of all the income in question.

The relevant facts are fully set out in the three Cases Stated, all of which are dated Sept. 14, 1945, and I shall only go into the history of the matter so far as is necessary for the purpose of stating my views on the various questions which arise for decision in your Lordships' House. By a lease (hereafter called "the lease") dated Dec. 29, 1921, and made between Lord Vestey, then Sir William Vestey, Bt., and Sir Edmund Vestey, Bt., of the first part, the Union Cold Storage Co., Ltd., (a company having its registered office in England and hereafter called "Union"), of the second part, and three persons residing in Paris named Kennerley Hall, Drabble and Stirling (hereafter called "the Paris trustees"), of the third part, the Vesteyes demised or agreed to demise certain properties situate abroad to Union for a term of 21 years from Apr. 10, 1921. Clause 3 of the lease is of an unusual kind, and should be set out in full:

"The lessees shall pay therefor to the said Kennerley Hall, Drabble and Stirling (whose receipt only shall be a good discharge of the same) yearly during the said term hereby granted and so in proportion for any less time than a year the rent of £960,000 to be paid to the said Kennerley Hall, Drabble and Stirling by quarterly instalments on Jan. 1, Apr. 1, July 1 and Oct. 1 in each year . . . provided always and it is hereby agreed that if on making up at the end of each financial year ending on Dec. 31 the accounts of the lessees (as to which the certificate of the auditors for the time being of the lessees shall be final and binding) it is found that in respect of the then past financial year the result of the lessees' operations after providing for the rent hereinbefore reserved shall be insufficient to enable the lessees to pay the aggregate of the following sums namely the interest on the debentures or debenture stock issued by the lessees for the time being outstanding and the

interest on the amount owing on all specific mortgages heretofore or hereafter created by the lessees and for the time being outstanding the dividend at the fixed rate of interest on all the preference shares issued by the lessees for the time being outstanding a dividend at the rate of 10 per cent. per annum at least on the ordinary shares issued by the lessees for the time being outstanding then the rent aforesaid for such financial year shall be abated to the extent of the deficiency so ascertained and any rent already paid by the lessees in respect of that particular year shall be repaid to them by the said Kennerley Hall, Drabble and Stirling to the extent of the rebate necessary."

It is to be noted that the rent was not to be paid to the lessors, but to the Paris trustees and that the rent payable was related to the annual profits of Union in the manner and to the extent mentioned in the clause just quoted. Clause 4 contained covenants by Union for themselves and their assigns with the lessors (and as a separate covenant with the Paris trustees as regards the covenant for payment of the said yearly rent) that Union would during the continuance of the term granted by the lease pay to the Paris trustees the said yearly rent and would during the said term pay and discharge all rates taxes and other outgoings payable in respect of the demised premises or the owner or the occupier in respect thereof.

The lease contained provisions of a usual kind as to repair, insurance and other matters and a power for either the Vestey's or Union to determine the lease on six months notice in writing. It also contained the following power of withdrawal:

"Provided further that the lessors may at any time during the term hereby granted on giving to the lessees six calendar months previous notice in writing expiring on one of the aforesaid quarterly days withdraw any part or parts of the premises hereby demised from this demise in which case the rent hereinbefore reserved to the said Kennerley Hall, Drabble and Stirling shall as from the date of such withdrawal be reduced by such amount as shall be agreed upon between the lessors and lessees and as from the date of such withdrawal the provisions hereof shall cease to apply to the premises so withdrawn but as regards the remainder of the said demised premises shall continue in full force and effect subject to the reduction of the said rent as hereinbefore provided."

On a number of occasions the Vestey's exercised this power of withdrawal by withdrawing a number of properties originally comprised in the lease. Save in one case, they substituted other properties. Certain subsidiary documents were executed by the Vestey's for the purpose of more effectively vesting in Union, for the term of the lease, certain properties agreed to be demised whereof the Vestey's did not hold the legal estate. Nothing turns on these documents, which may be treated as part of the lease for the purposes of the present appeals.

It is common ground between the parties that, if no further document had been executed, the Paris trustees would have received the rent under the lease as bare trustees for the Vestey's, who were beneficially entitled thereto in equal shares. On Dec. 30, 1921, a document which may conveniently be called "the trust deed" was made between the Vestey's, of the one part, and the Paris trustees, of the other part. The lease was recited, and it was also recited that the Vestey's:

"... executed and granted the said lease reserving the rent thereunder to the trustees to the intent that such rent as and when received by the trustees shall be held by them upon the trusts and with and subject to the powers and provisions hereinafter expressed and declared."

The trust deed was expressed to be made "in consideration of the natural love and affection of the settlors for the beneficiaries hereinafter referred to and

for divers other good causes and considerations" and it was thereby agreed that the Paris trustees should hold :

" . . . all rent and sums of money payable to them in accordance with the terms and during the continuance of the said lease and which they may receive subject to any refund or rebate they may be liable to make thereon to the lessees (all of which are hereinafter called " the settled fund ") and the the investments for the time being representing the same and the accumulations thereof "

on the trusts and with and subject to the powers and provisions therein set forth.

Clauses 1 and 2 of the trust deed are so important that they must be set out in full :

" 1. The expression ' authorised persons ' used therein means the settlors jointly during their lives and the survivor of them during his life and after the death of such survivor the following four persons namely) (a) the two eldest of the beneficiaries of 25 years of age and upwards for the time being entitled to share in William's fund hereunder but preferring males to females so that no such female beneficiary shall be included amongst the authorised persons so long as there are two male beneficiaries of that age and (b) such two persons as the said Sir Edmund Hoyle Vestey may appoint during his lifetime or by his will and in default of such appointment Percy Charles Vestey and Ronald Arthur Vestey and in the case of the death of either of such authorised persons such person as the survivor for the time being shall appoint by deed writing or will to fill the vacancy the said Sir Edmund Hoyle Vestey expressing the opinion that it is advisable to select a member of the family of the said Sir Edmund Hoyle Vestey to fill such vacancy provided that the person making such appointment considers such member of the said family is fit for the position Provided that if the authorised persons being not more than two in number cannot agree the trustees shall act on the direction of the majority but in case of equal voting by the authorised persons the trustees shall exercise their own discretion.

2. The trustees shall receive the aforesaid rent payable to them in accordance with the terms and during the continuance of the said lease (subject to any refund or rebate they may be liable to make thereunder to the said lessees as aforesaid) and shall capitalise the same until the expiration of 20 years from the death of the last surviving grandchild now living of the settlors (hereinafter referred to as ' the time of distribution ') by investing the same subject as hereafter provided in or upon any of the investments and in manner hereby authorised that is to say the settled fund shall (at the direction in writing of the authorised persons or a majority thereof and in the event of an equality of voting by such authorised persons at the trustees' discretion) be invested in the names or under the legal control of the trustees in or upon stocks funds shares securities or other investments of whatever nature and wheresoever (but where involving liability only with the consent of the trustees) or upon personal credit or upon loans to any company or companies wheresoever domiciled and with or without security and with the like power of varying such investments from time to time to the intent that the said trustees shall (subject to such direction as aforesaid) have the same full and unrestricted powers of investing and transposing the investments of the settled fund in all respects as if they were absolutely entitled thereto beneficially."

There is no evidence that any direction in writing was ever given by the Vestey's to the Paris trustees in regard to the investment of the rent or the settled fund.

The effect of subsequent clauses of the trust deed may be briefly summarised as follows. They provided (*inter alia*) for (a) the division of the residue of the income arising from the settled fund when invested, after meeting certain costs,

etc., until the time of distribution, into two parts, called respectively "William's fund" and "Edmund's fund," and (b) for the accumulation and investment as therein mentioned of William's fund and Edmund's fund respectively until the respective deaths of William and Edmund or for 21 years from the date of the deed whichever might be the earlier date, when the two funds with the accumulations thereof (respectively described as William's accumulated fund and Edmund's accumulated fund) should be held in trust for the benefit of the children or remoter issue (and their wives and widows) of William and Edmund as William and Edmund might respectively from time to time by deed revocable or irrevocable or will or codicil appoint (but so that no appointment either of a lump sum or of any specific investments should be made otherwise than in the shape of a capital payment). In default of and subject to any such appointment the funds were to be divided as therein mentioned among the lineal descendants of William and Edmund respectively. The Vesteyes had no power to give any directions as to the investment of any sums other than the rent coming to the hands of the Paris trustees.

Clause 11 of the trust deed reserved a power to William and Edmund respectively, notwithstanding anything contained in the deed, to appoint by will or codicil any interest in William's fund or Edmund's fund in favour of "the widow of the appointor" for her life or any shorter period. By cl. 17 and 19 of the trust deed the "authorised persons" were given power to fix the remuneration of the trustees, to remove trustees from their office and to appoint other trustees in their place. In exercise and by virtue of the relevant power given or reserved to them by cl. 4 of the deed or any other relevant powers the Vesteyes made the following appointments: (1) By deed dated Nov. 26, 1935, William irrevocably appointed and directed that the Paris trustees should from and after Apr. 1, 1942, or the earlier determination of the lease hold the whole of William's share, William's fund and William's accumulated fund both capital and income and also any part of the rent mentioned in cl. 2 of the trust deed which might belong or might have originally belonged to him and might not be effectively disposed of by inclusion in the said funds in trust for his eldest son if then living and in default in trust for that son's son. (2) By deed dated Dec. 31, 1935, Edmund irrevocably appointed and directed that the Paris trustees should from and after Apr. 1, 1942, or the earlier determination of the lease hold the whole of Edmund's share, Edmund's fund and Edmund's accumulated fund both capital and income including all income accruing in the meantime (except as hereinafter provided) and also any part of the rent not effectively disposed of by inclusion in the said funds in trust for his third son if then living, and in default in trust for such son of his third son as should first or alone attain the age of 21 years. Except and provided that the said deed should not appoint or affect the investments moneys and properties which on Oct. 31, 1935, represented Edmund's fund and Edmund's accumulated fund. (3) By deed dated Mar. 31, 1937, Edmund irrevocably appointed the investments and property left unappointed by the last mentioned deed in trust for his third son as from June 1, 1937, if then living, and in default in trust for his elder daughter and wholly released and extinguished in respect of all funds and income the power to appoint an interest therein in favour of his widow if and so far as such power had not already been extinguished. The Vesteyes, in exercise of the special powers of appointment reserved to them by the deed and of all other relevant powers, appointed a number of capital sums in favour of their children or children's issue, but these appointments (of which particulars are set out in the Cases Stated) are not material to any of the issues raised in the appeals.

The events leading up to the execution of the lease and the deed of trust, including the history of Union and of another company, the Western United Investment Co., Ltd. (hereafter called "Western"), are conveniently set out in the Cases Stated and in the printed case before your Lordships' House in

the case *Adamson v. Union Cold Storage Co., Ltd.* (5), which is incorporated by reference in the Cases Stated. It is sufficient for the present purpose to state the following facts. Western was incorporated on Aug. 26, 1918, with a capital of £1,000,004 divided into 1,000,000 ordinary shares of £1 each and four management shares of £1 each. At all material times the four management shares, which gave the holders complete control but no beneficial interest in profits or assets, were held by Lord Vestey and his son and Sir Edmund and his son. By certain transactions, which need not be set out in detail, Western came to own the whole of the ordinary shares in Union and by Nov. 28, 1930, the Paris trustees had come to own the whole of the ordinary shares in Western. Western acted as bankers and financial agents for Union, the Paris trustees and the Vesteyes. The Cases Stated set out in some detail certain dealings between the Paris trustees and Western and between Western and the Vesteyes, but on the view which I take of the case these dealings are not material to the decision of the matters now before your Lordships.

My Lords, I have already said that certain of the assessments now in question were made under the Finance Act, 1936, s. 18, while others were made under the Finance Act, 1938, s. 38. The relevant sections must now be quoted. The former section is in the following terms :

" For the purpose of preventing the avoiding by individuals ordinarily resident in the United Kingdom of liability to income tax by means of transfers of assets by virtue or in consequence whereof, either alone or in conjunction with associated operations, income becomes payable to persons resident or domiciled out of the United Kingdom, it is hereby enacted as follows :—(1) Where such an individual has by means of any such transfer, either alone or in conjunction with associated operations, acquired any rights by virtue of which he has, within the meaning of this section, power to enjoy, whether forthwith or in the future, any income of a person resident or domiciled out of the United Kingdom which, if it were income of that individual received by him in the United Kingdom, would be chargeable to income tax by deduction or otherwise, that income shall, whether it would or would not have been chargeable to income tax apart from the provisions of this section, be deemed to be income of that individual for all the purposes of the Income Tax Acts : Provided that this sub-section shall not apply if the individual shows in writing or otherwise to the satisfaction of the Special Commissioners that the transfer and any associated operations were effected mainly for some purpose other than the purpose of avoiding liability to taxation. (2) For the purposes of this section an associated operation means, in relation to any transfer, an operation of any kind effected by any person in relation to any of the assets transferred or any assets representing, whether directly or indirectly, any of the assets transferred, or to the income arising from any such assets, or to any assets representing, whether directly or indirectly, the accumulations of income arising from any such assets. (3) An individual shall, for the purposes of this section, be deemed to have power to enjoy income of a person resident or domiciled out of the United Kingdom if—(a) the income is in fact so dealt with by any person as to be calculated, at some point of time, and whether in the form of income or not, to inure for the benefit of the individual ; or (b) the receipt or accrual of the income operates to increase the value to the individual of any assets held by him or for his benefit ; or (c) the individual receives or is entitled to receive, at any time, any benefit provided or to be provided out of that income or out of moneys which are or will be available for the purpose by reason of the effect or successive effects of the associated operations on that income and on any assets which directly or indirectly represent that income ; or (d) the individual has power, by means of the exercise of any power of appointment or power of revocation or otherwise, to obtain for him-

self, whether with or without the consent of any other person, the beneficial enjoyment of the income ; or (e) the individual is able in any manner whatsoever, and whether directly or indirectly, to control the application of the income. (4) In determining whether an individual has power to enjoy income within the meaning of this section, regard shall be had to the substantial result and effect of the transfer and any associated operations, and all benefits which may at any time accrue to the individual as a result of the transfer and any associated operations shall be taken into account irrespective of the nature or form of the benefits. (5) For the purposes of this section—(a) a reference to an individual shall be deemed to include the wife or husband of the individual ; (b) the expression ‘ assets ’ includes property or rights of any kind, and the expression ‘ transfer,’ in relation to rights includes the creation of those rights ; (c) the expression ‘ benefit ’ includes a payment of any kind . . . (6) The provisions of sched. II to this Act shall have effect for the purpose of carrying this section into effect and otherwise for supplementing the provisions of this section, and this section is referred to in that schedule as ‘ the principal section.’ (7) The provisions of this section shall apply for the purposes of assessment to income tax for the year 1935-36 and subsequent years, and shall apply in relation to transfers of assets and associated operations whether carried out before or after the commencement of this Act : Provided that, for the year 1935-36, no income shall be charged to tax at the standard rate by virtue of the provisions of this section, but sur-tax shall be assessed and charged as if any income which would, but for this proviso, have been charged as aforesaid had in fact been so charged.”

Schedule II contains provisions not necessary to be quoted in regard to relief against double taxation, deductions and reliefs and other matters.

The Finance Act, 1938, s. 38, so far as material, is as follows :

“(1) If and so long as the terms of any settlement are such that—(a) any person has or may have power, whether immediately or in the future, and whether with or without the consent of any other person, to revoke or otherwise determine the settlement or any provision thereof and, in the event of the exercise of the power, the settlor or the wife or husband of the settlor will or may cease to be liable to make any annual payments payable by virtue or in consequence of any provision of the settlement ; or (b) the settlor or the wife or husband of the settlor may, whether immediately or in the future, cease, on the payment of a penalty, to be liable to make any annual payments payable by virtue or in consequence of any provision of the settlement ; any sums payable by the settlor or the wife or husband of the settlor by virtue or in consequence of that provision of the settlement in any year of assessment shall be treated as the income of the settlor for that year and not as the income of any other person : Provided that, where any such power as is referred to in para. (a) of this sub-section cannot be exercised within the period of six years from the time when the first of the annual payments so referred to becomes payable, and the like annual payments are payable in each year throughout that period, the said para. (a) shall not apply so long as the said power cannot be exercised. (2) If and so long as the terms of any settlement are such that—(a) any person has or may have power, whether immediately or in the future, and whether with or without the consent of any other person, to revoke or otherwise determine the settlement or any provision thereof ; and (b) in the event of the exercise of the power, the settlor or the wife or husband of the settlor will or may become beneficially entitled to the whole or any part of the property then comprised in the settlement or of the income arising from the whole or any part of the property so comprised ; any income arising under the settlement from the property comprised in the settlement in any year

of assessment or from a corresponding part of that property, or a corresponding part of any such income, as the case may be, shall be treated as the income of the settlor for that year and not as the income of any other person : Provided that, where any such power as aforesaid cannot be exercised within six years from the time when any particular property first becomes comprised in the settlement, this sub-section shall not apply to income arising under the settlement from that property, or from property representing that property, so long as the power cannot be exercised. (3) If and so long as the settlor has an interest in any income arising under or property comprised in a settlement, any income so arising during the life of the settlor in any year of assessment shall, to the extent to which it is not distributed, be treated for all the purposes of the Income Tax Acts as the income of the settlor for that year, and not as the income of any other person : Provided that—(a) if and so long as that interest is an interest neither in the whole of the income arising under the settlement nor in the whole of the property comprised in the settlement, the amount of income to be treated as the income of the settlor by virtue of this sub-section shall be such part of the income which, but for this proviso, would be so treated as is proportionate to the extent of that interest ; and (b) where it is shown that any amount of the income which is not distributed in any year of assessment consists of income which falls to be treated as the income of the settlor for that year by virtue of either of the last two foregoing sub-sections, that amount shall be deducted from the amount of income which, but for this proviso, would be treated as his for that year by virtue of this sub-section. (4) For the purpose of the last foregoing sub-section the settlor shall be deemed to have an interest in income arising under or property comprised in a settlement, if any income or property which may at any time arise under or be comprised in that settlement is, or will or may become, payable to or applicable for the benefit of the settlor or the wife or husband of the settlor in any circumstances whatsoever . . . (7) The foregoing provisions of this section shall apply for the purposes of assessment to income tax for the year 1937-38 and subsequent years and shall apply in relation to any settlement, wherever made and whether made before or after the passing of this Act : Provided that—(a) for the year 1937-38 no income shall be charged to tax at the standard rate by virtue of this section, but sur-tax shall be assessed and charged as if any income which would, but for this proviso, have been charged as aforesaid had in fact been so charged ; and (b) for the purpose of granting relief from tax at the standard rate in respect of any income which for the year 1937-38 is treated as the income of a settlor by virtue of sub-s. (1) or sub-s. (2) of this section but would be treated as the income of some other person but for that sub-section, that income shall be treated as the income of that other person.”

Section 40 of the Act of 1938 provides :

“(1) Any capital sum paid directly or indirectly in any relevant year of assessment by the trustees of a settlement to which this section applies to the settlor shall—(a) to the extent to which the amount of that sum falls within the amount of income available up to the end of that year, be treated for all the purposes of the Income Tax Acts as the income of the settlor for that year ; (b) to the extent to which the amount of that sum exceeds the amount of income available up to the end of that year but falls within the amount of the income available up to the end of the next following year, be treated for the purposes aforesaid as the income of the settlor for the next following year ; and so on. (2) For the purpose of the last foregoing sub-section the amount of income available up to the end of any year shall, in relation to any capital sum paid as aforesaid, be taken to be the aggregate amount of income arising under the settlement in that

A year and any previous relevant year which has not been distributed, less—
 (a) the amount of any other capital sums paid to the settlor in any relevant year before that sum was paid; and (b) so much of any income arising under the settlement in that year and any previous relevant year which has not been distributed as is shown to consist of income which has been treated as income of the settlor by virtue of sub-s. (1) or sub-s. (2) of s. 38 of this Act; and (c) any income arising under the settlement in that year and any previous relevant year which has been treated as the income of the settlor by virtue of sub-s. (3) of s. 38 of this Act; and (d) any sums paid by virtue or in consequence of the settlement, to the extent that they are not allowable, by virtue of the last foregoing section, as deductions in computing the settlor's income for that year or any previous relevant year; and (e) an amount equal to tax at the standard rate on—(i) the aggregate amount of income arising under the settlement in that year and any previous relevant year which has not been distributed, less (ii) the aggregate amount of the income and sums referred to in paras. (b), (c) and (d) of this sub-section. (3) For the purpose of this section, any capital sum paid to the settlor in any year of assessment by any body corporate connected with the settlement in that year shall be treated as having been paid by the trustees of the settlement in that year. (4) Where the whole or any part of any sum is treated by virtue of this section as income of the settlor for any year, it shall be treated as income of such an amount as, after deduction of tax at the standard rate for that year, would be equal to that sum or that part thereof. (5) This section applies to any settlement wherever made and whether made before or after the commencement of this Act, and in this section—(a) the expression 'capital sum' means—(i) any sum paid by way of loan or repayment of a loan; and (ii) any other sum paid otherwise than as income, being a sum which is not paid for full consideration in money or money's worth; but does not include any sum which could not have become payable to the settlor except in one of the events specified in the proviso to sub-s. (4) of s. 38 of this Act; (b) the expression 'relevant year' means any year of assessment after the year 1937-38; (c) references to sums paid to the settlor include references to sums paid to the wife or husband of the settlor."

Section 41 of the Act of 1938 provides:

F "... (4) For the purposes of this Part of this Act . . . (b) the expression 'settlement' includes any disposition, trust, covenant, agreement or arrangement, and the expression 'settlor' in relation to a settlement means any person by whom the settlement was made."

G The statement supplied by counsel to your Lordships, which I shall now set out, shows in a convenient form the assessments made under the provisions of the Finance Act, 1938, s. 38, and the Finance Act, 1936, s. 18, and the figures as adjusted by the Special Commissioners on appeal.

H Taxpayer	Income Tax or Sur-tax	Year of Assessment	Assessment made under Finance Act, 1938, s. 38	Adjusted by Special Commissioners on Appeal	Assessment made under Finance Act, 1936, s. 18	Adjusted by Special Commissioners on Appeal
Executors of Lord Vestey	Income Tax	1936/7	—	—	500,000	357,171
do.	do.	1937/8	—	—	464,011	464,011
do.	do.	1938/9	238,750	435,821	435,821	Not determined by Special Commissioners pending final disposal of assessments under Finance Act, 1938, s. 38
do.	do.	1939/40	320,000	509,635	509,635	
do.	do.	1940/41	218,301	246,298	246,298	

<i>Taxpayer</i>	<i>Income Tax or Sur-tax</i>	<i>Year of Assessment</i>	<i>Assessment made under Finance Act, 1938, s. 38</i>	<i>Adjusted by Special Commissioners on Appeal</i>	<i>Assessment made under Finance Act, 1936, s. 18</i>	<i>Adjusted by Special Commissioners on Appeal</i>
Executors of Lord Vestey	Sur-tax	1936/7	—	—	500,000	385,058
do.	do.	1937/8	292,916	503,800		
do.	do.	1938/9	238,750	502,264		
do.	do.	1939/40	319,766	597,511		
do.	do.	1940/41	218,301	283,802		
Sir Edmund Hoyle Vestey	Income Tax	1936/7	—	—	500,000	435,063
do.	do.	1937/8	—	—	468,257	468,257
do.	do.	1938/9	238,750	421,279	421,279	Not determined by Special Commissioners pending final disposal of assessments under Finance Act, 1938, s. 38.
do.	do.	1939/40	320,000	493,295	493,295	
do.	do.	1940/1	320,000	491,489	491,489	
do.	do.	1940/1	320,000	560,215		
do.	Sur-tax	1936/7	—	—	500,000	457,239
do.	do.	1937/8	292,916	504,932		
do.	do.	1938/9	238,750	486,902		
do.	do.	1939/40	320,000	581,281		
do.	do.	1940/1	320,000	560,215		

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My Lords, it often happens that when claims are made by the Crown under s. 18 of the Act of 1936, the taxpayer relies on the proviso to s. 18 (1) of that Act. Before the Special Commissioners, the Vestey's sought to claim the benefit of this proviso, and this claim is dealt with in the following passage taken from the findings of fact in the Cases Stated :

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“The benefit of the proviso to s. 18 in its original and amended form is claimed and we have been referred to Lord Vestey's evidence in 1919 before the Royal Commission on the Income Tax. It does not appear that he complained that United Kingdom tax made it difficult for him to compete against American firms but only that his profits which he did not spend or give away were subjected to that tax whilst the profits of his foreign competitors were not. To avoid United Kingdom taxation the Vestey's betook themselves abroad from 1915 to 1921. It is said that having removed the business from the area of taxation they could not in 1931 have had a purpose of avoiding taxation and that the primary and, indeed, sole object of the lease was to restore the business back to England. In our view it was the Vestey's' personal desire to reside in this country which led to the lease and deed and the main purpose of the creation of the rent and its transfer to the settlement trustees was the avoidance of the United Kingdom taxation which would normally accrue on their becoming resident.”

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For some 15 years after 1921 this “main” purpose appears to have been completely achieved. Payments in the nature of income flowed in to the Paris trustees year by year from five sources, the rent paid by Union, the income from William's fund and Edmund's fund respectively, and the income arising from investments representing accumulations of the income of William's fund and Edmund's fund respectively. No part of this income was ever paid away as income, and substantial funds rolled up annually for the benefit of the beneficiaries under the deed of trust. Moreover, Union was successful in the above-mentioned case of *Adamson v. Union Cold Storage Co., Ltd.* (5). In that case the Crown tried in vain to convince this House, on assessments made on Union for 1923-24 and 1924-25, that as the rent payable under the lease was dependent on the profits made by the company and reducible in the events therein mentioned, and as the tenure by Union of the properties for which the rent was paid was under the control of the Vestey's as lessors, the rent ought to be regarded as a distribution of profits by the company to the Vestey's and not as a deductible expense in computing the profits of the business of the company for income tax. Then came the Act of 1936, followed by the Act

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of 1938, and the assessments already mentioned which relate entirely to income received by the Paris trustees by virtue of the lease and the deed of trust. The Vesteyes have contended throughout, and now contend, that not one penny of the sums received by the Paris trustees comes under the scope of either s. 18 of the Act of 1936 or s. 38 of the Act of 1938.

The claims of the Crown in the present case depend to a large extent upon three matters :—(1) the power of the “ authorised persons ” to direct the investment by the Paris trustees of the sums received by them from Union ; (2) the contention of the Crown that all the properties comprised in the lease are “ comprised in the settlement ” within s. 38 (2) (b) of the Act of 1938 ; (3) the power of appointment in favour of a widow contained in cl. 11 of the deed of trust. For this reason, before considering in detail the relevant sections already quoted and their application to the income received by the Paris trustees, it is desirable to consider three questions of construction :—(a) Is the right or power of the “ authorised persons ” under the trust deed to direct how the rent payable by Union shall be invested by the Paris trustees a power of the kind conveniently described as a fiduciary power, which must be exercised in the best interests of the beneficiaries under the trust deed, or is it a right or power which the authorised persons are entitled to exercise, if they so think fit, in any way which best serves their own interests ? (b) Is the “ settlement ” which falls to be considered under s. 38 (2) of the Act of 1938 the trust deed alone, or the trust deed together with the lease, and what is the “ property comprised in the settlement ” within the meaning of the same sub-section ? (c) Does the existence of the power of appointment in favour of the widow of Lord Vestey and Sir Edmund respectively have the effect of bringing any income within the ambit of either of the two sections in question ? When these three questions have been answered, your Lordships will have gone a long way towards a solution of the numerous questions argued on these appeals.

In arguing question (a), which is a question of construction, counsel for the Crown sought to pray in aid such matters as the history, prior to and after 1915, of the vast business controlled by the Vesteyes, the structure and history of the various companies in which they were interested, and the various steps whereby the Vesteyes sought to reside in England and yet to avoid, so far as they legally could, the taxation which usually falls on persons so resident. It is said on behalf of the Crown that cl. 3 of the lease (already quoted) put the annual profits of Union into the hands of the Paris trustees, and that the power to direct investments, vested in the “ authorised persons,” was the means by which the Vesteyes were able to obtain, out of these profits, the cash necessary for financing the businesses which they controlled. It is further said that certain passages in the Cases Stated show that the power was, in fact, used for this purpose. My Lords, in my view, one must solve this question of construction on a consideration of the words used in the trust deed, by which alone this right or power is constituted, applying to these words the ordinary principles of construction, without regard to the fact that this deed is part of a scheme of tax avoidance. If it appears that there is some latent ambiguity in the deed itself, one can seek to resolve it by a consideration of the relevant surrounding circumstances.

It is important to note, at the outset, that if, as is contended by the Crown, the power to direct is not a fiduciary power, the authorised persons are quite unrestricted in their choice of an investment. They could, for instance, direct the Paris trustees to lend any instalment of rent to the authorised persons, without security, at $\frac{1}{2}$ per centum interest per annum. They could not, I think, direct the Paris trustees to make such a loan free of interest, for such a loan would no more be an “ investment ” than would be the placing of cash in a stocking ; but provided that the directed application of moneys can fairly be described as an “ investment,” I can see no limit on the powers of the

authorised persons, if the Crown's contention is correct, nor could counsel for the Crown suggest any limit.

With this in mind, I approach the consideration of the terms of the trust deed. By cl. 2 the authorised persons are to select the investments, and the Paris trustees are to hold the funds and make the investments and to exercise their discretion in selecting the investments if the authorised persons are equally divided or (as I think) if no direction is given by the authorised persons. Turning to the other provisions of the deed one finds that it is made "in consideration of the natural love and affection" of the Vestey family for the beneficiaries, while cl. 1 contains careful provision as to the persons who are to be "authorised persons." It is to be observed that the power is not reserved only to the settlors, and two facts are particularly to be noted in regard to Sir Edmund's successors. First, Sir Edmund desires that a member of his family shall be selected "provided that the person making the appointment considers such member of the said family is fit for the position." I think this indicates that the person selected is to be someone who can exercise a wise judgment in selecting suitable investments. Secondly, it may happen that two, at least, of the authorised persons may be persons who are not members of the Vestey family and are not beneficially interested in any way. Now it is clear that the nature of this power of direction must be the same throughout the duration of the trust, and I cannot believe that the Vestey family would have entrusted their successors with an arbitrary power or right to direct an investment greatly to the benefit of themselves and greatly to the detriment of the beneficiaries, such as an unsecured loan to the authorised persons at a rate of $\frac{1}{2}$ per centum interest. To my mind, all the indications in the deed are in favour of the view that this power of direction is a fiduciary power. To test the matter further, let it be assumed that the Vestey family or their successors direct the Paris trustees to make an investment of the kind just described, that one of the beneficiaries objects, and that the trustees ask the court, by originating summons, whether they are or are not bound to obey this direction. In my view, the court would hold that they were not so bound, and it would hardly avail the Vestey family to contend that, as this settlement was part of a scheme to avoid tax, they must be deemed to have inserted this power of direction in order to retain a valuable right for themselves. It is not, I think, irrelevant to note that the language used in this deed bears a strong resemblance to the wording of the Settled Land Act, 1882, s. 22 (2), which was in force at the date when the deed of trust was executed. That section provides that the investment or other application of capital money by the trustees "shall be made according to the direction of the tenant for life, and in default thereof, according to the discretion of the trustees," and it is clear that in giving such a direction the tenant for life is acting in a fiduciary capacity: see s. 53 of the Act of 1882 and (for instance) *Re Peel's Settled Estates* (6) ([1910] 1 Ch. 395). It seems to me hardly likely that the Vestey family would have used similar words in the deed of trust if they had intended the power in question to be non-fiduciary.

The result is that, in my view, on the true construction of the trust deed, the power of direction is a fiduciary power, and the authorised persons are not entitled to use it for the purpose of obtaining a benefit for themselves. They must exercise it *bona fide* in what they consider to be the best interests of the beneficiaries. This is not, to my mind, a case of latent ambiguity. I think that the Vestey family could have directed the trustees to lend trust moneys to Western, or even to themselves, but such a direction could only be justifiable if the loan were made at a commercial rate of interest and if the Vestey family honestly thought that it was in the best interests of the beneficiaries. If the trustees were to advance moneys to any company or to either of the Vestey family free of interest, they would commit a breach of trust, but there is no finding in any of the Cases Stated that this was ever done.

As to question (b) there can be no doubt that the deed of trust is a settlement

in the ordinary sense of the word, and I do not dissent from the Crown's contention that the lease and the deed of trust together constitute an "arrangement" within s. 41 (4) (b) of the Act of 1938 and are consequently a "settlement" for the purposes of pt. IV of that Act. In my view, however, whether one looks for this purpose at the deed of trust alone, or at the deed of trust and the lease together, the only property "comprised in the settlement" at any time was the rent payable by Union under the lease, together with any property resulting from the investment of the rent, and from the accumulation of the income arising from such investment.

My Lords, it was contended on behalf of the Crown that all the properties demised or agreed to be demised to Union by the lease were "comprised in the settlement" within the meaning of s. 38. I cannot agree with this contention, and I think it is wholly inconsistent with the decision of this House in *Chamberlain v. Inland Revenue Comrs.* (1). In that case LORD MACMILLAN said ([1943] 2 All E.R. 204), in reference to the decision of the First Division of the Court of Session in *Inland Revenue Comrs. v. Morton* (4) :

"I agree with LORD MONCRIEFF that the settlement or arrangement must be one whereby the settlor charges certain property of his with rights in favour of others. It must comprise certain property which is the subject of the settlement: it must confer the income of the comprised property on others, for it is the income so given to others that is to be treated as, nevertheless, the income of the settlor."

In the present case, immediately before the execution of the lease, the Vesteyes owned or controlled the properties about to be comprised in the lease. Immediately after the execution of that document, the freehold interest remained in the Vesteyes subject to the lease; the leasehold interest was vested in Union; and the rent was payable to the Paris trustees who would hold it as bare trustees for the Vesteyes. So far, no property had been "settled," but it remained in the power of the Vesteyes either to settle the freehold interest in the demised properties, subject to the lease, or to settle the rent which still belonged beneficially to them. They chose the latter course, and settled the rent by the deed of trust. It is, in my judgment, quite impossible to say that either the freehold interest, which the Vesteyes retained, or the leasehold interest, which remained the property of Union, was the subject of any settlement or "comprised in" any settlement, having regard to the reasoning of your Lordships' House in *Chamberlain's* case (1). I would add that, in my view, *Morton's* case (4) can no longer be regarded as good law. I think that in *Chamberlain's* case (1) this House agreed with LORD MONCRIEFF on the vital point on which he differed from the majority of the First Division in *Morton's* case (4).

It is convenient to consider at once what is the result of the view which I have just expressed on the Crown's endeavour to bring this case within s. 38 (2) of the Act of 1938. It is contended on behalf of the Crown that as Union, on the one hand, and the Vesteyes, on the other hand, had power to determine the lease, each of these parties had power to revoke or otherwise determine the settlement or a "provision" thereof, within s. 38 (2) (a). Clearly they had no power to determine the settlement itself, for even if the lease was determined, the trusts declared by the deed of trust concerning rents already accrued would continue undisturbed; and I gravely doubt whether the lease can be regarded as a "provision of the settlement." However, it is unnecessary to resolve this doubt, for even if the Crown can bring this case within para. (a) of s. 38 (2), it clearly does not come within para. (b). Once it is ascertained that only the rent and property derived therefrom is "comprised in the settlement," it becomes clear that if the lease is determined neither Lord Vestey nor Sir Edmund nor the wife of either of them "will or may become beneficially entitled to the whole or any part of the property then comprised in the settlement" or of the income arising therefrom. The determination of the lease

would make no difference at all to the position of any of these persons in regard to the property comprised in the settlement or the income thereof; it would merely have the effect that no further rent would reach the hands of the Paris trustees.

Question (c) should, in my opinion, be answered in the negative. A different view was taken by the Court of Appeal in *Gaunt v. Inland Revenue Comrs.* (2) and the Court of Appeal in the present case naturally followed that decision. *Gaunt's* case (2) has already been criticised by my noble and learned friend, LORD NORMAND. I agree with his criticisms, but out of respect for the Court of Appeal I shall add some observations of my own. For the sake of example I shall take s. 38 (4) of the Act of 1938, and shall disregard for the moment the appointments of 1935 and 1937 already noted. Could it be said, in any of the years of assessment, that any income comprised in the settlement might become payable to the wife (for instance) of William within the meaning of s. 38 (4)? In my view, it could not. To my mind, if a payment is to come within the sub-section it must be made to a lady who answers the description of a wife at the time of payment. No such payment could ever be made, because no payment could be made until after the death of William; the income then becomes payable, not to his wife, but to his widow. I do not propose to travel all through the language of s. 38 of the Act of 1938 or of s. 18 of the Act of 1936. I can find no passage in either section which is inconsistent with the view which I hold. Further, I think that the intention of each reference to a wife of the settlor is reasonably clear. It was thus stated by LAWRENCE, J., in *Gaunt's* case (2) ([1941] 2 All E.R. 85):

"On the second point, I am of opinion that the object of the section is to prevent the settlor from getting the benefit of the trust fund during his lifetime. It is not to prevent his wife from enjoying the trust fund after his death, and I do not think that the word 'wife' is apt to describe the settlor's widow. The income must be capable of being paid to, or for the benefit of, the wife, which, in my opinion, means while she is his wife."

My Lords, I entirely agree with this passage. I think that the treatment of husband and wife by the legislature, for income tax purposes, rests on the view that any income enjoyed by one spouse is a benefit to the other spouse. It is not surprising, therefore, that in the sections now under consideration a benefit to the wife of the settlor is treated as being a benefit to the settlor; but it seems to me unlikely that this principle is being extended, by these sections, to the widow of the settlor. Further, if, for instance, s. 38 (4) of the Act of 1938 is to be read as applying to the widow of the settlor, there would seem to be no reason why it should not have been extended to the children of the settlor. If it be said that the provision of a benefit for the widow of the settlor benefits the settlor himself, because he would naturally desire to make provision for his widow, exactly the same reasoning could be applied to the provision of a benefit for the settlor's children. Finally, although I do not myself think that there is a real ambiguity in the use of the word "wife" throughout these sections, if there is such an ambiguity it must be resolved in favour of the subject, according to principles which have been laid down many times. If I had come to a different conclusion on this point, it would have been necessary to consider how far the appointments of 1935 and 1937 precluded any appointment thereafter to a widow of either of the Vestseys, but this point does not arise, having regard to the view which I have just expressed.

Having determined the answers to these three questions of general importance, I now turn to a more detailed consideration of s. 18 of the Act of 1936. The opening words are:

"For the purpose of preventing the avoiding by individuals ordinarily resident in the United Kingdom of liability to income tax by means of

transfers of assets by virtue or in consequence whereof, either alone or in conjunction with associated operations, income becomes payable to persons resident or domiciled out of the United Kingdom, it is hereby enacted as follows . . .”

- It is pointed out by counsel for the Crown that the Vesteyes were individuals ordinarily resident in the United Kingdom in December, 1921, that they carried out a transfer of assets by virtue or in consequence whereof income became payable to persons resident outside the United Kingdom, namely the Paris trustees, and that these steps were taken by the Vesteyes with the object of avoiding liability to income tax. That is all true, but it must be borne in mind that the section only applies to a case which comes within sub-s. (1). If neither of the Vesteyes had had any rights or powers of direction or appointment under the deed of trust, both of them would have avoided all liability to tax. Your Lordships have simply to consider whether the existence of these rights or powers brings the present case within the ambit of the section, and for this purpose the provisions of sub-ss. (2), (4) and (5) must be borne in mind throughout. It is first necessary to consider whether Lord Vestey had at any relevant time, by means of any such transfer as is described in the opening words of s. 18 (either alone or in conjunction with associated operations), acquired any rights by virtue of which he had, within the meaning of s. 18, power to enjoy (whether forthwith or in the future) any income of the Paris trustees. It is necessary to consider separately the case of each of the two Vesteyes. They have been assessed separately, and, in my view, it is necessary to inquire, in the case of each of them, whether he was, at the material time, “an individual” in the position described in s. 1. I have not, of course, overlooked the fact that, by reason of s. 1 of the Interpretation Act, 1889, the word “individual” in s. 18 (1) would be construed as including the plural unless the contrary intention appears, but in considering whether any income is to be deemed to be income of a particular individual under s. 18 (1) I feel no doubt that one must have regard only to rights acquired by the same individual, and not to rights acquired by a group of individuals, however small, which includes him. Difficulties would arise from any other construction of s. 18 (1) which are, I think, so apparent that they need not be further discussed.

- As a preliminary matter one must inquire whether Lord Vestey acquired any rights at all by virtue of the deed of trust. I think he acquired only two rights, namely the power of appointment in favour of his widow conferred by cl. 11 and the power of appointment in favour of his children or remoter issue of their wives or widows conferred by cl. 4. During the whole of the relevant period, Sir Edmund was alive, and the various powers conferred by the trust deed on the “authorised persons” were powers vested jointly in the two brothers. The words “has acquired” are not followed by any such words as “either alone or jointly with some other person or persons” and this omission becomes very significant when one observes, by way of contrast, that the words “either alone or in conjunction with associated operations” are inserted immediately after the words “by means of any such transfer.” Compare also sub-s. (3) (d) “the individual has power . . . to obtain for himself, *whether with or without the consent of any other person*, the beneficial enjoyment of the income.” I cannot believe that sub-s. (1) would have been in its present form if the legislature had intended to include among the “rights” mentioned in the sub-section any rights which the individual held jointly with another person. It may be that the failure of the sub-section to cover such a joint power opens the door to easy evasion of the provisions of s. 18. If so, it is for the legislature to fill the gap and not for your Lordships to put a strained construction on the words: “Where such an individual has . . . acquired any rights. . .”

The next question is: Did Lord Vestey acquire these two rights by virtue of such a transfer of assets as is mentioned in sub-s. (1), either alone or in con-

junction with associated operations. I think he did. Before the lease was executed, Lord Vestey and his brother owned or controlled certain properties. By s. 18 (5) (b) the expression "assets" includes property or rights of any kind and the expression "transfer" in relation to rights includes the creation of those rights. By the lease, the Vesteyes created a right, namely the right to receive the rent payable by Union. That right was an asset. By the creation of it, and by the joint effect of the lease and deed of trust, income (namely the rent) became payable to the Paris trustees on the trusts of the deed of trust, and Lord Vestey "acquired" his two powers of appointment by virtue of the deed of trust. It was contended on behalf of the taxpayers that Lord Vestey did not "acquire" these rights, but merely "reserved" them when he and his brother transferred assets to which they were absolutely entitled. This contention places too narrow a meaning on the word "acquired." Before the deed of trust was executed, none of the various funds mentioned in it existed. After it was executed Lord Vestey possessed two rights or powers of appointment over one of these funds. I think he "acquired" these two rights, which did not exist before, by means of the "transfer of assets" already described. A B

The next question is: Had Lord Vestey, at any relevant time, by virtue of either of his two powers of appointment, "power to enjoy" within the meaning of s. 18 (1) any income of the Paris trustees. In order to answer this question, one must turn to sub-s. (3), bearing in mind that that sub-section merely puts an enlarged meaning on the words "power to enjoy" and never comes into play unless the circumstances described in the various paragraphs of sub-s. (3) arise "by virtue of" the right or rights described in sub-s. (1). I shall first consider these paragraphs in relation only to Lord Vestey's power of appointment in favour of his widow. My Lords, I share the difficulty which the Court of Appeal felt in linking up with sub-s. (1) the various paragraphs of sub-s. (3), but your Lordships need not, I think, be unduly troubled by para. (a). That paragraph depends on a question of fact, and there is no finding of fact by the Special Commissioners on which the Crown can rely. This is not surprising, as para. (a) was not relied on before the Special Commissioners, although the Crown sought to rely on it before MACNAGHTEN, J., and in the Court of Appeal. Your Lordships were asked by the Solicitor-General to remit this case to the Special Commissioners in order that they should arrive at findings of fact under paras. (a) and (c), but in all the circumstances of the present case I do not think that this suggestion should be accepted. The Crown had ample opportunities, of which much use was made, to obtain information as to the various dealings between the Paris trustees, Western, Union and the Vesteyes, and could have obtained further findings of fact from the Special Commissioners if its advisers had thought fit to do so. C D E

As to para. (b), the first question is: Is the power of appointment conferred on Lord Vestey by cl. 11 of the deed of trust as "asset" held by him for his benefit—and I think one must add "or for the benefit of his wife"—in view of sub-s. (5) (a). My Lords, in my view, it is not such an asset, for the short and simple reason that "wife" does not include "widow" and that this power of appointment is held by Lord Vestey only for the benefit or possible benefit of his widow. This being so, it is unnecessary to consider whether this power of appointment is an "asset" within the meaning of para. (b) or whether the value thereof will be increased by the receipt or accrual of the rent. Turning to para. (c), it is sufficient to say that neither Lord Vestey nor his wife received or was entitled to receive at any material time any benefit by virtue of Lord Vestey's power of appointment. Paragraph (d) cannot apply, because the only person who can obtain the beneficial enjoyment of any income under this power of appointment is Lord Vestey's widow. I would add that, even on the assumption that the joint power to direct investments falls to be considered under this head by reason of the words "with or without the consent" F G H

of any other person", I do not think that the existence of this joint fiduciary power could possibly be said to enable Lord Vestey to obtain for himself the beneficial enjoyment of any of the income received by the Paris trustees. He could only obtain such beneficial enjoyment by means of a grave breach of trust. In considering para. (e) one must first ask—what is "the income" there referred to? The answer must be, as regards each year of assessment "it is the income of the Paris trustees attributable to that year of assessment."

- A Taking, as an example, 1936-37, one must ask: Had Lord Vestey power to enjoy (whether forthwith or in the future) any income of the Paris trustees attributable to that year? If so, "that income" to quote sub-s. (1), must be deemed to be income of Lord Vestey for the purposes of the Income Tax Acts. Now it is clear that Lord Vestey had no power to enjoy the income of the Paris trustees attributable to 1936-37 either forthwith or in the future in the ordinary sense of the words "power to enjoy", but in view of para. (e) one must go further and inquire whether Lord Vestey was able in any manner whatsoever, and whether forthwith or in the future, and whether directly or indirectly, to control the application of that income. The answer is that his power of appointment under cl. 11 did not enable him to do this. No exercise of Lord Vestey's power of appointment under cl. 11 could prevent the Paris trustees from dealing with their income for 1936-37 strictly in accordance with the terms of the trust deed, and no income accruing to the Paris trustees during Lord Vestey's life is affected by any exercise of Lord Vestey's power of appointment under cl. 11. Your Lordships are not concerned in these appeals with any income accruing to the Paris trustees after Lord Vestey's death.

- D I now turn to the question whether Lord Vestey's power to appoint in favour of his children or remoter issue or their wives or widows can be brought within any of paras. (a) to (e) of sub-s. (3). It is at once apparent that the only paragraph which can possibly be material for this purpose is (e). Even apart from the appointment of Nov. 26, 1935, I do not think that the existence of this power brought Lord Vestey within this paragraph, for reasons which will appear later, and as soon as he executed the deed of irrevocable appointment of that date, Lord Vestey put the matter beyond all question. It is true that if both of the appointees under that deed had predeceased Lord Vestey, his power would have revived; but that event did not happen. It is also true that Lord Vestey might have made a subsequent appointment to take effect only in the event of both of the appointees failing to take a vested interest; but the fact that Lord Vestey might have made such an appointment could not, on any construction of para. (e), render him "able to control the application of the income" in the year of assessment. Even with the assistance of the words "in any manner whatsoever and whether directly or indirectly," the paragraph cannot be stretched to cover such a case. In considering whether Lord Vestey had power to enjoy income within the meaning of sub-s. (1), read in conjunction with all the paragraphs of sub-s. (3), I have borne in mind the terms of sub-s. (4), but I cannot find that the terms of that sub-section alter in any way the conclusions stated above.

- H The result is that, in my view, the attempt of the Crown to render Lord Vestey liable to tax under s. 18 of the Act of 1936 wholly fails. All the reasoning set out above applies equally to the case of Sir Edmund Vestey, except that I must deal separately with Sir Edmund's position in regard to para. (e). So far as regards the property which Sir Edmund appointed by the deed of Dec. 31, 1935, he is in the same position as Lord Vestey. But he excepted from the operation of that deed the investments moneys and properties which on Oct. 31, 1935, represented Edmund's fund and Edmund's accumulated fund. Thus, until he executed his second appointment, dated Mar. 31, 1937, Sir Edmund retained a power to appoint these funds among a limited class of persons, in addition to his power to appoint to his widow under cl. 11 of the trust deed. It is arguable that Sir Edmund is assessable for 1936-37 in respect of the income of

these two funds, on the ground that he had "power to enjoy" that income within s. 18 (1) and (3) (e), and the point is one of some difficulty. I do not think, however, that this limited power of appointment gave Sir Edmund power "to control the application" of any income, within the meaning of para. (e). He could only make an appointment "in the shape of a capital payment" in favour of one or more of his issue or their spouses and if such a power were intended to be caught by sub-s. (3) I think that it would have been included in para. (d), which deals expressly with powers of appointment. That paragraph is, however, limited in its operation to powers which enable the individual to obtain the beneficial enjoyment of income. A

My Lords, I cannot help feeling some regret that my opinion as to s. 18 should rest partly on the somewhat narrow ground that the joint power to direct investment, possessed by the Vesteyes jointly as "authorised persons", is not a right which either Lord Vestey or Sir Edmund, as an individual, acquired within the meaning of s. 18, and at one time I contemplated considering each paragraph of sub-s. (3) on the assumption that this joint power fell within sub-s. (1). On further reflection, however, I feel that the adoption of this course would only produce a rich crop of *obiter dicta* which might be an embarrassment, rather than an assistance, to those who may consider this case hereafter. For this reason I shall only say that, even if this joint power (which I have already held to be of a fiduciary nature) is a right which "such an individual" has acquired within the meaning of sub-s. (1), I am by no means satisfied that the Crown could bring the present case within the terms of any paragraph of sub-s. (3). It is, of course, well settled that a person in a fiduciary position is not entitled so to use his position as to make a profit for himself; and if he does so use his position, he is liable to account for the profit so made. The position would have been different in many respects if this House had taken the view that the power in question, on the true construction of the deed of trust, was one which the Vesteyes were entitled to use to serve their own ends. In that event, it would have been necessary to go into a number of matters which are irrelevant if the power is a fiduciary one. B C D

My Lords, I must now turn again to s. 38 of the Act of 1938. The Crown does not rely on sub-s. (1) and the claim of the Crown under sub-s. (2) is ill-founded, for the reasons which I have already given. As to sub-s. (3) it is clear that this sub-section can have no application, when one has arrived at the conclusion that the property comprised in the settlement only includes the rent and the property derived therefrom. Sub-section (4) however raises two questions. First, it is said that by reason of the joint power to direct investments, income arising under or property comprised in the deed of trust might become payable to or applicable for the benefit of either Lord Vestey or Sir Edmund, because the Vesteyes might at any time direct trust money to be lent to either of themselves on the personal credit of the borrower. It is said truly that the fact that the power is a joint one does not affect this argument adversely, by reason of the words "may become . . . in any circumstances whatsoever." As to this argument, I would first observe that, as the power to direct is of a fiduciary nature, any such loan would have to be at a commercial rate of interest. Assuming that such a loan were made, would the money lent be "payable to" the borrower within the meaning of sub-s. (4). Notwithstanding the words "in any circumstances whatsoever" I cannot believe that the words "payable to" were intended to apply to a payment made by way of loan. If these words were read quite literally, they would apply if the settlor were merely used as a channel for conveying the money to someone else, or if money were lent to the settlor on a mortgage of his lands. The phrase "payable to or applicable for the benefit of" is a well-known one, frequently used in settlements where money either is to be paid to a beneficiary, who can then use it as he pleases, or is to be applied by trustees in some manner which will benefit the beneficiary. Reading the phrase as a whole, I am satisfied E F G H

that the words "payable to" are directed only to an out-and-out payment, with no obligation on the payee to return the money. As to the words "applicable for the benefit of the settlor." I think that a loan may well benefit a person, even if it is made at a commercial rate of interest, as it may tide him over a difficult period; but I do not think that, if money is so lent, it is applied "for the benefit of" the debtor within sub-s. (4).

A Section 40 of the Act of 1938 goes far to confirm me in the views which I have just expressed. I need not review its provisions in detail, but it would apply to any "capital sum," defined as meaning *inter alia* any sum paid by way of loan, which might be paid directly or indirectly, in any relevant year of assessment, by the Paris trustees to either of the Vesteyes. To a limited extent, particularised in the section, any such capital sum would be treated for all the purposes of the Income Tax Acts as the income of the recipient for that year. B It seems to me incredible that the mere possibility of a loan being made should bring on the settlor the severe consequences set out in s. 38 (4), if the actual making of a loan only brings about the less severe consequences set out in s. 40. My Lords, I desire to confine my observations on s. 38 (4) to a case such as the present case, where any loan to either settlor must be made at a commercial rate of interest. C Any case in which such a loan could be made free of interest can be dealt with as and when it arises.

Lastly, I should mention a contention on behalf of the taxpayers that Lord Vestey's executors could only be assessed in respect of income which was in fact income of Lord Vestey, and not in respect of income which was to be "treated" as his income under s. 38 of the Act of 1938, or "deemed to be" D his income under s. 18 of the Act of 1936. This argument rests on the construction of r. 18 of the General Rules in sched. I to the Income Tax Act, 1918. Such income, counsel for the taxpayers contended, was not income which "arose or accrued" to Lord Vestey within the meaning of r. 18. In the events which have happened, it is unnecessary for counsel to rely on this argument, but it may be put forward in some other case hereafter. This being so, I think E it right to say that I cannot accept this argument and that, in my view, it gives too narrow a meaning to r. 18. The same argument could have been advanced in *Cottingham's Executors v. Inland Revenue Comrs.* (3), but was not advanced. In my view, however, if the argument now in question had been advanced in *Cottingham's* case (3), it would have been rightly rejected.

The result is that it is not established that any income received by the Paris F trustees in any of the relevant years ought to be treated as the income of either Lord Vestey or Sir Edmund for the purposes of the Income Tax Acts. My Lords, I am conscious that in arriving at this conclusion I am differing, to a very large extent, with the views of the majority of the Court of Appeal, and, to a lesser extent, with the views of EVERSLED, L.J., and that I have said very little about their judgments. These judgments have received my most G careful and respectful consideration, and I have refrained from discussing them in detail for very simple and compelling reasons. No one of the learned Lords Justices thought that the power of the "authorised persons" to direct investment of the rent was a fiduciary power, and, thinking rightly that they were bound by *Gaunt's* case (2), they thought that the word "wife" in the relevant sections included a widow of the settlor. Building on this foundation, H they naturally took a different view, on several points, from the view which I have expressed. It would therefore serve no useful purpose to discuss their judgments in detail. In my judgment, all the assessments in question should be discharged. The appeals by the taxpayers should be allowed with costs, and the cross-appeals by the Crown should be dismissed with costs.

LORD REID: My Lords, I agree with your Lordships and I only add a brief statement of my reasons in my own words because I am differing from the Court of Appeal on several difficult and important questions.

For the Crown to succeed in this case it must be shown that the facts bring the case within one or more of the provisions of the Finance Act, 1936, s. 18, or of the Finance Act, 1938, s. 38. I shall refer to these two sections simply as s. 18 and s. 38. Section 18 applies if individuals ordinarily resident in the United Kingdom seek to avoid liability to income tax by transferring assets so that income becomes payable to persons resident out of the United Kingdom. It is not now denied that the late Lord Vestey and Sir Edmund Vestey were both ordinarily resident in the United Kingdom in December, 1921, and that they sought to avoid liability to income tax by transferring assets in that month so that income became payable to three persons resident in Paris who are referred to as the Paris trustees. That being so the section enacts :

"(1) Where such an individual has by means of any such transfer, either alone or in conjunction with associated operations, acquired any rights by virtue of which he has, within the meaning of this section, power to enjoy, whether forthwith or in the future, any income of a person resident or domiciled out of the United Kingdom which, if it were income of that individual received by him in the United Kingdom, would be chargeable to income tax by deduction or otherwise, that income shall, whether it would or would not have been chargeable to income tax apart from the provisions of this section, be deemed to be income of that individual for all the purposes of the Income Tax Acts."

For this sub-section to come into operation an individual must acquire rights by virtue of which he has power to enjoy, within the meaning of the section, income of a person resident or domiciled abroad. The phrase "power to enjoy" is expanded in sub-s. (3) to cover a variety of cases and sub-s. (4) provides that :

"In determining whether an individual has power to enjoy income within the meaning of this section, regard shall be had to the substantial result and effect of the transfer and any associated operations . . ."

but there is nothing in the section to expand, qualify or modify the requirement that the individual who is to be assessed must have acquired rights by virtue of which he has power to enjoy. It is necessary, therefore, to determine the nature of the rights which the Vesteyes acquired. After the execution of the lease on Dec. 29, 1921, and the deed of settlement on Dec. 30, 1921, the only rights relevant to the present case which the Vesteyes had with regard to the moneys which came into the hands of the Paris trustees were rights to appoint certain funds to their issue, rights to appoint life interests to their widows, and a joint right to direct the investment of the settled fund. I think that these rights must be held to have been "acquired" by them within the meaning of this section : these rights were brought into existence in connection with the transfer of assets whereby income became payable to the Paris trustees. No doubt the Vesteyes gave up other and more extensive rights when they made the transfer but these were rights of a different character. Before the transfer there were no Paris trustees and there were no settled funds. The Vesteyes' rights against those trustees and with regard to those funds must, I think, be held to have been acquired by means of the transfer in conjunction with the operations associated with it.

The next question is whether by virtue of any of these rights either of the Vesteyes had, during any of the years with which this case is concerned, any power to enjoy any part of the income of the Paris trustees— bearing in mind the very wide meaning attached to the words "power to enjoy" by sub-ss. (3) and (4). Before the first year with which this case is concerned, 1936-37, Lord Vestey had made an irrevocable appointment covering the whole of the funds which he was entitled to appoint to his issue and Sir Edmund Vestey had irrevocably appointed part of the funds which he was entitled to appoint to

his issue. For the reasons which have been given by my noble and learned friend, LORD MORTON OF HENRYTON, I think that these appointments preclude any liability under s. 18 which might have arisen in their absence and I also agree with my noble and learned friend with regard to that part of the fund which Sir Edmund Vestey did not irrevocably appoint until Mar. 31, 1937. Sir Edmund also released and extinguished his power to appoint an interest in favour of his widow : but Lord Vestey retained his power to appoint in favour of his widow. This power could only affect Lord Vestey's liability under s. 18 or s. 38 if references in those sections to " wife " can be held to include " widow." Section 18 provides " (5) For the purposes of this section (a) a reference to an individual shall be deemed to include the wife or husband of the individual." Section 38 (2) applies if in the event of the exercise of a power to revoke or otherwise determine the settlement or any provision thereof " the settlor or the wife or husband of the settlor will or may become beneficially entitled " to property comprised in the settlement or income arising therefrom. Section 38 (4) deems the settlor to have an interest :

" . . . if any income or property which may at any time arise under or be comprised in that settlement is, or will or may become, payable to or applicable for the benefit of the settlor or the wife or husband of the settlor in any circumstances whatsoever."

I agree with your Lordships that references in the two sections under consideration to the wife of a settlor do not include his widow. I do not find any clear indication in the sections themselves of an intention either to include or to exclude widows. The learned judges who decided *Gaunt's* case (2) in the Court of Appeal took the view that " wife " was intended to include " widow," and if there were nothing beyond the terms of the sections to point to the intention of the legislature I might not venture to disagree though I would have doubts. But there are two reasons which were not discussed in that case but which seem to me to be important. In the first place there is a very obvious reason why the legislature should treat a benefit to a settlor's wife as equivalent to a benefit to the settlor. In the great majority of cases a husband does in fact derive benefit from a pecuniary benefit to his wife : indeed the benefit to a husband arising from such a benefit to his wife may often be as great or almost as great as if that benefit had accrued directly to him. This fact is recognised in the rule that for income tax purposes the incomes of husband and wife are in the general case treated as one. But there is no obvious reason why a benefit to a settlor's widow should be treated as a benefit to him : he can never enjoy it directly or indirectly. It is of great importance to a husband that his wife should be provided for after his death—so it is also that his children should be provided for—but the benefit to the husband from making such provisions is of an entirely different kind from the benefit which he can enjoy from a provision to his wife while he is alive. It is not something which could reasonably be regarded as part of his income.

The second reason arises in this way. The argument for the Crown in this case was that " wife " means the person who is the settlor's wife during the particular year of assessment, and that if a benefit may come to her in the future it matters not whether her husband is then alive or dead ; she is still the same person and it is the benefit to her that the statute is concerned with. It was admitted that this view must lead to the result that if in a particular year of assessment the settlor is unmarried there is no wife in that year to whom the section can apply. So if a bachelor or a widower makes a settlement which contains a provision for sums being set aside to provide payments to his wife during his lifetime, those sums would not be deemed to be part of his income unless or until he marries. It appears to me in the highest degree unlikely that this was the intention of the legislature, but no way was suggested by counsel of avoiding this result if the argument for the Crown is well founded.

This difficulty confirms me in my view that "wife" was never intended in these sections to include "widow," and of course the same argument applies to husband and widower.

There remains the joint right to direct investment of the settled fund. I agree with your Lordships that this must be held to be a right of a fiduciary character. It was argued for the Crown that there was plainly a comprehensive plan by the Vesteyes so to deal with their assets as to minimise their liability to pay taxes in the United Kingdom and at the same time to retain control over the use of those assets. This, it was said, shows that the power to direct investments was intended to be a power which the Vesteyes could use for their own purposes and not one which they must use in the interests of the beneficiaries. I think that there is a two-fold answer to this argument. In the first place the words of the deed point so clearly to the power being a fiduciary one that it is not relevant to consider other matters: but if it were relevant I should not accept the inference sought to be drawn from them. It may well be that the Vesteyes' advisers deliberately introduced a fiduciary power having in mind that death duties were payable on settled property unless it was retained by trustees to the entire exclusion of any benefit to the settlor by contract or otherwise. If this right or power to direct investment is fiduciary, I find it very difficult to see how it could confer any power to enjoy income within the meaning of s. 18. It is possible that a person having a fiduciary right may misuse it for his own benefit, but then he would not get the benefit by virtue of his right and s. 18 would not apply to it. But I need not pursue this matter because I agree that a right which an individual can only exercise in conjunction with some other person is not a right by virtue of which he has power to enjoy anything within the meaning of this section. I think that it is plain that in s. 18 the singular "individual" does not include the plural. The section is referring to the individual whose taxable income is being determined and to him alone.

I am, therefore, of opinion that none of the assessments under appeal which were made under s. 18 can stand, and I turn to consider the case under s. 38. Sub-section (1) admittedly does not apply to this case. Section 38 (2) involves issues of a different character. It must be considered in conjunction with the definition of settlement in s. 41. It enacts:

"If and so long as the terms of any settlement are such that (a) any person has or may have power, whether immediately or in the future, and whether with or without the consent of any other person, to revoke or otherwise determine the settlement or any provision thereof; and (b) in the event of the exercise of the power, the settlor or the wife or husband of the settlor will or may become beneficially entitled to the whole or any part of the property then comprised in the settlement or of the income arising from the whole or any part of the property so comprised; any income arising under the settlement from the property comprised in the settlement in any year of assessment or from a corresponding part of that property, or a corresponding part of any such income, as the case may be, shall be treated as the income of the settlor for that year and not as the income of any other person."

Section 41 (4) (b) enacts:

"The expression 'settlement' includes any disposition, trust, covenant, agreement or arrangement, and the expression 'settlor' in relation to a settlement means any person by whom the settlement was made."

Reading the sub-section, at least four questions suggest themselves: (1) What is included in the settlement? (2) Is there any power in any person to revoke or otherwise determine the settlement or any provision of it? If there is such a power, (3) what is the property comprised in the settlement? And (4), in the event of the power being exercised, may the settlor become

beneficially entitled to any of that property or of the income arising from it ? This sub-section was fully considered in this House in *Chamberlain v. Inland Revenue Comrs.* (1). In that case the settlor formed a company called Staffa with an unusual structure so that he retained control of the company. He then sold to it a number of shares in Commercial Structures, Ltd., which yielded a considerable income, and acquired a number of shares in Staffa. He then transferred to trustees for his family a sum which they invested in shares in Staffa. This was in March, 1936, and apparently the terms of this trust were not thought suitable for this purpose. So in December, 1936, he caused the ordinary shares of Staffa to be divided into five classes each of which was only to be entitled to such dividend as the company in general meeting should determine. No dividend was ever paid on the A shares held under the earlier trust, but four more trusts were set up for each of the settlor's infant children. These trusts were declared irrevocable and the trustees directed to accumulate the income. The trustees under these trusts invested further sums supplied by the settlor in B, C, D and E shares in Staffa. Dividends were paid on these shares, and re-invested by buying more shares in Staffa. It was contended for the Crown that, in view of the terms of s. 41 (4) (b), the whole of these operations must be regarded as the arrangement or settlement so that the whole assets of Staffa were property comprised in the settlement and the whole income of Staffa was income arising under the settlement and therefore to be treated as income of the settlor. That contention was held to be wrong. LORD THANKERTON said ([1943] 2 All E.R. 203) that the formation of Staffa was :

" . . . part of the arrangement conceived by the appellant, whereby a convenient and profitable investment was made available for the moneys respectively settled under the five deeds of settlement . . . the sums settled under these deeds were the funds provided for the purpose of the settlement . . . "

LORD MACMILLAN said (*ibid.*, 204, 205) referring to *Morton's* case (4) :

" I agree with LORD MONCRIEFF that the settlement or arrangement must be one whereby the settlor charges certain property of his with rights in favour of others . . . It is, I think, fallacious to confuse the steps taken by the appellant with a view to effecting a settlement or arrangement with the settlement or arrangement itself . . . It was not until he granted the trust deeds that he entered the legal stage of the settlement. All that he did previously was preparatory to making settlements."

LORD ROMER said (*ibid.*, 206) :

" If a man enters into a contract to buy 1,000 shares in a company with a view to settling 500 of them on his daughter and does so settle the 500 shares by deed, it may well be that, consistently with s. 41 (4) (b) of the Finance Act, 1938, the settlement can be described as consisting of the contract and the deed together. But the property comprised in the settlement is the 500 shares settled by the deed and not the whole of the 1,000 shares."

I think that *Chamberlain's* case (1) shews that the most profitable course to follow is first to determine what was the property comprised in the settlement, and that the way to find that property is to look for property charged with rights in favour of beneficiaries. I do not think that any hard and fast rule is laid down in *Chamberlain's* case (1). The ingenuity of those who devise these schemes is such that it might be rash to say that property can never be comprised in a settlement unless it is charged with rights in favour of others, but I think that as a general rule this must now be the test.

The Solicitor-General sought to distinguish *Chamberlain's* case (1) on the ground that in that case there was no finding that there was an " arrange-

ment" comprising anything more than the deeds of settlement, and that in this case he was free to argue that there was an "arrangement" within the meaning of the Act which comprised both the deed of settlement and the lease, and then to proceed that as the stations were comprised in the lease they were therefore comprised in the arrangement, and were therefore property comprised in the settlement within the meaning of s. 38 (2). But, in my view, that is just the argument which was rejected by this House, and I am satisfied that the decision in *Chamberlain's* case (1) makes it impossible in this case to hold that any property was comprised in the settlement other than that which the Paris trustees were entitled to get under the deed of settlement. I think that it follows that the Crown case fails on the double ground that the power to determine the lease on six months' notice was not a power within the meaning of s. 38 (2) (a) to revoke or otherwise determine the settlement or any provision thereof, and that, if the lease were determined, the Vestey's would not as required by s. 38 (2) (b) become beneficially entitled to any part of the property comprised in the settlement or of the income arising therefrom.

There remains only the claim under sub-ss. (3) and (4) of s. 38. Sub-section (3) would only apply if the Vestey's had "an interest in any income arising under or property comprised in" the settlement. If the stations had been property comprised in the settlement the Vestey's would have had such an interest because they remained owners of the stations and on the termination of the lease they were entitled to resume possession of them. But, on the footing that the property comprised in the settlement is only that which the Paris trustees were entitled to get under it, the Vestey's had no interest in that property or in the income arising under the settlement. Sub-section (4) provides :

"For the purpose of the last foregoing sub-section, the settlor shall be deemed to have an interest in income arising under or property comprised in a settlement, if any income or property which may at any time arise under or be comprised in that settlement is, or will or may become, payable to or applicable for the benefit of the settlor or the wife or husband of the settlor in any circumstances whatsoever."

The only way in which any part of the sums which the Paris trustees got under the settlement could become in any sense "payable to or applicable for the benefit of" the Vestey's would be by means of a loan to them. If I am right in thinking that the Vestey's' power to direct investment of the settled fund was of a fiduciary character, then no loan could lawfully be made of the trust funds to the Vestey's except at a commercial rate of interest. I do not think that such a loan could come within the scope of s. 38 (4) especially as loans are separately dealt with in s. 40. I find it impossible to hold that a sum of money lent at a commercial rate of interest is "payable to or applicable for the benefit of" the borrower in the sense of this section. I am, therefore, of opinion that none of the assessments under appeal which were made under s. 38 can stand and I agree that the appeal must be allowed.

Appeals allowed with costs. Cross-appeals dismissed with costs.

Solicitors : Chas. H. Wright & Brown (for the appellant taxpayers) ; Solicitor of Inland Revenue.

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

END OF VOLUME ONE.



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